THE

Calcutta Weekly Notes

LAW NOTES

AND

NOTES OF CASES

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

The English Law Courts.

VOL. XII

NOVEMBER TO OCTOBER,

1907-1908.

CALCUTTA

WEEKLY NOTES OFFICE,

3, HASTINGS STREET.

[All rights reserved.]

PRINTED BY JOY GOPAL DAS
AT THE
WEEKLY NOTES PRINTING WORKS,
3, HASTINGS STREET
CALCUTTA

TABLE CRIMINAL CASES—NOTES.

PRIVY COUNCIL.

CRIMINAL APPELLATE.

CRIMINAL REVISIONAL.

INDEX OF NOTES—CRIMINAL CASES.

(Which have not been fully reported).

(Calcutta High Court)

TABLE OF ENGLISH CASES—NOTES.

INDEX OF NOTES--ENGLISH CASES (CIVIL & CRIMINAL.)

INDEX

TO THE

Editorial Notes and Articles, High Court Rules and Circular Orders, Legislation, Notifications of Government, Review of Books and Miscellaneous matters.

JUDGES OF THE HIGH COURT.

Chief Justice:

HON'BLE SIR FRANCIS WILLIAM MACLEAN, KT., *K.C., K.C.I.E.*

Puisne Judges:

HON'BLE R. F. RAMPINI, *I.C.S., (acting C. J.)*

" R. HARINGTON.

" C. M. W. BRETT, *C.S.I., I.C.S.*

" H. L. STEPHEN.

" SARADA CHARAN MITRA.

" B. G. GEIDT, *I.C.S.*

" J. G. WOODROFFE.

" ASUTOSH MOOKERJEE, *D.L.*

" C. P. CASPERSZ, *I.C.S.*

" H. HOLMWOOD, *I.C.S.*

" C. W. CHITTY.

" E. E. FLETCHER.

" SAIYID SHARF-UD-DIN.

" H. R. H. COXE.

" L. M. DOSS.

" A. E. RYVES, *(Offg.)*

" H. L. BELL, *(Offg.)*

MR. S. P. SINHA. *Advocate-General.*

INDEX OF NOTES OF CASES.

(Vol. XII).

TABLE OF CIVIL CASES—NOTES.

PRIVY COUNCIL.

ORIGINAL CIVIL.

CIVIL APPELLATE.

CIVIL APPELLATE—*contd*

CIVIL REVISIONAL.

INDEX OF NOTES—CIVIL CASES

(Which have not been fully reported).

(Calcutta High Court and Judicial Committee of the Privy Council).

THE

Calcutta Weekly Notes.

REPORTS OF IMPORTANT DECISIONS

OF THE

CALCUTTA HIGH COURT

AND OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON

Appeal from India.

VOL. XII

NOVEMBER TO OCTOBER,

1907-1908.

CALCUTTA:
WEEKLY NOTES OFFICE
3, HASTINGS STREET.

[All rights reserved.]

PRINTED BY JOY GOPAL DAS,
AT THE
WEEKLY NOTES PRINTING WORKS,
3, HASTINGS STREET,
CALCUTTA.

JUDGES OF THE HIGH COURT.

Chief Justice:

HON'BLE SIR FRANCIS WILLIAM MACLEAN, KT., *K.C.*, *K.C.I.E.*

Puisne Judges:

HON'BLE R. F. RAMPINI, *I.C.S.*, (*acting C. J.*)

„ R. HARINGTON.

„ C. M. W. BRETT, *C.S.I.*, *I.C.S.*

„ H. L. STEPHEN.

„ SARADA CHARAN MITRA.

„ B. G. GEIDT, *I.C.S.*

„ J. G. WOODROFFE.

„ ASUTOSH MOOKERJEE, *D.L.*

„ C. P. CASPERSZ, *I.C.S.*

„ H. HOLMWOOD, *I.C.S.*

„ C. W. CHITTY.

„ E. E. FLETCHER.

„ SAIYID SHARF-UD-DIN.

„ H. R. H. COXE.

„ L. M. DOSS.

„ A. E. RYVES, (*Offg.*)

„ H. L. BELL, (*Offg.*)

MR. S. P. SINHA, *Advocate-General.*

„ W. G. GREGORY, *Standing Counsel.*

TABLE OF CIVIL CASES.

(Vol. XII.)

PRIVY COUNCIL.

SPECIAL BENCH.

FULL BENCH.

APPEAL FROM ORIGINAL CIVIL.

EXTRA-ORDINARY ORIGINAL CIVIL.

ORIGINAL CIVIL.

APPELLATE CIVIL.

APPELLATE CIVIL—*contd.*

CIVIL REVISION.

CIVIL REFERENCE.

MATRIMONIAL.

INSOLVENCY.

CRIMINAL REVISION.

CASES REFERRED TO.

INDEX OF CIVIL CASES.

(Vol. XII).

Page

Civil Procedure Code—*contd.*

of costs were not taxed but were settled out of Court by execution of a deed, will not justify a Court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist, or the bills are *primâ facie* shewn to be extortionate *Lambert* v. *Still*, (1894) 1 Ch. 73 (1893), followed *Lawless* v *Mansfield*, 1 Drury and Warren 557 (1811), distinguished *and* explained. Sec 16 of the Contract Act only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable. To prove "good faith" of a transaction in which one party stands in a fiduciary relationship to the other, it is certainly not necessary to prove that all the accounts on which the contract is based are correct. Under the practice obtaining in the Original Side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation. The case of *Monohur Doss* v *Romanath Low*, I L. R. 3 Cal. 473 (1878), was decided on the special circumstances of that case and does not lay down any general rule of law. An attorney may be bound under certain circumstances to advise his client to take independent advice It is not his business to see that the attorney selected by his client fulfils his duties to his client and is not guilty of any remissness or negligence If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more, or to be responsible for another's omissions If the parties to a promissory note agree that on the promisor executing a bond for the amount due in favour of a third person, the promisee would cancel the note, this arrangement would be a perfectly valid contract, whether the third party paid any money to the promisee or not Although a negotiable instrument can only be assigned by endorsement, that does not prevent any arrangement not to negotiate the note but to put an end to it. SHAMULNHONE DUTT *v.* SRIMUTTY SUSILA BALA DEBI 1102

——, s. 13. *See* REG. III OF 1891 ...1095

——————, A suit for assessment of additional rent on the same additional area which formed the subject-matter of a previous suit, is barred as the decision in the previous suit, operates as *res-judicata*. MAHARAJA RADHA KISORE MANIKYA *v* UMED ALI ... 904

——, *Civil Procedure Code (Act XIV of 1882), sec 13, Expl II—Res judicata—Matter which should have been made a ground of defence in previous suit—Subject-matter, if must be indentical—Rent suit—Ex parte decree—Plea of payment not raised—Claim of set off in subsequent rent suit*] In a suit for rent, the Defendant claimed a set off for a certain sum which he said he had paid on account of previous arrears of rent but for which no credit had been given by the Plaintiffs in a suit for the rent of that period. That suit had been heard *ex parte* and decreed in the Plaintiffs' favour, *Held*—That the plea of payment now raised should have been made a ground of defence in the previous suit and the defendant was precluded from claiming a set off in regard to it by Expl II of sec. 13 of the Civil Procedure Code. *Kailash Mondul* v *Baroda Sundari Dasya*, 1 C W. N. 565 : s c I. L R. 24 Cal. 711 (1897) ; *Rajendra Nath Ghose* v. *Tarangini Dasi*, 1 C. L. J. 248 (1901), considered. *Srigopal* v. *Pirthi Singh*, I. L. R 20 All. 110 (1897), followed *Semble*, per Ryves, J —The Privy Council in *Srigopal* v *Pirthi Singh*, 6 C. W. N. 889 s. c I L. R. 24 All. 429 (1902), has by implication overruled the decision in *Kailash Mondul* v *Baroda Sundri Dasya*, 1 C. W N. 565 : s. c. I. L. R. 24 Cal. 711 (1897). JAMADAR SINGH *v.* SERAZUDDIN AHAMAD CHOWDHURY 862

——————, s 13—*Debutter estate—Representation in suit by person acting under the authority of shebait—Res judicata—Identity of subject-matter not essential—Judgment in previous suit—Admissibility—Evidence Act (I of 1872), sec 13.*] A decision obtained in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the debutter estate under an *urpunnama* from the *shebait* and who in fact did represent the debutter estate, is binding on a succeeding *shebait*, on the principle of the case of *Prosunno Kumari* v. *Golab Chand*, L R 2 I. A. 145 (1875), *Gora Chand* v. *Makhun Lal*, 11 C. W N. 489 · s. c 6 C. L J 404 (1907) ; *Venkayya* v *Suramma*, I L. R 12 Mad. 235 (1889), *Radhabai* v. *Anantrav*, I L. R. 9 Bom. 198 (1885), referred to. For purposes of *res judicata* it is not essential that the subject-matter of litigation should be identical with the subject-matter of the previous suit. *Raja of Pittapur* v. *Raja Rao Buchi*, L. R. 12 I A 16 (1884); *Balkishan* v *Kishan Lal*, I. L R. 11 All. 148 (1888); *Mani Roy* v *Rajbunsee Kooer*, 25 W R. 393 (1876), referred to. The scope of the former litigation and the question raised and decided therein must be determined by reference not merely to the decree, but also to the judgment, and if need be, to the pleadings. *Kunratulain* v. *Peara Saheb*, 9 C. W. N. 938 : s c. L. R. 32 I. A. 244 (1905), referred to. *Held*—That the previous judgment relied on in this case did not operate as *res judicata* but was admissible in evidence, if not under sec. 13, Evidence Act, in proof of all the facts found therein, at least to the extent indicated by Geidt, J., in *Abinash Chandra* v. *Paresh Nath*, 9 C. W. N. 402 (1904).

Page

Legal Practitioners Act—*contd.*

———— ———, s. 36—*Legal Practitioners Act (XVIII of 1879), sec 36—Tout, declaring a person to be—District Judge to take evidence himself—Power to direct Munsif to take, it Opportunity to show cause—Procedure when Munsif suspects a person to be a tout.*] Sec. 36 of the Legal Practitioners' Act is of a final nature and its provisions must be strictly and precisely complied with. It is only the Judges and other officers specially mentioned in sec 36 of the Legal Practitioners' Act who can frame and publish a list of touts and they can only frame and publish such a list when it has been proved to their satisfaction by evidence taken and heard by themselves that the person whom they propose to include in the list habitually acts as a tout. A District Judge has no power to delegate to the Munsif the special statutory powers conferred upon him by that section. When a Munsif has reason to suspect that any person is acting as a tout he should inform the District Judge of his suspicions giving him the names of witnesses and leaving it to him to take and hear evidence. IN THE MATTER OF PRASANNA KUMAR DAS . . 842note

———— ——— s. 36—*Legal Practitioners Act (XVIII of 1879, secs 3, 36—District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause.*] Before proceeding to declare a person to be a tout, the District Magistrate should himself, make an enquiry as to the person's antecedents and give him an opportunity to show cause. Where a Sub divisional Officer called on a person to show cause why he should not be declared a tout and he showed cause and the Sub-divisional Officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate and the latter after perusing them passed order declaring the person to be a tout, the order was set aside. *In the matter of Madhu Pershad*, 6 C. W. N 258 (1901), followed. CHANDI CHARAN DEY 842

Legislation to extinguish right to carry Jhum cultivation outside settled estate. *See* Reg. III of 1891 1590

Letters Patent 1865, cl. 12—*Jurisdiction, waiver of—High Court, Letters Patent, 1865, cl. 12—Leave under—Step in the action, a waiver of plea in bar to jurisdiction—Power of Registrar to grant leave—*Ultra vires] The Registrar of the High Court has no power to grant leave to institute a suit under cl. 12 of the Letters Patent of 1865, and his action in so doing is *ultra vires*. *Lalitessur Sing* v *Maharajah Sir Ramessur Sing Bahadur*, 11 C. W N. 649 : s. c. I. L R. Cal. 619 (1907), followed. There is no distinction between a case where no leave has been granted and a case where leave has been granted by a person not entitled to grant the same. The objection that the leave was granted by the Registrar or Master is one which can be waived by the Defendant by taking any step in the proceedings before applying to have the action dismissed. *Moore* v. *Gamgee*, 25 Q. B D. 244 (1890), and *In re Jones* v. *James*, 19 L. J. (Q B.) 257 (1890), followed. A. J. KING *v.* THE SECRETARY OF STATE FOR INDIA 705

———— 1865, cls. 9 and 10. *See* MANDAMUS 873

——— **of administration obtained by fraud.** *See* ADMINISTRATOR 802

———, application of —*Bona fides*—Discretion of Court to refuse. *See* PROBATE AND ADMINISTRATION ACT, s. 41 747

————————. *See* RIGHT OF SUIT 738

Libel—*Libel—Privilege—Trade protective society—Information as to position of business men supplied to subscribers for consideration—Volunteering of information—Welfare of society not served by such business—American authorities, value of.*] The Defendants carried on the business of a trade protective society, their business consisting in obtaining information with reference to the commercial standing and position of persons in the State of New South Wales and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential enquiry on their part, *Held*—That the Defendants are really to be regarded as volunteers in supplying the information which they profess to have at their disposal and their motive in carrying on the business is self-interest. That having regard to the methods which will be naturally adopted in carrying on such a business it is not for the welfare of society that the protection which the law throws around communications made in legitimate self-defence or from a *bonâ fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people. In cases which are near the line and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an important element for consideration. *Held*, in an action for libel brought against the Defendants by a firm in respect of whom the Defendants had made communications to a subscriber, that the same were not made on a privileged occasion. American authorities not followed *Toogood* v. *Spyring*, 1 C. M. and R. 181 at p. 193 (1834); *Pearse* v. *Pearse*, 1 De G. and S. 13 at p. 28 (1846), relied on MACINTOSH *v.* DUN ...1053

———, *Newspaper libel—Publication for public benefit—Fair and* bonâ fide *comment,*

Page

Partition—*contd.*
though not made parties, approved. UPENDRA CHANDRA SINGHA ROY *v.* MAHOMED FAIZ CHOWDHURY ... 670

———, if effects division of holding. *See* LANDLORD AND TENANT . 568

———, Family arrangement, agreement amongst co-parceners not to partition. *See* HINDU LAW . 793

———. *See* HINDU LAW . 687

———. *See* BABUANA GRANT ... 958

——— **suit.** *See* COURT FEES ACT, SCH. II, Art 17 .. . 37

Partnership- *Partnership—Expulsion of one member by others, if causes dissolution—Contract Act (IX of 1872), s. 253 (?)—Suit for account or dissolution by excluded partner—Limitation—Limitation Act (XV of 1877), Sch II, Arts 106, 120.]* Under the Indian law there is no dissolution of partnership when one partner expels the other. A suit by the expelled partner for accounts or for dissolution of partnership and a share of the profits is not governed by Art 106 but by Art 120 of Sch II of the Limitation Act, and is within time if brought within 6 years of the date of expulsion. Under the Indian law a partner can be expelled only by an order of the Court. DWARKA DAS KARNANI *v.* CHUNI LAL DAGA . . 155

———, *Partnership—Fraud by co-partner—*Hatchitta—*Material alteration by a partner to set up exclusive title to debt—Suit on behalf of firm—Maintainability—Claim if to be disallowed to the extent of the interest of the fraudulent partner—Apportionment, before dissolution.]* A fraud committed by a partner while acting on his own separate account and not as agent for the firm is not imputable to the firm although had he not been connected with the firm he might not have been in a position to commit the fraud. Where one of the partners of a firm sued to recover a debt which was really due to the firm on the allegation that it was due to himself and not to the firm and his suit was dismissed on the ground that he had materially altered the *hatchitta* executed by the debtor by striking out the other partners' name without the debtor's consent, *Held*—That the other partners were not precluded from suing for the debt on behalf of the firm, making the first-mentioned partner a Defendant in the suit. *Master* v. *Miller*, 2 R R 390; 1 Term Rep. 320 (1791). *Gour Chandra* v. *Prasanno Kumar*, I. L. R 33 Cal 812 (1906), distinguished. That it was not open to the Court in such a suit to give them a decree for such portion only of the claim as represented their share in the firm. Questions regarding the share of the debt to be allocated to the partners *inter se* can only be decided when the accounts of the partnership are taken. MUNSHI BASIRUDDIN MULLICK *v.* SURJA KUMAR NAIK ... 716

Page

Parties—Power of Appellate Court to make co-Defendant liable upon appeal by a Defendant. *See* APPEAL 720

———. *See* TRANSFER OF PROPERTY ACT, s. 85 94

———. *See* PARTIES 670

———. *See* MORTGAGE 911

Party—*Civil Procedure Code (Act XIV of 1882), sec. 437 -Suit against* mutwallis—*Suit for rent—Parties—Minor—Representation.]* When a suit for rent was brought against two persons in the capacity of *mutwallis*, but one of them who was a minor was not properly served and no guardian was appointed on his behalf, *Held*—That *mutwallis* are trustees and the presence of all of them in the suit was essential, and it was properly dismissed for defect of parties. SYED ABDUL ROB CHOWDHURY *v.* H. C. KOGAR 160

———. *See* PARTIES.

———, addition of. *See* BENGAL TENANCY ACT, s. 106 8

———. *See* MORTGAGE 107

Personal decree—Shebait. *See* RIGHT OF SUIT ... 308, 310

Pleading *See* TRANSFER OF PROPERTY ACT, s. 111 587

Pleader—Unprofessional conduct. *See* LEGAL PRACTITIONERS ACT, ss. 13, 14 381

——— **and client** *See* AGENCY ... 28

Pleading *See* LAND ACQUISITION ACT . 569

——— false case, setting up, at latter stage Effect. *See* MORTGAGE . 761

Police duties. *See* SERVICE TENURE . 193

Possession suit for—*Practice—Possession, suit for—Failure of cause of action—Proper decree to be made—Collateral issues, Court's power to decide and pass declaratory decree.]* Where the Plaintiffs asked for possession of their mother's property on the ground that she was dead and the Court held that it was not proved that the lady was dead, the only decree that could be made was that the suit be dismissed. The mere circumstance that some of the *media concludendi* might be the same in other actions did not vest the Court with any right or duty to pronounce upon them. MUSSUMMAT WALIHAN *v.* JOGESHWAR NARAYAN 227

———, *Possession, suit for—Onus of proof—Nature of evidence to be adduced by either party—Title, proof of, effect of—Presumption of possession—Constructive possession—Survey map, value of, as evidence.]* In respect of jungle and hilly land possession must be presumed to be with the rightful owner. Plaintiff in an action for ejectment must not only prove his title but also his possession, actual or constructive, within 12 years of suit. When

TABLE OF CRIMINAL CASES.

(Vol. XII.)

ORIGINAL CRIMINAL.

CRIMINAL APPELLATE.

CRIMINAL REVISIONAL.

CRIMINAL REFERENCE.

CASES REFERRED TO.

INDEX OF CRIMINAL CASES.

(Vol. XII).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, NOVEMBER 11, 1907. [No. 1

Contents.

NOTES.

On the re-opening of the High Court to day, the constitution of the Benches will be as follows :—

APPEALS FROM THE PRESIDENCY GROUP will be heard by the Hon'ble the Chief Justice and the Hon'ble Mr. Justice Geidt.

CRIMINAL APPEALS AND REVISIONAL CASES by the Hon'ble Mr. Justice Rampini and the Hon'ble Mr. Justice Sharfuddin.

PATNA GROUP OF APPEALS —The Hon'ble Mr. Justice Brett and the Hon'ble Mr. Justice Woodroffe.

BURDWAN GROUP —The Hon'ble Mr. Justice Mitra and the Hon'ble Mr. Justice Caspersz.

RAJSHAHYE GROUP.—The Hon'ble Mr. Justice Stephen and the Hon'ble Mr. Justice Holmwood

ORIGINAL SIDE —The Hon'ble Justices Harington, Chitty and Fletcher will sit singly.

ORIGINAL SIDE APPEALS will be heard from next Monday, the 18th instant.

WE VERY MUCH REGRET TO LEARN THAT MR. JUSTICE Mookerjee will not be able to resume his duties on the reopening of the Court owing to ill-health. We wish the learned Judge a speedy recovery.

IN THE CIVIL PROCEDURE CODE BILL WHICH HAS been recently introduced in the Council of the Governor-General of India matters of form and ordinary practice have been relegated to rules capable of alteration by each High Court subject to certain checks and only those provisions have been retained in the body of the Code regarding which some degree of permanence and uniformity is desirable. The amendments have been made with a view to lay down general rules of procedure rather than to provide in detail for every possible contingency. Without expressing any opinion as to the merits of the amendments, we feel no hesitation in saying that the scheme is a very commendable one and we thoroughly agree with the observations of the learned committee that excessive elaboration of details of procedure tends to cramp the action of the Court and to encourage technicalities. Amendments have also been made to meet case-law only on points on which there is a conflict of authority.

THE GENERAL CHARACTER OF SOME OF THE PRINCIPAL amendments may be summarised as follows :—(1) Curtailment of the multiciplity of suits, (2) Increased facilities for the service of process, (3) Improvement of the system of pleadings in the mofussil, (4) Provision for the admission not only of documents but also of facts, (5) Power of Court to compel the production of documents, (6) Power of Court to pronounce judgment after the death of a party and before substitution, (7) Facilities for checking the delay that now results from the objectionable practice of leaving for determination in execution questions which should be decided by the decree, (8) Embodiment in the Code of the provisions in the Transfer of Property Act relating to the execution in mortgage suits, (9) Provisions giving greater assistance to the Courts in the framing of decrees, and (10) Conferment of power to appoint Receivers on subordinate Courts.

IT HAS BEEN PROPOSED TO VEST THE POWER OF making rules to the High Courts, subject to the control of the Local Government and in the case of the Calcutta High Court of the Government of India. In exercising this power the Courts should have the assistance of representatives of the various branches of the legal profession. It has accordingly been provided that in the case of chartered High Courts and Chief Courts, rules can only be made after those Courts have taken the opinion of a Rule Committee on which there will be representatives of the Bar, of Vakeels or Pleaders, and in Presidency towns, of Attorneys. In the case of

other High Courts power has been given to establish such Rule Committees as the Governor-General in Council may determine.

REFERRING TO MATTERS OF DETAIL WE FIND THAT "Mesne profits" of property have been defined, to be "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom etc., etc." It appears that so far as this portion of the definition is concerned, it is the same as before. We think, that the definition should be made more comprehensive. As it stands at present the nature of the plaintiff's possession before dispossession is not taken into consideration. But that this is a most essential element will appear from the case of *Surja Pershad* v. *Reid* (6 C. W. N. 409: S. C. 29 Cal. 622). For instance if a cultivator who ordinarily grows crops himself is dispossessed, it is hardly reasonable that he should get only a money rent as compensation if the person who dispossessed him actually used to receive rent or would have to receive the same. We think the definition should be made comprehensive enough to include such cases.

IN THE CASE OF *Sheo Ram Tewari* v. *Takur Prasad*, reported at p. 562 of the current volume of the I. L. R. Allahabad Series, the question was raised whether a decree passed by a Civil Court on a Sunday was operative. It was contended that the decree having been made on Sunday, a *dies non*, it was altogether void of any effect. But His Lordship Griffin, J, held that the decree was not but the Court in passing the decree on a Sunday only committed an irregularity which is covered by the provisions of sec. 578, C. P. C. In this case it should be noted that the proceedings in the course of which the decree was made were held on the Sunday with the consent of the parties.

WE INVITE ATTENTION TO THE CASE OF *Dost Mahammad Khan* v. *Mani Ram*, reported at p. 537 of the current volume of the I. L. R. Allahabad Series, in which a Full Bench of the Allahabad High Court overruled the decision in the case of *The Collector of Moradabad* v. *Muhammad Diam Khan*, I. L. R. 2 All. 196. The facts of the case were shortly these:—One R executed a mortgage in favour of C purporting to hypothecate the whole of a certain house. Subsequently C brought a mortgage suit to realise the amount of the mortgage, but having ascertained that the mortgagor was only entitled to mortgage a $\frac{7}{18}$ share of the house, he confined his claim to that share and obtained a decree for sale. M, a sister of R, the mortgagor, then brought a suit against her brother R in *forma pauperis* to have the mortgage set aside so far as regards her share in the mortgaged house, and obtained a decree which directed that the Court-fee should be recovered from the Defendant R. In execution of this decree the $\frac{7}{18}$ share of the house was sold and purchased by D. The mortgagee then applied for the sale of the mortgaged property. D. raised the objection that the property having been purchased by him in execution of a decree in a pauper suit for the realisation of the Court-fee payable to Government, the same could not be sold again. It was contended that under sec. 411, C. P. C, the Court-fee payable to the Government was a first charge upon the property and the sale having taken place to satisfy the Court-fee there could not be a second sale.

THE FULL BENCH HELD THAT THE AMOUNT OF the Court-fee was a first charge upon such property which the Defendant R had at the time of the decree in the pauper suit. At that time the $\frac{7}{18}$th share was hypothecated to the mortgagee by R so that R's interest in the property was only an equity of redemption, or in other words he possessed the property subject to the mortgage. This property *that is* the equity of redemption was sold for the satisfaction of the Court-fee, therefore the property after purchase by D remained subject to the mortgage. Their Lordships also pointed out that in certain cases the Government could claim for the amount of the Court-fee a first charge on the property in preference to all other creditors But such is the case where the property on which the Court-fee is chargeable is won by the suit. This is only fair. For, had the Plaintiff not been allowed to sue as a pauper, the property would not have been recovered at all.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH.—Ex parte *Tilonko* v. *Secretary of State for the Colonies*. Before the LORD CHIEF JUSTICE, JUSTICES PHILLIMORE and WALTON. 14th October 1907.

Colonial Prisoner's Removal Act, 1884—Natal Native Chief—Sedition—Deportation.

This was an *ex parte* application for a *certiorari*. Petitioner seeking a rule *nisi*. The order complained of was made on the 3rd May last by the Secretary of State purporting to be in consonance with the powers conferred under the above Act. The Petitioner was ordered thereby to be removed from Natal for sedition to the Island of St. Helena. It was conceded that the order for removal would be lawful if made upon the ground of expediency to ensure safe custody, but it was urged on Petitioner's

behalf that from a Blue-book recently issued it appeared that the order was really made not for that purpose but owing to a report having been circulated among the Natal natives that there was impending the early release of prisoners locally confined and that this was to be done under orders of the Imperial Government.

The Court considered that from the Blue-book and materials before them the conclusion to be drawn was quite the contrary. The Home Government was pressed by the Natal Government to deal with the matter on the ground that disorder was likely to result in case of delay, and deportation was necessary to prevent disorder. It was upon the urgency of the matter that the Home Government were not prepared to refuse the safe-guard of deportation. The Home Government had acted within their jurisdiction.

Mr. E. G. Jelleicoe for the Petitioner.

C. W. A. *Rule refused.*

CHANCERY DIVISION.—*In re Winter—German Opera, Limited.* Before MR. JUSTICE WARRINGTON. 2nd July 1907.

Bankruptcy—Preferential Payments Act, 1888—Opera singer—Servant—Salary—Wages.

The question arose under the compulsory winding up order of the above company. The contract was in German. The Official Receiver as Liquidator of the company, applied for the Court's directions whether he ought to treat as preferential the claims of artists who had performed for the company in its business of theatrical managers, 4 months prior to the commencement of the winding up. For the defence the argument was that the engagement was a purely transitory one for a month, with a defined and fixed payment for each performance, and the company had no control regarding the manner of the performance rendered. This control was the test of "servant." The payment was not receipt of any thing in the shape of a wage or salary.

The learned Judge referred to the terms of the Act in question and those of the contract, and arrived at the conclusion that an artist was under that contract a "servant," and was paid a salary or wages in respect of services rendered. The liquidator was therefore entitled to treat the claim as preferential under the Act.

Mr. Martelli opposed on the part of Creditors.

Mr. Hart for the Liquidator.

C. W. A.

PRIVY COUNCIL.

[APPEAL FROM THE COURT OF APPEAL OF NEWZEALAND.]

THE LORD CHANCELLOR.
LORD ROBERTSON.
LORD COLLINS.
SIR FORD NORTH.
SIR ARTHUR WILSON.
1907.
31, July.

THE LYTTLETON TIMES COMPANY, LTD.
v.
WARNERS, LTD.,

Contract—Common intention if can be bisected—Printing press—Nuisance.

The parties had entered into an agreement believing that a proposition to enlarge a building so that the bed rooms would be free from the noise or any inconvenience which a printing machine to be carried on the ground floor was practicable. Each party when entering into this contract had entertained doubts as to the wisdom of combining in the same building an engine house and printing machinery with hotel bed-rooms. They discussed about the risk of noise and of vibration, but their doubts were removed by the representation of the architect a Mr. Luttrell as to his ability to neutralize such risk The agreement contained no guarantee or any stipulation whatever to indemnify. These facts were found by the Newzealand Courts Warners Limited finding when the building was erected that there was considerable noise and vibration felt in the bed rooms he had erected, brought this action for an injunction and damages against the Lyttleton Times Company.

THE LORD CHANCELLOR in giving judgment observed :—"The question at the root of the difficulties in the case, was, ought the fact that Lyttleton Times Ltd. was the grantor and the Plaintiffs the grantee of lease to dominate the decision of the case. Mr. Luttrell's suggestion which was agreed upon by the parties was that the premises of the Lyttleton Times Company which adjoined the other should be so rebuilt as to provide Plaintiffs as tenants with the bed rooms on the upper floors." And, *inter alia*, His Lordship said : "Mr. Levett and Mr. Pollock argued the case on behalf of the Respondents (Plaintiffs) as though the common intention was that the Plaintiffs should have reasonably quiet bed rooms. It was so, but that was only one half of the common intention. The other half was that the Defendants should keep on printing. One could not bisect the intention and enforce one half of it when the effect of doing so would be to frustrate the other half. If it could be shown that the Defendant Company or their servants had erected the building or established or worked their machinery or plant improperly, no doubt there would have been a cause of action. But that was not found by Mr. Justice Denniston nor by the majority of the Court of Appeal nor was it in reality the case made by the Plaintiffs. It was rather put on the ground that a duty lay on the Defendant

Company to prove affirmatively that the building could not have been so constructed as to avert a nuisance and that they had failed in that duty. Their Lordships did not think that in this case the burden of proof was on Defendants, and shared what appeared to have been the opinion of most of the Judges in Newzealand that negligent or improper construction and working had not been established."

Mr. R. T Hughes, K. C., and *Mr. Paterson* for the Defendants, Appellants.

Mr. Levett, K. C., and *Mr. Dighton Pollock* for the Respondents.

C. W. A. *Appeal allowed with costs.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN.	KARSONDAS DHARAMSEY,
LORD ATKINSON.	Petitioner,
LORD COLLINS	*v.*
SIR ARTHUR WILSON.	GUNGABAI, widow of Gorhandas
1907.	Soonderdas, and others,
19th July.	Respondents.

Special leave—Appeal prefered out of time—Sufficient cause—Limitation Act, sec. 5.

This was an application for special leave to appeal under the following circumstances:—

In April 1901 a suit was brought by Gorhandas Soonderdas abovenamed for a declaration that a trust-deed executed by his father and his grandfather, Muljee Jetha, was inoperative, and that the property remained in the settlors notwithstanding the execution of the deed of settlement. The Petitioner is the brother's son of that Plaintiff; being the son of Dharamsey who was the brother of the Plaintiff, Gorhandas.

The decision in that suit which was in the Original Side of the High Court was delivered by Mr. Justice Russell, dated 10th April 1901, was in Plaintiff's favour deciding that the property passed under the Will of Muljee Jetha

During the whole pendency of that suit, Petitioner was a minor. He was represented in that suit by Bai Ramcoverbai, his step mother, and by his maternal grandfather, Khimjee Parshotum, who were two of the executors of the Will of his father, and were parties Defendants to the suit in that capacity, and who were appointed guardians *ad litem* on the said Plaintiff's application.

Petitioner's complaint in his petition here and before the High Court was that he was not and could not be properly represented by them, inasmuch as the position necessary to be taken up on his behalf, *viz*, that the family was joint in family, food, worships and estate throughout, thus involving the contention that the Will of the said Dharamsey, his father, was invalid and inoperative was in conflict with the interests and position of the said executrix and executor.

On the 1st September 1905, Petitioner having come of age applied to a Bench of the High Court of Bombay to admit an appeal presented on his behalf against the said decision of Mr. Justice Russell on the 4th November 1905. The Chief Justice and Mr. Justice Batty, decided that in the exercise of their discretion under sec. 5 of the Indian Limitation Act the appeal ought not to be permitted after the prescribed period. They overruled the Petitioner's objection that the guardians had not acted with propriety in not appealing from the said decree of Mr. Justice Russell. The Court pointed out that the guardians at the trial of the case, had gone the length of briefing counsel from Calcutta, and had taken counsel's opinion as to advisability of appealing; one counsel had said, "the case is fraught with so many difficulties and intricate questions of law that it is impossible to say with any certainty that the appeal will be successful:" another wrote: "In my opinion this is a case in which there should be an appeal. There are many points in the case which in my opinion the learned judge has been in error in deciding in the way he has done:" a third counsel had said that there should be an appeal pointing out that the result if the guardians were unsuccessful would probably be in an adverse order for costs. Upon this point of costs the Chief Justice in refusing to admit Petitioner's memorandum of appeal said: "I do not place much stress upon that circumstance but I find in the case of *Moneypenny* v. *Derring*, 4 DeGex and Jones, p. 175, an order as to costs on the understanding that it was made for the purpose of preventing further litigation was regarded as a circumstance to be taken into consideration in determining whether or not a decree adverse to the infant should be attached subsequently." Petitioner then applied for leave to appeal to His Majesty in Council on 18th April 1907 that was refused by the same Judges. In refusing such leave the Court *inter alia* said:—

"It is true that in *Ram Narain Joshi* v. *Parmeswar Narain*, L R. 30 I. A. 20, the Privy Council did consider whether the power of admitting an appeal beyond time might have been exercised But that in no way concludes the present case for it does not appear from the report either in Law Reports or in I. L. R. 30 Cal. 309, that the appeal to the Privy Council was preceded by leave obtained from the High Court under Chap. 45, C. P. C."

In the present application *Mr. Upjohn, K C., Mr. Younger, K. C.*, and *Mr. Turner* for the Petitioner.

Mr Upjohn went fully into the facts of the case, referred to the opinions of counsel, to sec 5, Limitation Act and to L. R. 30 I. A. 20 submitting that sufficient cause was shown for not presenting the appeal within the prescribed period, and that Petitioner had not been properly represented.

Mr. DeGruyther opposing was not called upon.

Application was refused with costs.

C. W. A.

THE CALCUTTA WEEKLY NOTES.

REPORTS.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 732 OF 1907.

MITRA, J.
FLETCHER, J.
1907.
13, August.

KANULLAH, Petitioner,
v.
THE EMPEROR, Opposite Party.

Criminal Court, duty of, to give effect to a final judgment of the Civil Court—Criminal Procedure Code (Act V of 1898), sec. 476—Proceeding under, to be stopped, when the judgment on which it is based is reversed by the Appellate Court—Indian Penal Code (Act XLV of 1860), sec. 193.

Where in a suit against one K on a registered bond, alleged to have been executed by him, K denied the execution of the bond but the Munsif, holding that the bond was genuine, decreed the suit and directed his prosecution under sec. 476, Cr. P. C., for an offence under sec. 193, I. P. C., and on appeal by K, the judgment of the Munsif was reversed by the Subordinate Judge who held that the bond was not genuine and K had not executed it,

Held—*That the result of the judgment of the Subordinate Judge must be taken to be that the order for the prosecution of K under sec. 476, Cr. P. C., was not maintainable as the basis of that order had gone.*

That when a copy of the judgment of the Subordinate Judge was filed in the Criminal Court in which the case against K was pending, it was the duty of that Court to withhold its hands and not to have proceeded with the case.

That the order of the Criminal Court convicting K under sec. 193, I. P. C., and sentencing him to imprisonment, which order was affirmed on appeal by the Sessions Judge, ought to be set aside by the High Court, although K did not move the High Court to quash the proceedings against him as soon as the judgment of the Subordinate Judge was pronounced.

This was a rule issued on the 24th June 1907, calling on the District Magistrate of Backergunge why the order passed by Mr. W. L. Scott, the Sub-divisional Magistrate of Patuakhali, on the 28th March 1907, convicting the Petitioner under sec. 193 of the I. P. C., which order was, on appeal, affirmed by Mr. J. D. Cargill, the Sessions Judge of Backergunge, on the 1st May 1907, should not be set aside.

The facts of the case material to this report appear from the judgment.

Babu Gunada Charan Sen for the Petitioner.

Mr. Douglas White for the Crown.

The JUDGMENT OF THE COURT was as follows:—

Shamserennessa instituted a suit against Kunullah, the Petitioner before us, in the Court of the Munsif of Patuakhali, for recovery of a sum of money due on a registered bond executed by Kunullah. Kunullah denied the execution of the bond. The Munsif, however, came to the conclusion that the bond was genuine, decreed the suit and direct-

KANULLAH v. THE EMPEROR.

ed under sec. 476 of the Code of Criminal Procedure that Kunullah should be tried of an offence under sec. 193, I. P. C., for giving false evidence in respect to the execution of the bond. Kunullah appealed from the decision of the Munsif and the Subordinate Judge of Backergunge held, on appeal, that the bond was not genuine and that Kunullah had not executed it. The evidence of Kunullah given before the Munsif was not, therefore, false and the result of the judgment of the Subordinate Judge must be taken to be that the order for the prosecution of the Petitioner under sec. 476, C. Cr. P., was not maintainable as the basis of that order had gone. In the meantime and before the decision of the Subordinate Judge was pronounced, proceedings in the Criminal Court had been taken but when the Subordinate Judge pronounced his judgment, which was on the 7th December 1906, the case was still pending in the Court of the Sub-divisional Magistrate. We are informed that a copy of the judgment of the Subordinate Judge was filed in the proceeding before the Sub-divisional Magistrate but the Sub-divisional Magistrate gave no weight to it and, on the 28th March 1907, convicted the accused under sec. 193, I. P. C, and sentenced him to undergo simple imprisonment for six months. On appeal from the conviction and sentence passed by the Sub-divisional Magistrate, the learned Sessions Judge of Backergunge held that the conviction was right and that the sentence was a proper one.

The judgments of both the Sub-divisional Magistrate and the Sessions Judge were passed mainly, if not wholly, on a comparison of the thumb impressions.

On an application by the accused, the Petitioner before us, we issued a rule to show cause why the conviction and sentence should not be set aside. We are of opinion, after hearing the learned vakil for the Petitioner and the Deputy Legal Remembrancer for the Crown, that the conviction and sentence should be set aside. It would be disastrous to the administration of justice in this country if a final judgment of a Civil Court could be practically set aside by a judgment of a Criminal Court. The judgment between the parties as regards the genuineness of the bond would be *res judicata* in all subsequent proceedings between the parties. If the Civil Court held that the bond was not genuine, the Criminal Court ought to have withheld its hand and ought not to have proceeded with the case. It might be that the accused should have, as soon as the judgment of the Subordinate Judge was pronounced, come to this Court and asked for revocation of the order under sec. 476, C. Cr. P.; but that would not affect our jurisdiction in setting aside the order passed by the Criminal Court in a proceeding based on an order under sec. 476, C. Cr. P., which ought to have been set aside as soon as the judgment of the Subordinate Judge was known. We, therefore, direct that both on the merits of the case as well as on the ground that the proceedings in the Criminal Court ought not to have been allowed to proceed, the conviction and sentence should be set aside.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICITON.]

RULE No. 434 OF 1907.

MACLEAN, C. J.,
HOLMWOOD, J.
1907.
7, May.

KALI CHARAN LAL,
Petitioner,
v.
BASUDEO NARAIN
SINGH, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction to prosecute, when to be granted.

Sanction to prosecute is not usually granted unless there is a very reasonable chance of a conviction following.

A sanction to prosecute under sec. 195 of the Code of Criminal Procedure ought to be granted with great circumspection and care. If granted it places in the hands of the person obtaining it a very powerful weapon which the unscrupulous might use for purposes of oppression or blackmail.

This is a rule issued on the 23rd April 1907, calling upon the District Magistrate of Shahabad to show cause why the order passed by M. Smither, Esq., Sessions Judge of Shahabad, on the 12th March 1907, granting sanction to the opposite party to prosecute the Petitioner for an offence under sec. 193 of the I. P. C., should not be set aside.

The material facts appear from the judgment.

Babus Dasarathi Sanyal and *Sarat Chandra Lahiry* for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—I think this rule must be made absolute. It is a rule obtained by the Petitioner who is a Sub-Inspector of Police against the grant of sanction by the Sessions Judge of Sahabad to prosecute him under sec. 195 of the Criminal Procedure Code for the alleged offence of having falsely recorded that the first information of some alleged offence was given to him at 9 P.M. in the evening of a certain day. The trying Magistrate refused this sanction and I think very properly refused it, but the Sessions Judge has granted it. It is a rule of this Court that sanction to prosecute is not usually granted unless there is a very reasonable chance of a conviction following. In this case, I think the chance of conviction would be very small. It is impossible to see what motive the Petitioner could have had for making the alleged false entry. No motive is suggested. In these circumstances, I do not think that the sanction ought to have been granted. In my opinion a sanction to prosecute under sec. 195 ought to be granted with great circumspection and care. If granted, it places in the hands of the person obtaining it a very powerful weapon, which the unscrupulous might use for the purposes of oppression or blackmail. The rule is made absolute.

Rule made absolute.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER
No. 173 OF 1906.

RAMPINI, J.
SHARFUDDIN, J.
1907.
7, March.

UPENDRA CHANDRA
SINGH, Petitioner,
Appellant,
v.
SAKHI CHAND, Opposite
Party, Respondent.

Execution—Mesne profits, application for assessment of—Dismissal for default—Fresh application—Limitation.

UPENDRA CHANDRA SINGH *v.* SAKHI CHAND.

Where more than 30 days after an application for ascertainment of mesne profits was dismissed for default, a fresh application was made for that purpose,

Held—*That the application was not barred.*

There is no substantial distinction between an order striking off an application and one dismissing it for default.

This was an appeal preferred on the 2nd of May 1906, against an order of F. S. Hamilton, Esq., District Judge of Zillah Bhagulpore, dated the 2nd of February 1906, reversing that of Babu Nanda Lal Dey, Subordinate Judge of that district, dated the 4th of May 1905.

The facts of the case as set out in the judgment of the lower Appellate Court are as follows :—

The Appellant had obtained a decree and when he applied for mesne profits the judgment-debtor, Respondent, objected :—

(1) That the decrees of the Appellate Courts were silent on the subject of mesne profits and that no assessment of them could be made,

(2). That the application was barred by time.

The learned Subordinate Judge set forth the various orders passed in the suit and found that there was no direction for mesne profits, and that therefore he could not assess them.

As regards the second question, he found that it had been held that an application for the assessment of mesne profits was a continuation of the original suit. The decree-holder ought therefore to have renewed his application within thirty days from the date of the rejection of his former application for default. The present application was, therefore, time-barred.

On appeal the District Judge held as follows :—

"On the first point, I am unable to agree with him, as I can find nothing in the orders of the Appellate Courts that indicates that the portion of the original decree that related to mesne profits was ever reversed.

"On the second point, the Appellant's pleader urges that the decision in *Ram Kishore Ghose* v. *Gopi Kantha Sahu* (1) is on all fours with the present case

"In this view I agree. It is very plainly stated in the judgment of the Honorable Judges that the practice has always been to treat applications to determine mesne profits as applications for execution of the decree and that the striking off of such applications does not finally decide them or prevent the decree-holder from making a further application for the determination of mesne profits. I cannot agree in the distinction drawn by the Subordinate Judge between dismissal for default and striking off.

"The ruling referred to seems to me to apply more exactly to this case than the authorities quoted by the learned Subordinate Judge and the pleader for the Respondent. I therefore allow the appeal with costs Pleaders' fee Rs. 16. The case is remanded for assessment of the amount of mesne profits."

Babus Basanta Coomar Bose, Joy Gopal Ghosh and *Sailendra Nath Palit* for the Appellant.

Babu Ashutosh Mukherjee for the Respondent.

(1) I. L. R. 28 Cal. 242 (1900).

UPENDRA CHANDRA SINGH *v.* SAKHI CHAND.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against an order of the District Judge of Bhagulpore, dated the 2nd February 1906.

The facts of the case are these:—The opposite party, Respondent, obtained a decree for *wasilut* against the present Appellant. The present Appellant had made a claim to certain property under sec. 335, C. P. C., and had got possession of the property. The present Respondent had therefore to sue for possession and prove possession against the present Appellant. He did so and obtained an order for *wasilut*: so that he was entitled to *wasilut* from the date of delivery of possession in the sec. 335 case up to the date of recovery of possession in his suit. There was an appeal to the District Judge; but before the District Judge there was no discussion as to the question of *wasilut*. The appeal there was only as to the boundaries of the plots of which the present Respondent was to recover possession. Now, the present Respondent has applied for execution of his decree for *wasilut*; and the contention of the Appellant is that the lower Appellate Court's decree does not give him *wasilut*. It is further urged that when the present Respondent did apply for *wasilut* he did not prosecute his application with diligence, and it was dismissed for default on the 25th January 1904; so that the present application of the 13th April 1904 is barred by limitation. The learned District Judge has overruled both these contentions and ordered that execution should proceed.

The judgment-debtor in the *wasilut* decree again appeals and urges that the District Judge is wrong.

We think, however, that there is no reason to interfere with the decision of the learned District Judge. It is clear that the present Respondent did obtain a decree for *wasilut* and that decree was never interfered with nor was its correctness ever impugned. The lower Appellate Court, through inadvertence, did not specially refer to the question of *wasilut*: but it is evident, beyond question, that the decree for *wasilut* was never meant to be interfered with. We think, therefore, that the Respondent is entitled to execute his decree for *wasilut*.

Then, it is urged that as the application for ascertainment of mesne profits was dismissed on the 25th January 1904 and he did not apply for a fresh ascertainment of mesne profits till the 13th April 1904, his application is barred by limitation, because, it is urged, he was bound to apply within 30 days of the order of dismissal of the application, dated the 25th January 1904. The learned District Judge, has, however, pointed out that the facts of the case of *Ram Kishore Ghose* v. *Gopi Kantha Saha* (1) are on all fours with those of the present case; and he says:—"It is very plainly stated in the judgment of the Honorable Judges that the practice has always been to treat applications to determine mesne profits as applications for execution of the decree and that the striking off of such cases does not finally decide them or prevent the decree-holder from making a further application for the determination of mesne profits. I cannot agree in the distinction drawn by

(1) I. L. R. 28 Cal. 242 (1900).

the Subordinate Judge between dismissal for default and striking off."

We see no reason to dissent from this view: nor do we consider that there is any substantial distinction between an order striking off an application and one dismissing it for default.

We therefore dismiss this appeal with costs: the hearing fee is assessed at five gold mohurs.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 586 OF 1904.

GHOSE, C. J. CASPERSZ, J. 1906. 28, July.	SHOROSHIBALA DEBI, Petitioner, Appellant, v. ANANDAMOYEE DEBI and others, Respondents.

Probate and Administration Act (V of 1881), sec. 50—Citation on minor—Minor represented by applicant as guardian—Proceeding defective—Revocation, application for—Applicant acting in concert with another.

Where an applicant for probate of a will took out citation upon a minor who was represented by the applicant herself as guardian,

Held—*That the proceedings to obtain the grant were defective in substance and the grant should be revoked.*

The fact that the Petitioner for revocation of probate was acting in concert with somebody else could not take away the right which she otherwise possessed of applying for revocation.

This was an appeal preferred on the 21st of December 1904, against the decree of W. B. Brown, Esq., District Judge of Zillah Tipperah, dated the 22nd of September 1904.

The appeal arose out of an application for revocation of probate under sec. 50 of the Probate Act on the ground of want of citation.

Babus Tara Kishore Chowdhury, Jadu Nath Kanjilal and *Gobind Chandra Dey Roy* for the Appellant.

Babus Golap Chandra Sarkar and *Braja Lal Chuckerbutty* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of an application presented by one Soroshibala Debi for revocation of probate of the Will said to have been left by her father, one Gopi Mohan Roy Chowdhury. The Will purports to bear date the 20th February 1897. Upon the death of Gopi Mohan, which took place on the 7th March 1897, an application was made for probate of the Will by Anandmoyee and Bhubaneswari, the two widows of Gopi Mohan, on the 3rd February 1898. Soroshibala, the Petitioner in this case, was a minor at that time, and though citation seems to have been issued, and was issued, apparently at the instance of the applicants for probate, it was upon her as represented by her mother Bhubaneswari, and the application not being opposed by anybody, the Will was not proved in solemn form, but what may be said to be in common form, and probate was granted on the 7th March 1898. Soroshibala has since been married, and she has attained her majority; and the petition that she presented in the Court below on the 11th March 1904 was under sec.

SHOROSHIBALA DEBI v. ANANDAMOYEE DEBI.

50 of the Probate and Administration Act, and upon the grounds, first, that the proceedings to obtain the grant were defective in substance, in that she was not cited as she ought to have been, and, secondly, that the Will propounded by Anandmoyee and Bhubaneswari was a forged document. The learned Judge of the Court below confined his inquiry to a single point, that point being whether the application of Soroshibala was a genuine one and whether, in the probate proceedings, her interests were set aside by fraud and collusion. Evidence was necessarily confined to this point, and to this point only, and the learned Judge, being of opinion that there was no reason to suppose that the interests of Soroshibala were set aside by fraud and collusion on the part of her mother, and that the application presented by her was but the outcome of a concert between Bhubaneswari, the Petitioner and her husband Ramtanu, and was indeed inspired by Bhubaneswari herself, held that the petition could not be granted. In this view of the matter, the learned Judge has dismissed the application. We are, however, unable to agree with that officer in the view that he has adopted, and the course that he has pursued in dealing with the matter of the application which was presented to him. The first question that he had to apply his mind to was whether the proceedings to obtain the grant were defective in substance. One of the illustrations to sec 50 of the Probate and Administration Act, by way of explanation of what 'just cause' is, runs thus:—"The grant was made without citing parties who ought to have been cited;" and the question that here arises is whether the citation that was taken out in the name of Soroshibala was a proper citation; for, if it was not, it is obvious that there was really no citation. As already mentioned, the citation was taken out in the name of Bhubaneswari, who was one of the applicants for probate of the Will. Under the law, citation is taken out against such parties as are interested in contesting the application for probate, such parties being, as it were, Defendants to the proceeding in the matter of the grant of probate. And looking at the matter from this point of view, it seems to be obvious that the Petitioner Bhubaneswari could not represent both her interest and the interest of Soroshibala, then a minor. The proper course for the Petitioner in that case to pursue was to have somebody appointed by the Court to act as guardian of Soroshibala, or to take out citation against her represented by her next friend, or an officer of the Court, who could have no interest adverse to Soroshibala herself. It has however been contended by the learned vakil for the Respondent, that at the time that the application was made by Bhubaneswari for probate of the Will of her husband, Soroshi had but a contingent interest in the estate left by her father, the persons then interested being Bhubaneswari and her co-wife Anandmoyee, and it could not be said that her (Bhubaneswari's) interest and the interest of Soroshibala were antagonistic to each other and that, therefore, Bhubaneswari could well represent the interest of Soroshibala in the probate proceeding. We are, however, unable to accept this view of the

SHOROSHIBALA DEBI v. ANANDAMOYEE DEBI.

matter, for though Soroshibala had a contingent interest, yet it must be taken that she had an interest, however, contingent it might be, and when the Will in question declares or gives Bhubaneswari and her co-wife the power to adopt, the moment such adoption is made, Soroshi would be entirely cut off. Looking at the matter from this point of view, it can hardly be said that the interest of Bhubaneswari was not adverse to, or it was the same as that of Soroshibala. Upon these considerations, we are of opinion that the citation that was taken out in the name of Sorsohibala was really no citation at all and the proceedings were defective from this point of view. As to the conclusion arrived at by the learned Judge that the petition presented by Soroshibala was inspired by Bhubaneshwari and that Soroshibala, her husband and Bhubaneswari were 'acting hand in glove together,' all that we need say is that, assuming that it is so, if she has a right in herself to present the petition that she presented in the Court below, and if she is entitled to have the proceedings set aside, the mere circumstance that she was inspired by somebody else, or that she was acting in concert with somebody else, could not take away the right which she otherwise possessed. Upon these considerations, we are of opinion that the order of the learned Judge refusing the application of Soroshibala must be set aside, and that the grant of probate should be revoked. We order accordingly: each party will bear his own costs in both the Courts.

We desire to add that the view that we have expressed is supported by the observations of this Court in the case of *Walter Rebells* v. *Maria Rebells* (1).

S. C. S.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE Nos. 2338 AND 2339 OF 1905.

WOODROFFE, J.
COXE, J.
1907.
Heard, 17, 18 & 25, July.
Judgment, 30, July.

MOHUNT PADMALAV RAMANUJA DAS, Plaintiff, Appellant,
v.
LUKMI RANI and ors., Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 106—Suit between rival proprietors—Scope of suit—Question of possession or title—Limitation—Limitation Act (XV of 1877), sec. 22—Substitution of executor in place of supposed legal representative—New Defendant.

In a suit under sec. 106 of the Bengal Tenancy Act, certain lands were alleged to have been erroneously recorded as part of mouzah P. and it was prayed that the record-of-rights be amended and the disputed lands entered as part of Plaintiff's own mouzah R. from the record of which the same had been omitted. The suit was instituted more than two months after the final publication of the record-of-rights for mouzah R. but within two months of the final publication of the record-of-rights for mouzah P.,

Held—*That the suit was not time-barred.*

In such a suit the Revenue-Officer, and in case the suit is transferred to the Civil Court, the Civil Court is confined to the question of possession and cannot be asked to adjudicate upon the title of rival proprietors.

(1) 2 C W. N. 100 (1897).

MOHUNT PADMALAV RAMANUJA DAS *v.* LUKMI RANI.

The suit was originally instituted against the person whose name was entered in the record-of-rights. But it appeared that this person was the widow of the deceased proprietor and her name was entered as representing the estate of her deceased husband,

Held—*That the executors to the estate of the deceased proprietor who were substituted as Defendants were not new Defendants within sec. 22, Limitation Act.*

This was an appeal preferred on the 6th of December 1905, against the decree of S. S. Skinner, Esq., Officiating District Judge of Zillah Cuttack, dated the 2nd of September 1905, reversing the decision Moulvi Abdul Barry, Subordinate Judge of Cuttack, dated the 31st of March 1904.

The suits out of which these appeals arose were instituted under sec. 106, Bengal Tenancy Act, and transferred by the Revenue-Officer to the Civil Court. Plaintiff complained that certain lands belonging to his Mouzah Ramchunderpur had been erroneously recorded in the record-of-rights as forming part of Mouzahs Pursottam Sahi and Debata Sahi, a lady named Lakhmi Rani being recorded as the proprietress of the said mouzahs. Accordingly Plaintiff instituted these suits against Lakhmi Rani as the Defendant. Lakhmi Rani's name was subsequently removed from the record and those of the executors of the estate of her deceased husband substituted in its place. The suits were decreed in the Original Court, but on appeal the District Judge reversed the decision of that Court and second appeals were preferred by the Plaintiff in the High Court.

Babu Ram Chandra Masumdar for the Appellant.

Babus Ram Charan Mitra and *Provash Chandra Mitra* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—These two suits are brought under sec. 106 of the Bengal Tenancy Act. The Plaintiff is not asking for possession nor can it be given him. What he asks for is that the record-of-rights be amended upon declaration of his title to lands which belong to his Mouzah Ramchunderpur but which have been entered in the record as parts of Mouzahs Pursottampur and Debata Sahi. The District Judge is wrong in holding that these are not suits for the correction of entries. The cases were headed under sec. 106 brought before the Revenue-Officer and by him and under that section transferred to the Civil Court. The first paragraph of the plaints states that the suits have been brought "for getting lands alleged to belong to Ramchunderpur removed from the record-of-rights of Pursottampur and Debata Sahi respectively. On the merits it has been found by the first Court that both possession and title were with the Plaintiff and that the lands in dispute form part of the Plaintiff's mouzah and the record should be amended accordingly. On this point the District Judge reversed the finding of the first Court as he held that the identity of the Bhauria numbers of the Survey of 1268 with the Khasra numbers mentioned in the plaint had not been established. In so holding he has dismissed the suit on the ground that a fact was

not proved which it was unnecessary to prove. No doubt it was for the Plaintiff to show that the Khasra numbers in the plaint covered his lands but it does not appear to have been in contest that the Khasra numbers in the record covered the disputed land. The only point to be proved there was whether the disputed land appertained to Ramchunderpur and this was shown by reference to the Bhauria or Survey numbers. The enquiry by the Amin would have been wholly useless unless the identity of the Khasra numbers in the record and the disputed land was assumed and no objection was taken to the admissibility of the evidence given on the report. The appeal therefore must be reheard unless the suit is, as the Respondents contend, barred. The Subordinate Judge held that the suits were in time under sec. 106 of the Bengal Tenancy Act, a point to which I will refer later. In the lower Appellate Court a fresh objection was taken on the ground of limitation, and it was held that Art. 120 applied. The grounds upon which the District Judge proceeded were that the suit was not one for the correction of the record under sec. 106 and that the Plaintiff had himself stated that his cause of action arose on the 22nd December 1892. In so stating an erroneous view was taken of his rights and of the nature of the suit. In a suit (such as this is) under sec. 106 the cause of action can only arise on the date of the final publication of the record-of-rights. The suit is not governed by Art. 120 which applies to suits for which no special provision is made but by the special provisions of sec. 106 of the Bengal Tenancy Act. This part of the finding of the lower Appellate Court has hardly been attempted to be supported before us. The question which has been argued is whether assuming that sec. 106 applies, the suits have been brought within the two months mentioned in that section. It is said that the suits are barred as not having been instituted within two months of the publication of the record-of-rights of Ramchunderpur (28th November 1900). I however agree with the conclusions and reasonings of the Subordinate Judge that the final publication mentioned in sec. 106 must be taken in this case to be final publication of the record-of-rights of the land itself which was done on the 19th December 1900 and 11th February 1901 when the record-of-rights of the Defendant's mouzahs were published containing the disputed land.

As the Judge in my opinion rightly remarks, until the record-of-rights including the disputed land was published how could the Plaintiff know whose name was recorded and whom to sue. Sec. 106 requires that there should be a dispute and for this two parties are necessary. It is said that the Plaintiff knew from before the publication of the Defendant's record, that the dispute was with him. But the dispute must be as to something in the record and this did not arise until a record was made including the Plaintiff's lands in the Defendant's mouzahs.

Next it is said that the name of the party against whom the original suit was brought and whose name was on the record (Lakmi Rani) was expunged and that the executors whose names were substituted are new Defendants within the meaning of sec. 22 of the Limitation

MOHUNT PADMALAV RAMANUJA DAS *v.* LUKMI RANI.

Act. I do not think that this is so. The Plaintiff might I think proceed either against the person whose name was recorded or any other person representing the same interest as the former person. I think it must be taken that Lakmi Rani's name was entered in the record as representing the estate of her deceased husband and that the executors do so in succession to her. They are not in my opinion new Defendants. The suits are therefore in time having been instituted within the period of two months of the publication of the record.

Lastly, it is said that the suit should fail because the Plaintiff has sued the wrong party. It is argued that the only person against whom he might proceed was the person whose name was recorded, *viz.*, Lakmi Rani. But I do not think that is so, for if Lakmi Rani formerly represented the estate, he might and indeed should sue those who now in succession to her now do so.

There must therefore be a remand. The only question is as to the point to be remanded. Upon the facts in this case and for the reasons stated by my learned brother in the judgment he is about to deliver, I think that the only question which should be remanded is whether the Plaintiff is in possession of the disputed land in which case only he is entitled to have the record corrected in accordance with such possession. The costs will abide the result of the suit. Though Lakmi Rani and the executors have been made parties, their appearance here appears to have been quite unnecessary as the interests of the estate have been represented by the Manager under the Court of Wards. I would therefore allow only one set of costs for the Respondents.

COXE, J.—With regard to the question whether the District Judge's decision on the facts is final and the question whether the suits are barred by sec. 22 of the Limitation Act, I agree fully with the observations of Mr. Justice Woodroffe. But as to the limitation of two months prescribed by sec. 106 of the Bengal Tenancy Act, I agree with some hesitation. That section, as it stood when these suits were instituted, permitted the institution of a suit, within two months of the date of the final publication of the record, for the decision of disputes regarding entries in, or omissions from, the said record. Sec. 103A, sub sec. (3) provides for the publication of separate records for separate areas, apparently with the object of ensuring that a person aggrieved by an entry in a particular record should be compelled to sue within two months of publication of that record. In one of the present suits the Plaintiff sued for the transfer of the disputed lands from the village of Pursottampur to that of Ramchunderpur, by which he must be taken to have meant that certain entries should be expunged from the record of Pursottampur and inserted in the record of Ramchunderpur with the modification that his own name should be substituted in the place of the Defendants as the landlord of the land.

Now no doubt the suits so far as they seek omissions in the records of Pursottampur and Debata Sahi are not barred. As regards the village of Debata Sahi, no question of limitation appears to arise. But as regards the prayer for

MOHUNT PADMALAV RAMANUJA DAS v. LUKMI RANI.

the entry in the record of Ramchunderpur of certain particulars now contained in the record of Pursottampur, I think it is open to considerable doubt if the suit is in time. It is argued that, the land being one and the same, limitation should run from the date of the publication of the last entry affecting the land. But on the other hand, it may be said with some show of reason that, as the suit is not, and could not be, a suit for the recovery of land, or even for a declaration of a right to land, but only a suit for the correction of a record, the identity of the land can make no difference. Again it is argued that it takes two to make a quarrel, and that the publication of the record of Ramchunderpur, with the land omitted, could raise no "dispute" before the record of Pursottampur in which the land was definitely assigned to that village was published. To this, it has been answered by the learned pleader for the Respondents that, if a "dispute" cannot be raised by a mere omission, then in that case if Pursottampur had been a contiguous village, not within the settled area, no "dispute" could ever have arisen, and the Plaintiff would have obtained no right of suit under sec. 106. It is argued that it cannot have been intended to limit the operation of the section in this way, and that it must have been intended that an omission should by itself, justify a suit.

I think therefore that it is open to some doubt whether the Pursottampur suit, so far as it seeks the insertion of entries in the Ramchunderpur record, is in time. But the point is one of little practical importance. The Plaintiff may certainly sue for the exclusion of entries from the Pursottampur record, and the decision of that prayer will have the force of a decree. On the other hand, if he is barred by the lapse of time from suing to have these entries added to the Ramchunderpur record, the result is that the dispute regarding the omissions in the Ramchunderpur record must be taken to have failed. Those omissions therefore must be regarded as undisputed omissions, and consequently their only effect is to give rise to certain presumptions of correctness which, if the Plaintiff is successful, the decree with respect to the Pursottampur record will at once rebut. In these circumstances I certainly do not think that I should be justified in dissenting from Mr Justice Woodroffe's conclusions and accordingly I agree that the suits are not barred by the limitation of two months prescribed by sec. 106.

The decision of the three points mentioned above in favour of the Plaintiff, would ordinarily necessitate a remand. But in framing the order for remand the question has arisen as to whether in a suit under sec. 106, the Plaintiff can plead his title, or whether the Court is confined to the question of possession. Moreover we were at first informed that the question of possession had been decided with respect to Pursottampur and Debata Sahi by awards under the Bengal Survey Act, 1875, and as an award under that Act carries the force of an order of a Civil Court declaring the possession of the parties, the further question arose whether, in the event of the suit having to be decided according to possession, the Plaintiff could be permitted to plead

his possession in the teeth of the survey awards. The parties have accordingly been heard again on these points, and the record has been further examined. It is now clear for reasons that I will state later, that there is no bar to the consideration and decision of the question of possession, and all that remains to be decided is whether the Plaintiff is confined to proof of possession or can go further and ask the Court to adjudicate upon his title.

I am of opinion that he is confined to proof of possession. Sec. 106 provides that a suit may be instituted for the decision of any dispute, regarding any entry, which a Revenue-Officer has made in a record-of-rights. Now the disputed entries in these suits are, *firstly*, the entries which show that the disputed lands, the plot number of which are stated in the plaint, lie in the village of Pursottampur and Debata Sahi, and, *secondly*, those which show that the landlord of those lands and the tenant there on is the Defendant. And of these two sets of entries, those which show the Defendant to be the landlord are far the most important. It would be of little avail to the Plaintiff to prove that the lands lay in Ramchunderpur if the Defendant remained recorded as the landlord. How the landlord of any plot is to be ascertained, is therefore the first thing to decide. According to sec. 101 the record-of-rights is to be prepared in accordance with rules made in that behalf by the Local Government. Rule 8 of Chap. VI of the rules so made, prescribes that the record shall be contained in the *khewat* and *khatian* and Rule 9 deals with the preparation of the *khewat*, which is to show the character and extent of proprietary interests. It is to be first drawn up with reference to the registers kept by the Collector under the Bengal Land Registration Act, 1876, registers which, it may be observed, are prepared according to possession and possession alone, as a reference to secs. 29, 32, 38, 52, 55, 59 of the Act will show. And as the record writing proceeds the *khewat* is to be altered in accordance with the facts of possession, alterations are to be notified to the Collector, in order that he may correct his registers which, as I have said are based exclusively on possession, and have no concern with title unaccompanied by possession.

Moreover the preparation of the record-of-rights is usually preceded by a survey under the Bengal Survey Act, 1875, for the purposes of marking out the villages which are subsequently to be cadastrally surveyed and settled, and of settling all boundary disputes. It is in these proceedings that the names of the proprietors are first ascertained, and they have to be conducted with regard solely to the facts of possession, as a reference to sec. 41 of the Act will show.

Moreover, to look at the matter from different standpoint, it is evident that in proceedings under the Tenancy Act no disputes of title between rival proprietors, considered merely as proprietors, can legitimately arise. The Act deals with the relations of landlords and tenants, and it is no part of its purposes to regulate disputes between rival proprietors, except in so far as such disputes affect their relations with their tenants. And the practical effect of sec.

MOHUNT PADMALAV RAMANUJA DAS v. LUKMI RANI.

60 of the Act is to render it unnecessary to go into questions of title in order to ascertain who is the landlord of any tanant. It is necessary only to ascertain who is the registered proprietor; and the registered proprietor, as has been pointed out above, is the proprietor in possession, be the title with whom it may.

These considerations demonstrate, and indeed the learned pleader for the Appellant concedes, that in framing a record-of-rights under sec. 103A of the Act, the Revenue-Officer must record the proprietors according to possession. But it is contended that when the record has been finally published, and disputes have arisen about its correctness with respect to the interests of proprietors, the Revenue-Officer is no longer confined to the question of possession, but may go into questions of title and may decide who, by reason of his title, irrespective of his possession, should be regarded as the true landlord.

For this view there is undoubtedly much to be said. In the first place the wording of the section is very comprehensive. It authorises the Revenue-Officer to decide any dispute regarding any entry. But I think it is reasonable to suppose that these words are confined to disputes, which may legitimately arise from incorrect entries. If the entries have been made in strict accordance with rules of Government, which have the force of law, and show all that a record-of-rights is required to show, I do not think that the section authorises an objector to plead that, although the record has been properly prepared and gives a correct view of the landlords and tenants actually on the land; yet it ought to be altered and prepared otherwise than in accordance with the rules, because it is incorrect for the purpose of ascertaining the legal titles of the proprietors, a purpose which is not one of the purposes either of the Tenancy Act or of a settlement under it.

Secondly, it is pointed out that sec. 109A gives a right of appeal to a Special Judge, and of second appeal to the High Court, and it is argued that, if suits under sec. 106 were confined to questions of possession, there would be no more need of this appellate machinery, than there is in cases under sec. 9 of the Specific Relief Act, 1877. This argument however is two edged for, as has been pointed out by the learned pleader for the Respondent, if Revenue-Officers may decide pure questions of title between rival proprietors, it is strange that, in cases of high value, the first appeal should lie to the Special Judge, and that there should be no appeal on the facts to the High Court. But the true answer to the argument is that suits between rival proprietors form but an insignificant fraction of the suits, with which sec. 106 deals. Almost all the suits brought under this section are suits between tenant and tenant, or between landlord and tenant, and relate to entries to which the rule quoted above for the preparation of the *khewat* has no application. For such suits the appellate machinery described in sec. 109A is clearly necessary, and this fact seems to me to render it unsafe to draw any inference from the fact, that that machinery is unsuitable for the rare and exceptional cases of which the present suits are examples.

Thirdly, we have been referred to the Board's Instructions. These have not the force of law, but none the less, deserve great respect as indicating the view of the most experienced Revenue-Officers of the scope of the law which they are accustomed to administer. In Rule 2 of Chap. 9 of Part III of the Survey and Settlement Manual it is stated that disputes under sec. 106 may be regarding possession on regarding right or title; and further on, it is said that suits to obtain possession may be accepted. But here too, it is possible that the experienced authors of these rules were not adverting to disputes between proprietors, but were thinking of the suits, which probably form an overwhelming majority of suits brought under sec. 106, namely, suits between tenant and tenant, or between landlord and tenant, in which questions other than that of possession may legitimately arise. This explanation will not apply to the concluding words of Rule 11, Chap. 5, Part II of the Manual, and with regard to those words I can only say with all respect, that I am unable to agree that they are a correct statement of the law.

As has been said, it is conceded that the Revenue-Officer in dealing with the rights of proprietors, is confined to the question of possession when he is farming the record. If then the entries are accurate according to the method by which the record must necessarily be prepared, and show merely the facts of possession, and neither show nor are intended to show with whom the title to the land rests; it seems to me that they cannot reasonably be held to give rise to a cause of action for a suit to declare that though originally they were correctly prepared, they are inaccurate from another point of view, and do not show what they were never intended to show. The result is that in my opinion, the Revenue-Officer in deciding disputes between rival proprietors under sec. 106, is confined to the question of possession, and I feel no doubt that a Civil Court to which a suit is transferred under the proviso to that section, cannot have any wider jurisdiction than the transferring Revenue-Officer himself could exercise.

It is necessary, in conclusion, to deal with a point that has been argued on behalf of the Respondent to the effect, that the question of possession has already been finally decided. The survey award to which a reference has already been made was found on examination, to relate to the land claimed by the Plaintiff within the village of Sasantima. The suit relating to that village has been dismissed. With respect to the villages of Pursottampur and Debata Sahi a decision of the Assistant Settlement Officer, dated the 6th October 1893, about a year after the survey proceedings, is put forward. It is argued that as the Assistant Settlement Officer was empowered to act under Survey Act, this decision must be regarded as a survey award. This however by no means follows. The usual course, I believe, is that the area to be settled is first surveyed under the Survey Act, the villages demarcated and the proprietors ascertained. Thereafter the cadastral survey of the lands, village by village, and the preparation of the record-of-rights under the Tenancy Act is taken in hand. Be-

MOHUNT PADMALAV RAMANUJA DAS *v.* LUKMI RANI.

cause the same officers may be employed throughout, it does not follow that in the second stage of the proceedings they are exercising the powers which were suitable to the first. I feel no doubt that the Assistant Settlement Officer's order, whatever, it may be, is not an award under the Survey Act. What precisely it is, it is by no means easy to say, but to take it at its highest value it can only be one of two things. That is to say, it may be either the summary disposal of an objection under the Tenancy Act as it then stood, or, if it is taken to be the decision of a dispute under the Civil Procedure Code, it can only be regarded as a dismissal of the Plaintiffs suit in default under sec. 157 of the Code. In neither case, can it be regarded as precluding the Plaintiffs from now proving that he is in possession of the disputed land.

Accordingly, I would set aside the decision of the District Judge, and remand the cases for decision of the question whether the Plaintiff is in possession of the disputed land, as the Special Judge has found. If the learned District Judge finds that the Plaintiff is in possession, he should direct the entry of his name as landlord in the records under sec. 107, sub-sec. (2). Otherwise the suits should be dismissed.

N. G. *Cases remanded.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2251 OF 1907.

BRETT, J.
MOOKERJEE, J.
1907.
Heard,
22, August.
Judgment,
29, August.

MUSSTT. UMATUL MEHDI, Petitioner,
v.
MUSSTT. KULSOOM, Opposite Party.

Land Registration Act (VI of 1876, B. C.), sec. 55—Land Registration dispute—Reference to Civil Court—Conditions to be satisfied before making reference—"Possession," meaning of—Mahomedan Law—Dower—Widow's right to hold property till dower paid—High Court—Revision.

Before the Collector can order the name of an Applicant to be registered as proprietor of an estate or any interest therein under the provisions of the Land Registration Act, he must satisfy himself that the possession of the estate exists in the applicant as alleged or that a succession or transfer has taken place as alleged and that the applicant has acquired possession in accordance with such succession or transfer, but not otherwise. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co sharers or as manager. When, however, the applicant claims to be proprietor by succession or transfer, the Collector has to satisfy himself on two points, namely, that the succession or transfer has taken place and that the applicant is in possession accordingly. If the succession or transfer is proved but possession is found against the applicant, his name cannot be registered, or conversely, if possession alone is proved, but the succession or transfer is not established, i.e., *if the*

MUSSTT. UMATUL MEHDI *v.* MUSSTT. KULSOOM.

possession proved is not attributable to the title set up the application for registration must be refused.

The first duty of a Collector in a case of dispute is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. He can determine the question of the right to possession or refer it to the Civil Court only when upon investigation no one is proved to be in possession.

Possession in sec. 55, Land Registration Act, does not mean lawful possession, but actual possession which includes possession by receipt of rent, the possession of the tenant being in a sense the possession of the landlord.

When a Mahomedan widow has obtained possession of the undistributed property of her deceased husband lawfully and without force or fraud, she is primâ facie *entitled, as against the other heirs of her husband to retain possession until her dower-debt or any portion of it which is due and unpaid is paid.*

The jurisdiction which the Civil Court acquires upon a reference to it under sec. 55 of the Land Registration Act is that of a Civil and not of a Revenue Court and its decision is subject to revision by the High Court.

The ordinary rule is that where an aggrieved party has other remedy available, e.g., *by regular suit, the High Court is unwilling to interfere in revision, but even if there be such remedy the High Court may interfere in exceptional cases.*

This was a rule granted on the 18th of July 1907, against an order of Babu Atul Chandra Batabyal, Officiating Additional Subordinate Judge of Patna, dated the 29th of June 1907.

The material facts are fully set out in the judgment.

Mr. Jackson, Mr. Chaudhuri, and *Moulvi S. M. Tahir* for the Petitioner.

Mr. O'Kinealy (Advocate-General), Mr. S. Ahmed, Moulvi Syed Shamsul Huda and *Moulvi Mahomed Mustafa Khan* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The order which we are called upon to revise in the present rule was made by the Subordinate Judge of Patna under sec. 59 of the Bengal Land Registration Act of 1876. The circumstances under which the order in question was made are not in controversy before this Court and may be briefly outlined. One Nawab Sabdar Hossain Khan, a wealthy zemindar of Husnabad, in the District of Monghyr, died on the 7th August 1905. He left considerable landed properties in the Districts of Monghyr, Gya and Patna. The Petitioner who alleges that she was the daughter of the maternal uncle of Sabdar Hossain was married to him and the parties lived as husband and wife till the death of the former. Upon the death of her husband she took possession of his estates, the bulk of which was situated in the Districts of Monghyr and Gya. On the 15th November 1905, the present opposite party, Mussammat Kulsum, who claims to be the sister of the father of Sabdar Hossain, applied for registration of her name in the Collectorate in respect of the properties situated in the district of Patna upon the allega-

MUSSTT. UMATUL MEHDI v. MUSSTT. KULSOOM.

tion that as Sabdar Hossain was governed by the Shia law, the Petitioner, his childless widow, was not entitled to the estate and that she as sister of the father of the deceased had succeeded to the properties by right of inheritance. On the 9th January 1906, the widow Umatool Mehdi preferred objection on the ground that she was entitled to the estate by right of inheritance as the daughter of the maternal uncle of Sabdar Hossain and that in any event she was entitled to retain possession of the properties till her dower which was alleged to have been fixed at a sum of 5 lacs of rupees and 25 gold mohurs, was satisfied out of the profits. The Deputy Collector heard the parties at considerable length and on the 17th February 1906 made an order of reference to the Civil Court under sec. 55 of the Land Registration Act. The widow applied to the superior revenue authorities but the Collector, the Commissioner and the Board of Revenue successively declined to interfere. The case was then taken up by the Subordinate Judge of Patna and he held what is described as a summary enquiry into the question of the right to possession in respect of the interest in the estate in dispute but which in substance is as full an investigation into the question of title and possession as can take place in a regular suit. The Subordinate Judge came to the conclusion upon the evidence that the widow was in possession of the properties by receipt of rent from the lessees; that she was not entitled to the estate by right of inheritance; that the dower-debt claimed by her did not entitle her to take or keep possession of the properties; that the legal possession in the disputed properties must be taken to be in Musumutt Kulsum and that consequently the objection of the widow must be disallowed and possession delivered to the rightful heiress. The widow now seeks to have this order discharged and upon her application the rule under consideration was issued. The learned counsel who appears in support of the rule has contended that the proceedings before the Subordinate Judge are vitiated by two defects, namely, *first*, that the Subordinate Judge had no jurisdiction to determine the matters in controversy as there was no valid reference to him by the Collector under sec 55 of the Land Registration Act, and, *secondly*, that the Subordinate Judge has acted illegally in the exercise of his jurisdiction, if he had any, and he ought to have held that not only the actual possession of the properties but also the right to retain possession of them till the satisfaction of the dower-debt, was in the Petitioner. It has been argued on the other hand by the learned Advocate-General, *first*, that as the Subordinate Judge exercised a special statutory jurisdiction in aid and at the instance of the Revenue Courts, this Court has no jurisdiction to revise his orders and, *secondly*, that the Subordinate Judge was correct in his conclusion that the widow had no right to retain possession, temporary or otherwise of the disputed properties in satisfaction of her claim for dower. To determine which of these contentions ought to prevail, it is necessary to refer for a moment to the leading provisions of the Land Registration Act applicable to the matter before us.

Sec. 42 provides that every person

MUSSTT. UMATUL MEHDI v. MUSSTT. KULSOOM.

succeeding to the proprietary right in or management of estates shall apply to the Collector for registration of his name and the character and extent of his interest as such proprietor or manager." Sec. 48 provides for notice to possible objectors. Sec. 52 lays down the mode and scope of enquiry by the Collector. It provides that he has to ascertain the truth of the alleged possession of, succession to or transfer of the estate or interest therein in respect of which registration is sought. Before the Collector can order the name of the applicant to be registered as proprietor of the estate or of any interest therein, he must satisfy himself that the possession exists or that the alleged succession or transfer has taken place and that the applicant has acquired possession in accordance with such succession or transfer but not otherwise. This clearly contemplates two different classes of cases. The determination of the question of possession alone is sufficient when the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharers or as manager; in such a case, the Collector need satisfy himself only on the one point of the possession of the applicant. When, however, the applicant claims to be proprietor by succession or transfer the Collector has to satisfy himself on two points, namely, that the succession or transfer has taken place and that the applicant is in possession accordingly. In this latter case, therefore, the applicant cannot succeed unless both the elements are established. If the succession or transfer is proved, but possession is found against the applicant, his name cannot be registered, or conversely, if possession alone is proved, but the succession or transfer is not established, that is if the possession proved is not attributable to the title set up; the application for registration must be refused. Sec. 55 next deals with cases of dispute as to possession, succession, or acquisition by transfer. This section provides that if there is a dispute as to the possession, succession, or acquisition by transfer by the applicant of the extent of interest in respect of which he has applied to be registered, the Collector must, in the first instance, try to satisfy himself, whether any person is in possession of the interest in dispute. If it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute, the Collector may adopt one of two courses. He may either himself determine summarily the right to possession, deliver possession accordingly, and make the necessary entry in the register, or, if, in his opinion, the dispute is of a character which is properly determinable by a Civil Court, he shall refer the matter in dispute to the principal Civil Court of the district, for determination. It is obvious, therefore, that the first duty of the Collector in the case of dispute is to determine whether any person is in possession of the disputed interest. If possession is found to be with any person, the Collector has no jurisdiction summarily to oust him. This is manifest from the alteration which was made in sec. 55 of the Land Registration Act by sec. 1 of Act V of 1878. Under sec. 55 as it stood in Act VII of 1876 in its unamended form, the Collector was entitled to

MUSSTT. UMATUL MEHDI v. MUSSTT. KULSOOM.

determine summarily the right to possession, if the possession of the applicant in accordance with his application was not proved to his satisfaction. Under such a provision of the law, it might be open to the Collector to determine summarily the right to possession and deliver possession accordingly, so as to oust the third person. In the present amended form of sec. 55, however, the Collector is entitled to determine summarily the right to possession or make reference to the Civil Court for the same purpose, only if no one is proved to be in possession of the interest in dispute. The essential pre-requisite for a reference to the Civil Court by the Collector is, therefore, an investigation by him into the question of possession and a conclusion that no body is proved to his satisfaction to be in possession. In the case before us, there was no such investigation by the Collector. The order of reference which he made shows on the face of it, that he did not direct his attention to the question, whether any person was in possession of the interest in dispute. It follows, therefore, that the reference was irregular and in contravention of the provisions of sec. 55. We may add that sec. 58 lays down the procedure when a reference has to be made under sec. 55 and one of the heads upon which the Collector has to furnish information to the Civil Court is, "the circumstances of the case, as far as they are before the Court; and the reasons which have led him to make the reference." It is not enough, for the Collector to repeat the language of sec. 55 and to say that in his opinion the dispute ought to be properly determined by a Civil Court. He must state that it is not proved to his satisfaction that any person is in possession of the interest in dispute.

Sec. 59 next defines the procedure before the Civil Court on receipt of reference. The Civil Court is to determine summarily the right to possession in respect of the interest in dispute, subject to a regular suit, and to deliver possession accordingly. Sec. 62 provides that the summary decision of the Court under sec. 59 shall have no other effect than that of settling the actual possession, but for such purposes, it shall be final and not subject to any appeal or order for review.

Upon a review of these provisions of the Land Registration Act, the following conclusion appears to us to be reasonably plain. When a person alleges that he has by succession, as in the present case, acquired an interest in an estate and is in possession of such interest, and on this basis, seeks registration of his name, if his claim is disputed by any other person who sets up a conflicting claim in respect of the same interest, the Collector must enter into the question of possession. If he finds that possession is with the applicant and that the title set up is also proved, he may enter his name in the register. If, however, it is not proved to his satisfaction that any person is in possession of the disputed interest, he may either determine summarily the right to possession and deliver possession accordingly or he may make a reference to the Civil Court which may determine summarily the right to possession and deliver possession accordingly. The learned Advocate-General contended that in sec. 55, the term

MUSSTT. UMATUL MEHDI *v.* MUSSTT. KULSOOM.

'possession' means 'lawful possession'; in other words, that if the title of a person is established, the possession under sec. 55 must be assumed to be in him in the eye of law, even though the actual possession may be with some one else. He further contended that it is not merely open to the Collector, but it is his duty to determine, in every case, the right to possession and to place the rightful owner in possession, so as to oust the person who is actually in occupation. This contention, however, is contrary to the provisions of sec. 52 which as we have stated already, show clearly that the Collector must not only satisfy himself that the alleged succession or transfer has taken place but also that the applicant has acquired possession in accordance with such succession or transfer. If, as is contended by the learned Advocate-General, whenever it is found that A has succeeded to the estate of B or has obtained it by a transfer, it follows, as a matter of law, that A has acquired possession thereof, it would be wholly unnecessary for the Legislature to provide in sec. 52, as it has done, that the Collector must satisfy himself as to both the elements, namely, succession or transfer and the acquisition of possession in accordance with such succession or transfer. Sec. 52 shows plainly that unless both the elements are established, the Collector cannot order the name of the applicant to be registered. Reliance was, however, placed by the learned Advocate-General upon the case of *Bushby* v. *Dixon* (1), in which it was ruled by the Court of King's Bench that where a freehold land in the occupation of tenant for years, passes by descent, the heir is immediately seised in fact, and this is not altered by the occupier paying rent by mistake to another. Mr. Justice Bayley stated that where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact; but when there is a tenant, his possession becomes that of the heir, immediately on the death of the ancestor; the subsequent misconduct of the tenant in paying rent to another person or the mistake of the heir as to his right, cannot be to alter the nature of the seisin which he had before. This decision, founded on the ancient learning of the seisin may be treated as good law and was in fact relied upon by Lord Selborne in *Lyell* v. *Kennedy* (2). But it has no application to the present case. It may be conceded that under the Land Registration Act, a person who claims to have acquired an interest in an estate by succession or transfer and to be in possession by virtue of such title, is not entitled to be registered merely upon proof of possession. He must show that his possession is not wrongful and is attributable to the title which he sets up. But it does not follow, conversely, that, if he proves his title merely, but not his possession, he is entitled to have his name registered. As a wrongdoer in possession is not entitled to claim registration, so the rightful owner, if out of possession, is not entitled to claim registration merely on the ground that the legal possession is in him. To hold otherwise, would be to ignore the clear

(1) 3 B. and C. 298; 27 R. R. 362 (1824).

(2) L. R. 14 App. Cas. 437 at p. 456 (1889).

distinction between possession and right to possession which is recognised in secs. 52 and 55. In the case before us, it has been found that the Petitioner, the widow, is in possession of the estate by receipt of rent from the lessees. It is not quite accurate to describe this as constructive possession. In the case of zemindaries where the proprietor can be in possession only by receipt of rent, he is in actual possession of his interest, if he is in receipt of rent. The zemindar's possession of the right to collect rent from the tenants in occupation is actual possession of a tangible property, *Sarbananda Bose Mozumder* v. *Pransankar Rai Chowdhury* (3), *Sib Narain Singh* v. *Brij Mohon Thakur* (4). When a person has proprietary interest in land and as such is entitled to receive rent, he is in possession of his interest if he is in receipt of rent, while his tenant who is in actual occupation has possession which, in a sense, is the possession of the landlord or superior proprietor. [See the observation of Lord Davey in *Secretary of State for India* v. *Krishnamoni Gupta* (5)]. If, therefore, a proprietor finds that the rent receivable by him is intercepted by some other person, he is dispossessed of his interest in the land. He loses possession, because the only mode of enjoyment by which that possession can be held, ceases to be available by the act of the trespasser. If this principle be applied to the facts found by the Subordinate Judge in this case, what is the position? There can be no possible controversy that the widow is in possession of the proprietary interest in the disputed properties. The question, therefore, arises whether her possession is lawful. It may be observed that she sets up what is *primâ facie* a good title to possession. She alleges that she is entitled to a large sum of money as dower. According to her case, the amount is 5 lacs of rupees and 25 gold mohurs. According to the finding of the Subordinate Judge, it is at least Rs. 41,000 and one gold mohur. Whatever the precise amount may be, as to which a determination is not necessary for our present purposes, she contends that she is entitled to remain in possession till the dower-debt has been satisfied. There is a considerable body of high authority in support of this view. [See the decisions of their Lordships of the Judicial Committee in *Ameeroonnissa* v. *Mooradoonnissa* (6) and *Musstt. Beebee Bachun* v. *Shk. Hamid Hossein* (7)]. According to these cases, when a widow is in possession of the undistributed property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any portion of it, is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid. But she must account for all profits received by her, and she cannot, in her capacity as creditor, transfer, sell, or mortgage the property, so as to affect their shares. It may be conceded that there has been some divergence of judicial opinion upon this point, as is indi-

(3) I. L. R. 15 Cal. 527 (1888).
(4) I. L. R 23 Cal. 80 (1896).
(5) 6 C. W. N. 617 at p. 622 : s. c. I. L. R. 29 Cal. 518 (1902).
(6) 6 M. I. A. 211 (1855).
(7) 14 M. I. A. 377 : s c. 10 B. L. R. 45 (1871).

MUSSTT. UMATUL MEHDI *v.* MUSSTT. KULSOOM.

cated by the decisions of the learned Judges of the Allahabad High Court in *Amanatunnissa* v. *Bashiran-nissa* (8) and *Mahammad Karimullah Khan* v. *Amani Begam* (9). There is no foundation, however, for any suggestion that the widow has taken possession of the estate by force or fraud. Her possession is *primâ facie* lawful. If, therefore, she is in fact in possession as found by the Subordinate Judge, if such possession was not obtained by force or fraud, if she came into possession peaceably, and if the possession can be attributed to a claim of title *primâ facie* well-founded in law, it is not easy to perceive upon what ostensible ground it can be suggested that she is not in such possession of the property, as the Revenue Courts will recognise for purposes of registration. It could never have been intended that either the Revenue Courts or the Civil Court on a reference by the Revenue Court, should enter into a minute examination of the authorities upon a difficult question of Mahomedan law; and while professing to decide summarily the right to possession, practically come to a decision upon the question of title, as elaborate and exhaustive as in a regular suit. We must consequently hold that the order of reference made by the Collector in this case was in itself irregular and that the Subordinate Judge upon the reference has exercised his jurisdiction illegally and with material irregularity when he found upon the facts that the widow is in possession of the disputed property, as proprietor, by receipt of rent, that she is entitled to a large sum of money from the estate of her husband on account of her dower and that she peaceably entered into possession upon the death of her husband and claims to hold possession not as a wrongdoer but upon an assertion of title which is *primâ facie* supported by Judicial decisions of the highest authority, he ought not to have made an order the effect of which is to determine the question of title and to oust her from possession.

The only other point to which a reference is necessary is the question of this Court's power to revise the order of the Subordinate Judge. It was contended by the learned Advocate-General that the order in question is made in the exercise of a special statutory jurisdiction and is consequently not an order in a "case" in which this Court can exercise its revisional powers under sec. 622, C. P. C. In our opinion there is no foundation for this contention. No doubt, the Civil Court acquires jurisdiction by virtue of the reference made by the Revenue Court; but once the Civil Court has got seisin of the case, it exercises its powers as a Civil Court. It determines the question referred to it and delivers possession accordingly. It does not make report to the Revenue Court to enable the latter to pass the final orders. Its decision must be taken to be the decision of an ordinary Civil Court, to which it is competent for it to give effect. The mere fact that the exercise of its jurisdiction is initiated by a reference from the Revenue Court does not make the exercise of jurisdiction by it equivalent to an exercise of jurisdiction by the Revenue Court; nor can we legitimately attribute to the proceedings before it the character

(8) I. L. R. 17 All. 77 (1894).
(9) I. L. R. 17 All. 93 (1895).

of a proceeding before a Revenue Court. This is borne out by the provisions of sec. 62 which expressly bars an appeal and a review. Such a restriction would not have been necessary, unless the order of the Civil Court was one which without such bar would be appealable or open to review under the provisions of the Code of Civil Procedure. In this view of the matter, this Court has clearly jurisdiction to interfere either under sec. 622 of the Code of Civil Procedure or under sec. 15 of the Charter Act. There can be no question therefore as to the competency of this Court to interfere in the exercise of its revisional powers. It was suggested, however, that as the Petitioner has her remedy by a regular suit, this Court ought not to interfere. No doubt the ordinary rule is that where an aggrieved party has other remedy available, this Court is unwilling to interfere, but it is unquestionable, that even if there be such remedy, this Court may interfere in exceptional cases [*Debi Das* v. *Ejaz Husain* (10)] and upon the facts of the present case, we are satisfied that the exercise of our revisional powers is justified.

The result, therefore, is that this rule must be made absolute; the order of the Subordinate Judge will be discharged and the Petitioner will be maintained in possession pending the decision of the question of title in controversy between the parties in a regular suit as contemplated by the Land Registration Act. We further direct the Subordinate Judge to certify accordingly to the Collector under sec. 63 of the Land Registration Act.

The Petitioner is entitled to the costs of this rule, we assess the hearing fee at 10 gold mohurs.

N. G. *Rule made absolute.*

(10) I. L. R. 28 All. 72 (1905).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, NOVEMBER 18, 1907. [No. 2

Contents.

The following constitution of the Benches and the distribution of business amongst them take effect from date:—

PRESIDENCY AND PATNA GROUPS.—Mr. Justice Brett and Mr. Justice Holmwood.

RAJSHAHYE AND BURDWAN GROUPS.—Mr. Justice Mitra and Mr. Justice Caspersz.

CRIMINAL BUSINESS.—Mr. Justice Rampini and Mr. Justice Sharfuddin.

CASES BELOW Rs 1,000.—Mr. Justice Geidt.

APPEALS FROM ORIGINAL SIDE AND PRIVY COUNCIL DEPARTMENT.—The Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

ORIGINAL SIDE.—Mr. Justice Stephen, Mr. Justice Woodroffe and Mr. Justice Chitty will sit singly.

The Journal of the Society of Comparative Legislation, Vol. VIII, Part I, New Series, is of more than ordinary interest. It opens with a short biographical sketch of Lord Macnaghten. We have often in these columns drawn attention to the outspoken Privy Council judgments of this great judge whose eminent fairness and strong sense of justice has made his name universally respected in this country. The same issue of the journal contains a short memoir of the late Lord Davey from the pen of Lord Macnaghten. Besides these there are a number of articles and editorial notes both instructive and interesting.

IN THE DEFINITION OF *res judicata* IN THE CIVIL Procedure Code Amendment Bill the words "another suit" have been substituted for the words "former suit." But the words "subsequent suit" and "subsequently raised" in the same paragraph have been retained; these words, it need hardly be said, were used as being correlated to the earlier words "former suit;" it seems doubtful whether the advantage secured by substituting the word "another" for the word "former" will not be neutralised by the retention of the words "subsequent" in the section. The purposes of the amendment will perhaps be better carried out if the words "already decided" be inserted after the words "another suit," and the words "pending suit" substituted for the words "subsequent suit" and the words "is pending trial" or similar words substituted for the words "has been subsequently raised."

CL. 24 GIVES THE HIGH COURT OR THE DISTRICT Court power to transfer or withdraw any suit or appeal pending before it or any Subordinate Court. The High Court and the District Court have concurrent powers in this respect. We think that there should be a provision to the effect that "no application for transfer or withdrawal of a case shall be entertained by a District Judge when a similar application has been pending before or disposed of by the High Court."

CL 47 OF THE BILL CORRESPONDS TO SEC. 244 OF THE present Code. Cls. (*a*) and (*b*) of sec. 244 have been omitted and consequently questions regarding the amount of mesne profits should not, according to the Bill, be determined in execution. We think that this will entail hardship in certain cases, for it would certainly not be desirable to put parties to the expense which is often incurred in an enquiry for the determination of mesne profits when the decrees for recovery of possession are liable to reversal by superior Courts. We will revert to this question

later on when dealing generally with the procedure-suits in which preliminary decrees liable to reversal on appeal have to be passed.

FOR THE PURPOSES OF CL. 47 (SEC. 244, C. P. C.) a Plaintiff whose suit has been dismissed and a Defendant against whom a suit has been dismissed are parties to the suit. This explanation is intended to put an end to a conflict of judicial decisions (see 6 C. W. N. 10: s. c. 30 Cal. 134; 6 C. W. N. 327: s. c. 29 Cal. 696; 23 All. 346; 23 Mad. 61). But the clause is silent as to whether a party sued or suing in a representative character is a party when he raises a question relating to his personal capacity. We think that this question ought to be set at rest. There seems to be a conflict of decisions on this point: (See *Bhajahari Pal* v. *Ram Lal Das*, 6 C. W. N. 63; observations of Parsons, J., in *Murigeya* v. *Hayat Saheb*, 23 Bom. 237; and *Beg Raj Marwari* v. *Kundali Debya*). It is doubtful whether the definition of "legal representatives" in cl. 2 will throw any light on this point.

CL. 58 AND THE CORRESPONDING SECTION OF THE Code, *viz.*, sec. 342, C. P. C, provide the periods of imprisonment for debts. According to the case of *Sujan Bibi* v. *Sagar Mandal*, 5 C. W. N. 145, sec. 342 does not empower a Judge to fix a term of imprisonment at his discretion within the maximum. We think that in this respect the law should be amended and judges ought to be invested with powers to fix terms of imprisonment. Under the present law the Court must pass an order of imprisonment *for the full period of six weeks or six months* according as the amount of debt is fifty rupees or more. It seems to us only fit and proper that the judges should be given a discretion to pass orders for the detention of the debtor for any period they think fit not exceeding the limit of time fixed by law.

THE FOLLOWING NOTE OF A PUNJAB FULL BENCH decision regarding "back-fees" appears in the recent number of *The Journal of the Society of Comparative Legislation.* We are completely in accord with the opinion expressed by the learned editors regarding the impropriety of making professional fees contingent on the success of a suit.

A full bench—consisting of nine judges—of the Chief Court of the Punjab have recently had before them the question—highly important from a professional point of view—whether a legal practitioner may make his remuneration in a case contingent on the success of the case, or to use the common phrase take a "back-fee"—that is, a fee which is to be paid back in whole or in part if the case fails. In England the traditions of the Bar have long proscribed such an agreement, and sec. 11 of the Solicitors Act, 1870, expressly prohibits it as between client and solicitor. In nearly all parts of India also—in Madras, in Allahabad, in Calcutta, and in Bombay—such agreements are not permitted; but the case has been otherwise in the Punjab, where the practice has largely prevailed, owing to a decision some thirty years back of Sir M. Plowden, a judge of high authority in the Province. In this opinion there was nothing against public policy in a stipulation that a pleader should be paid an additional sum by his client on condition of his conducting the case to a successful issue: it was calculated, he thought, to secure to the client a decree of zeal and diligence on the part of his pleader in conducting the case which the client would not otherwise get. There is certainly something in this. But it is from this very stimulus to zeal which the back-fee gives that its dangers arise. It tempts legal practitioners to resort—as experience has proved—to improper means, in order to win cases: more than that, it leads to gambling in litigation, to those speculative actions with which Indian Courts are by no means unfamiliar. It is therefore satisfactory to find that the Punjab Court, with two dissentients only out of nine, have condemned the practice. There is nothing of course inherently disgraceful in it, but in the interests of the profession, in the maintenance of a high standard of honour, it is, well—undesirable.

IN THE SEPTEMBER ISSUE OF THE CURRENT VOLUME of I. L. R. Bombay Series the case of *Chhagan* v. *Lakshman* deserves some special notice. There a mortgagee of Lakshman obtained a money-decree against him. This decree was transferred to Chhagan who applied for execution of the money-decree by attachment and sale of the mortgaged property In appeal to the High Court the question arose whether the transferee of the decree is bound by the restriction imposed upon the mortgagee, transferor of the decrees, by sec. 99 of the Transfer of Property Act. Mr. Justice Chandravarkar held that the transferee could not be in a better position as regards the execution of the decree than the transferor. His Lordship observed, "the mortgagee who obtained the money-decree held it subject to the condition or obligation prescribed by sec. 99 of the Transfer of Property Act, that, if he seeks execution of it against the mortgaged property, he can only attach it but he cannot bring it to sale except by instituting a suit under sec. 67. It is true that the present appellant, being a transferee of the money-decree only and not of the mortgage, cannot himself institute such a suit. There is no hardship involved in that because in the first place the appellant (transferee) must be regarded as having obtained the assignment with knowledge of the obligation imposed on his assignor, and, secondly, he might have stipulated with his assignor while taking the assignment that he should institute such a suit for him."

IT MIGHT BE URGED IN SUPPORT OF THE JUDGMENT that if the transferee of the decree be held not bound by the restrictions imposed by sec. 99 on the mortgagee who transferred the decree, the provisions of that section might be evaded by the mortgagee who has got a decree against the mortgagor for the satisfaction of any claim by transferring the decree to a third person. Besides sec. 232 of the Civil Procedure Code makes it obligatory that the assignee of a decree, if he is permitted by the Court to execute it, must get it executed in the same manner and subject to the same conditions as if the application was made by the decree-holder.

FROM A REVIEW OF THE LUNACY COMMISSIONERS' Report, recently issued, it would appear that lunacy in England and Wales is undergoing a steady increase. The number of lunatics under care on 1st January 1907 was 123,988 or 2,009 more than on 1st January 1906. The increase for the past few years over each preceding one has been 2,150, 2,630 and 3,235 respectively; and the annual average increase for the last 10 years 2,462, for the last five 2,655. The total number of certified insane persons in England and Wales stood to the estimated population in proportion of one in 282, whilst the actual numerical increase was 1·64 per cent. Taking the decennial period, the increase in the whole population during the decade was 12·1 per cent. while that of certified lunatics 24·8. The records first began to be kept on 1st January 1859 and the number of certified insane under care on that date was 136,672. The number on 1st January 1907 was 123,988. This shows the alarming rate of increase of 237·2 per cent. during the period. The population during the same period has, however, increased only 77·5 per cent.

EXPERTS BELIEVE THAT THIS INCREASE IS TO BE attributed more to the care taken of degenerates in modern times and want of any restraint on their marrying freely and procreating children than to drunkenness. It is suggested by lunacy experts that "people should not be allowed to get married unless they can produce a certificate of good health." Dr. Reid Rentoul says that breeding from degenerates has never yet paid a nation and never will pay. He observes: —

> The existing conditions compel thinking men and women to agree to this—that the preservation of the supposed rights of individual idiots, imbeciles, epileptics, lunatics, feeble-minded, and habitual criminals, in order that they may beget offspring, is but of very secondary importance when considered in connection with the future welfare, the mental and physical strength of our nation.

THE RIGHT HON. LORD MACNAGHTEN.

(From the Journal of the Society of Comparative Legislation.)

Lord Macnaghten was born in 1830, and belongs to a Scottish family which settled in Ulster in the sixteenth century, and of which several members have attained to distinction. He is a nephew of the Sir William Macnaghten whose tragical death outside the walls of Cabul on the Christmas Day of 1841 was one of the prominent incidents of the first Afghan War. He shares with the present Lord Chancellor the honour of being a University First Class man and a University "Blue." In 1852 he was bracketed Senior Classic with two other Trinity men, and obtained the second classical medal, the first having fallen to his lifelong friend Benson, afterwards Archbishop of Canterbury. At the same time he was rowing for two successive years in the Cambridge "Eight," first as bow, and afterwards as storke. He was called to the Bar at Lincoln's Inn in 1857, practised as a Chancery barrister, was made a Q. C. in 1880, and became a leading counsel in the Court of the Master of the Rolls, then a Chancery judge. The year in which he took silk was also the year of his election to the House of Commons. He represented his native county, Antrim, from 1880 to 1885, and the northern division of that county from 1885 to 1887. In the latter year he leapt at a bound from practice at the Bar to the position of Lord of Appeal and for the last thirty (*sic*) years he has adorned, dignified, and strengthened the highest Court of appeal. Lord Macnaghten's judgments are not only good law but good literature. There is racy humour in them, in addition to their learning and their sound, solid, subtle reasoning, and they are permeated by a flavour of fine scholarship, which gives them brilliancy and distinction, and makes them excellent reading. Since 1895 Lord Macnaghten has been chairman of the Legal Council of Education.

CURRENT INDIAN CASES.

KESAVARAPU *v.* KOTTA, I. L. R. 30 Mad. 96. *Court Fees Act, sec. 7—Mortgage decree—Appeal as to the liability of certain properties.*

Where an appeal is preferred against a mortgage decree not against the amount of the decree, but as to the liability of certain properties for the mortgage debt, *held* that the Court-fee payable is *ad volorem* upon the value of the properties if the value does not exceed the amount of the decree, and when the value exceeds that then upon the amount of the decree.

RAMCHANDRAIYAR *v.* NOORULI.., I. L. R. 30 Mad. 101. *Civil Procedure Code, sec. 586.*

If a suit is cognizable in the Small Cause Court the addition of a prayer for a declaration would not prevent it from being so cognizable, if the reliefs can be obtained without such prayer.

BHAKTHAVATSALU *v.* EMPEROR, I. L. R. 30. Mad. 103. *Criminal Procedure Code, sec. 423.*

When the period of imprisonment in default of payment of the fine *plus* the period of imprisonment left unaltered by the Appellate Court, is the same as the period of the original sentence, there is no enhancement of the sentence such as would render it illegal having regard to the provisions of sec. 423, Criminal Procedure Code.

ARUNACHELLA *v.* RAMIAH, I. L. R. 30 Mad. 109. *Transfer of Property Act, sec. 106.*

It is perfectly open to the parties to a lease to agree that the monthly period of tenancy should be reckoned not from the date of the lease but from another date and all the Court has to do is to ascertain whether such was the intention of the parties.

EMPEROR *v.* KANDASAMI, I. L. R. 30 Mad. 134. *Criminal Procedure Code, secs. 307, 310.*

In a case referred under sec. 307, Criminal Procedure Code, there is no conviction or acquittal in the Sessions Court. Unless there is a conviction the accused cannot be asked to plead guilty to previous convictions.

SRIVAMULU *v.* ANDALAMMAL, I. L. R 30 Mad. 145. *Letters Patent, sec. 15.*

An order of a Judge of a High Court precluding a party from adducing any evidence to be given by the witnesses mentioned in the affidavit is appealable under sec. 15 of the Letters Patent.

SUB-COLLECTOR OF GODAVARI *v.* SERAGAM, I. L. R. 30 Mad. 151. *Land Acquisition Act, sec. 3 (a).*

The word "land" as defined in sec. 3 (*a*) of the Land Acquisition Act includes trees. The value of the trees is therefore included in the market-value of the land.

BADDA *v.* THE MAHARAJA OF VIJIANIGRAM, I. L. R. 30 Mad. 155. *Landlord and tenant.*

A landlord is entitled to restrain the raiyat from cutting fruit trees.

APPASAMI *v.* RAMANATHAM, I. L. R. 30 Mad. 167. *Principal and surety.*

Where a decree was obtained for Rs. 3,000, against the principal and the surety, and a decree for Rs. 5,000 (which included the Rs. 3,000) against the principal, *held* that the surety was not entitled to a reduction of the sum which was realised from the principal upon rateable distribution under sec. 295, C. P. C.

EMPEROR *v* SAMUEL, I. L. R. 30 Mad 179. *Penal Code, sec 342—Arrest of judgment-debtor.*

The legal duty of an officer arresting a judgment-debtor is to produce him at the next sitting of the Court and in the meantime he is responsible for his safe custody; he is necessarily empowered to confine the complainant in the interval and the law does not prescribe where he should be confined or prohibit confinement in the decree-holder's house.

DORASAMI *v.* EMPEROR, I. L. R. 30 Mad. 182. *Criminal Procedure Code, sec. 106.*

An Appellate Court cannot pass an order under sec. 106 (*3*) unless the convicted person has been convicted by one of the Courts specified in cl. (*1*) of the section.

APPACOOTY *v.* MUTHU, I. L. R. 30 Mad. 191. *Probate—Trustee—Executor.*

The mere circumstance that the property is left by the Will to trustees without words referring to them as executors would not prevent those persons being granted probate as executors according to the tenor, if, among the duties to be discharged by them under the Will, there are included such duties as executors have to perform. But that should appear from the Will.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL. *Christopher and Roney* v. *White and others.* Before the MASTER OF THE ROLLS, LORDS JUSTICES COZENS-HARDY and FLETCHER MOULTON. 27th February 1907.

Solicitor's costs—Agreement—Company "going to allotment"—Payment by cheque—Voidable allotment—Solicitor failing to use reasonable care—Gross negligence.

This appeal deals with two questions, one arising on the claim and the other on the counter claim. The claim was brought by Messrs. Christopher and Roney, Solicitors, to recover a lump sum, as agreed upon, £623 for work done and money expended by them as solicitors. The Defendants had promoted a limited liability company called the Western Canada Pulp and Paper Company. Plaintiffs alleged an agreement to pay them 500 guineas and out of pocket expense. This was to be paid immediately "on the Company going to allotment." It was alleged that the Company went to allotment on 12th May 1905. The Defendants deny liability on the ground that there was only on abortive allotment and they counter-claimed for damages owing to loss of promotion profits caused by the negligence of Plaintiffs' advice as Solicitors. The evidence showed that at time of allotment the minimum subscriptions had not been received in coin. Cheques by which they had been paid had not been cashed and Defendants referred, in support of this being no payment within the Companies Act, to *Mears* v. *Western Canada Pulp and Paper Company*, 1905, 2 Ch 352. Plaintiffs relied on evidence of common practice of payment by cheques. Mr. Justice Grantham held that there had been a good allotment. The jury found for Plaintiffs and they got judgment on claim and counter-claim. In this appeal by Defendants on both claims the Court held, "the company did go to allotment but it did so in such a manner as to be ineffectual in point of law; at best it was a voidable allotment one capable of being undone and in fact very shortly afterwards legal proceedings were taken which rendered it void." The Court came to the conclusion that what had taken place could not be described as an allotment. The Company never had any living existence and so the condition had not been fulfilled but had failed. The verdict must be set aside and judgment must be entered for Defendants.

Then on the counter-claim the Court was of opinion that Defendants were right in complaining

of the rejection and admission of evidence by the learned Judge, Counsel was also right in complaining of certain passages in the summing up as being misdirections or at all events infelicitous expressions. He asked the jury more than once whether they thought the Plaintiffs had been guilty of negligence so as to be liable not only to lose their fees but also to pay damages. Such a question was open to the comment that it seemed to suggest an imperfect and misleading standard for considering whether there had been a failure to use due diligence. The learned Judge had also used the terms "gross negligence" or "*crassa negligentia*"; in modern practice it was not customary to use those epithets. Solicitors being persons who were skilled for the performance of certain duties, must be held to be guilty of gross negligence or *crassa negligentia* if they failed to use reasonable care in the exercise of such skill. The real standard was whether reasonable care was used or not. There certainly was here a want of reasonable care or skill such as might be demanded of a solicitor. The verdict was unsatisfactory.

Mr. Montague Lush, K. C., and *Mr. Lewes Thomas* for the Defndants.

Mr. Gore Brown, K. C., and *Mr. Norman Craig* for the Plaintiffs.

C. W. A. *New trial ordered on counter-claim.*

CHANCERY COURT.—*The Attorney-General* v. *The Mersey Railway Company.* Before MR. JUSTICE WARINGTON. 8th March 1906.

Business incidental to or consequential upon a Railway Company's undertaking—Omnibus business— Ultra vires.

The question to be determined in this litigation resolved itself into whether there was a sufficient analogy between Tramway Companies and Railway Companies, so that the Court should follow the principles laid down in *London County Council* v. *Attorney-General*, (1902) A. C. 165. The Mersey Railway Company owned and worked a railway from Liverpool to Birkenhead and had started recently an omnibus service in connection therewith and from one of their railway stations to a point at the west-end of Birkenhead carrying ordinary passengers to and fro. This route ran parallel to the Birkenhead Corporation's tram lines and the competition thus was opposed to the interests of the Birkenhead rate-payers. The Corporation now sought to have it declared that it was beyond the powers of the Mersey Railway Company, to carry an on omnibus proprietary business. The Company contended that what they were doing was incidental to their undertaking. That they had no special powers was admitted.

The learned Judge referring to the abovementioned decision in the case of *The London County Council*, where it was held that a Tramway Company could not carry on the business of an omnibus proprietor, *held* that, it equally applied to a railway and that the business of an omnibus proprietor as carried on by the Defendants was not incidental to or consequential upon their undertaking and so was *ultra vires*. Injunction granted to restrain them from so doing.

Mr. Cripps, K. C., and *Mr. L. Scott* for the Corporation.

Mr. Neville, K. C., *Mr. Norton, K. C.*, and *Mr. A. B. Shaw* for the Defendants.

C. W. A.

DIVISIONAL COURT, KING'S BENCH.—*Davis* v. *Petrie.* Before the LORD CHIEF JUSTICE and MR. JUSTICES KENNEDY and RIDLEY. 9th June 1905.

Bankruptcy Act, 1883, secs. 43, 49—Payment made with notice of an act of bankruptcy—Payment to trustee under deed of assignment—Whether good discharge.

The bankrupt was one Watson, a builder. On 5th June 1903 Watson had executed an assignment of all his property to one Afford, on trust for Watson's creditors. Alleging that to be the act of bankruptcy, a petition was filed and a receiving order was made against him two months after, and he was adjudicated a bankrupt. This action against Defendant was to recover £21 for work done for him by the bankrupt, the Plaintiff was the trustee in bankruptcy of Watson. The defence was that that amount was paid by cheque, dated 12th June 1903, drawn in favour of the said Afford. The question for the County Court Judge was to determine whether such payment was a good discharge, in the event of the assignment to Afford being rendered void within 3 months of its date, under the 49 section of the above Act. The County Court Judge upon the authorities decided in favour of the Defendant. The Divisional Court was of opinion that none of the authorities supported the view that a payment made with notice of an act of bankruptcy was protected. Afford was only an assignee subject to all equities. Sec. 49 the Judge thought protected payment to the trustee under the deed but anyhow payments to the bankrupt were not protected, if at the time of payment the person paying had notice of the act of bankruptcy. It would render sec. 43 of no effect if it were held otherwise in the case of a payment to a trustee under a deed like this. Of course there were cases where on equitable principles it had been held that independently of sec. 49 of the Act, if the bankrupt was bound to make over chattels that transaction would be protected because of his duty to fulfil his obligations. Held that the payment to Afford was not a good discharge.

Mr. S. R. Earle for the Plaintiff.

Mr. Mellor and *Mr. Giveen* for the Defendant.

C. W. A. *Appeal allowed with costs.*

DIVORCE COURT.—*Beer* v. *Beer*. Before the PRESIDENT. 15th March 1906.

Restitution of conjugal rights—Refusal to wife's solicitor "usual order" for costs—Solicitor's duty to enquire.

This was a wife's suit for restitution of conjugal rights. The husband proved that the wife was of drunken habits, that she came within the words of the Habitual Drunkards Act, 1879, and the Licensing Act, 1902. The husband thereupon prayed for judicial separation on the ground of cruelty. The Court held that the husband had succeeded in establishing that he had just cause for withdrawing from co-habiting and refusing to return to his wife, but that a sufficient case of legal cruelty was not made out. The wife's petition was therefore dismissed as also was the husband's cross-application.

The learned President delivered a considered judgment as to the wife's costs. He referred to his own decision in *Ash* v. *Ash*, (1893) P. 222 The principle cases upon the subject were *Robertson* v. *Robertson* (6 P. D. 119), *Flower* v. *Flower* (3 P. & D. 132) and said so long as a solicitor "reasonably" incurred the costs of a suit, the husband must secure them, as otherwise no married woman could be able to employ a solicitor to defend herself. The Court, therefore, should not be too acute or astute in finding that a wife's solicitor had no such reasonable grounds, especially when one considered that a solicitor could not know as much about a case at its inception as the Court knew at the end of the trial. On the other hand it was the duty of the Court to see that the suit was not instituted against the husband in circumstances which would necessarily put him to great expense and cause great hardship, which would ultimately recoil on the wife. The learned President then referred to certain letters of the husband's solicitor to the wife and other matters which were known to the wife's solicitor. His knowledge that the wife was often intoxicated. The fact that he never interviewed the medical man who had attended the wife. And the conclusion the learned President arrived at was that this was an extremely unreasonable piece of litigation. A case in which it must have been known that the husband's allegations were true, such a suit should not have been launched without much stronger materials than the wife's solicitor had. The only question really in dispute was as to the amount of the wife's allowance. The learned Judge would therefore exercise his discretion and refuse to give the wife "her usual order" for costs.

Mr. Barnard, K. C., and *Mr. Stevenson* for the Wife.

Mr. Willock for the husband.

C. W. A.

DIVORCE COURT.—*Petition of Regina Pollock Née Gordon.* Before the PRESIDENT. 30th July 1907.

Formal marriage for emancipation from parental control—Want of co-habitation—Nullity.

This was an application for nullity of marriage. The parties were cousins and both domiciled Russians. They were both under age. The Petitioner wanted to study law in Paris. Her cousin told her that her parents would not consent, she had better go through a betrothal form with him and that would emancipate her from her parents' control. Believing this she went through a marriage ceremony with him at the Shoreditch Registry Office, London. False declarations were made. No ring was used, and no co-habitation had taken place. This was in April 1906. She was *vergo intacto* although they went to Paris together and studied law living as brother and sister. These facts were admitted and *Szapira* v. *Leiberman*, Times, December 8th to 19th, 1899, and *Ford* v. *Stier*, 1891, p. 1, were referred to.

The President decided that he was satisfied on the facts, proved that Petitioner was entitled to a decree for nullity with costs.

Mr. Bayford for the Petitioner.

Mr Murphy for the Respondent.

C. W. A.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ROBERTSON. LORD ATKINSON. LORD COLLINS. SIR ARTHUR WILSON. SIR ALFRED WILLS. 1907. 31, July.	MUSST. MANJHARI KOER, Appellant, *v.* MUSST. JANKI KOER and ors., Respondents.

Special leave—Maintenance allowance—Value below Rs. 10,000—Question of general importance.

This was a petition for special leave to appeal of Musst. Manjhari Koer, the widow of Jagarnath Pershad.

Jagarnath Pershad was the son of Babu Bundi Lal. The latter had three brothers Binda Lal, Harbans Lal and Banarsi Lal.

Jagarnath Pershad died prior to 1870 and disputes having arisen on his death they were referred to arbitration. An award was made by which Petitioner was granted Rs. 600 a year for maintenance by the surviving brothers of Babu Bundi Lal.

This she received till the death of Binda Lal in or about 1898.

In default of further payment Petitioner instituted suit to recover Rs. 1,800 for arrears from 1306 to 1309 F. with interest thereon.

The Subordinate Judge decided that the award was binding, but that as Petitioner had subsequently inherited property from her father yielding Rs. 12,000 a year she was not in law entitled to maintenance. Upon her appeal the District Judge of Chupra

held the award binding, and as the large estate she had inherited from her father was heavily burdened with debts, her circumstances required that she should receive the amount awarded to her by the award for maintenance. Upon 2nd appeal the High Court held that she had sufficient means for her wants, and could not claim maintenance, and so restored the decree of the Subordinate Judge. Petitioner's leave to appeal was refused on the ground that she had not substantiated that the subject-matter of dispute was of the value of Rs. 10,000.

Mr. DeGruyther for the Petitioner now submitted that the arrears of Rs. 600 per annum plus the amount she would recover in future was far above the appealable amount, that the question whether a Hindu widow loses her right to maintenance by the subsequent acquisition of property sufficient for her wants is a question of law of general importance and that there has been a miscarriage of justice inasmuch as the fact that the claim is based on an award and not on an ordinary allowance for maintenance has not received due consideration. Moreover the finding of the District Judge that the allowance was necessary for her needs was a finding of fact and could not be questioned on 2nd appeal.

C. W. A. *Leave to appeal was granted.*

PRIVY COUNCIL.

[APPEALS FROM TWO JUDGMENTS OF THE SUPREME COURT OF NOVASCOTIA.]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
SIR ELZEAR TSCHERAW.
SIR ALFRED WILLS.
1907.
31, July.

TOWNSEND *v.* COX.

Leave granted by local Court in a case not fit—Respondent's application to cancel leave where judgment plainly right.

The following passage in *La cité de Montreal* v. *Les Ecclésiastegues du Sémenaire de St. Salpice de Montreal* (14 Ap. Cas. at p. 662) followed. "A case may be of a substantial character, may involve matter of great public interest and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least unattended with sufficient doubt to justify their Lordships in advising His Majesty to grant leave to appeal."

The appeal related to the Canada Temperence Act of 1888 (51 Vict., C. 34). The Respondent acting under it laid an information before 2 justices and secured a warrant, to search an hotel at Kentville for intoxicating liquor. The Appellant was the keeper of that hotel. The warrant issued led to the discovery of quantities of intoxicating liquor, which were produced before the justices. Appellant was also summoned to answer an information for so breaking the said law. He was convicted and fined and the stuff declared forfeited to His Majesty and their destruction ordered. Appellant took out a writ of certiorari to remove into the Novascotia Court the rocord of search warrant and the order made as above. The Supreme Court dismissed the application, but granted leave to appeal to His Majesty in Council. The Respondent urged that such leave should be set aside. Their Lordships allowed the application to stand over to the hearing and now in their judgment referring to the passage above given from 14 App. Cas. state: "Without venturing to predicate of those appeals, any of the propositions in the earlier part of the sentence, their Lordships are clearly of opinion that the last part was directly applicable to them. The chief ground was that with respect to the search warrant certain cases had decided that such a warrant could only issue as ancillary to a prosecution already commenced. It was undoubtedly true that certain cases had so decided, but in the following year the legislature had amended the Act under which the search warrants in those cases had been issued by striking out the words on which the Courts had founded their opinion, that the commencement of a prosecution was a condition precedent to the issue of a search warrant; and it was under the amended Act that the proceedings now in dispute took place. Without therefore enquiring further into the reasons which had been urged against the granting of special leave in these cases, their Lordships were content to rest their decision on the authority above cited. These were not cases in which they would have been disposed to grant special leave to appeal.

Sir R. Finlay, K. C., Mr. Power, K. C., (Canadian Bar) and *Mr. Rowlatt* for the Appellant.

Mr. Newcombe, K. C., (Canadian Bar) and *Mr. Frank Russell* for the Respondent.

C. W. A. *Appeal dismissed with costs.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERZ and CHITTY, JJ CRIMINAL REVISION No. 1079 OF 1907. JAINAIT MULLICK AND OTHERS, Petitioners *v.* THE EMPEROR, Opposite Party. 27th September 1907.

Appellate judgment not according to law—Appellate judgment must be independent.

Seventeen persons were ordered to find security to be of good behaviour; 7 of them for two years and 10 others for one year. These latter appealed to the District Magistrate who dismissed their appeal

fter recording a judgment in which the case of each of the Appellants was not individually considered. The Appellants moved the High Court for revision on the ground *inter alia* that the appellate judgment was not in accordance with law. The case of the other seven went up to the Sessions Judge who confirmed the order of the lower Court.

Their Lordships observed :—

"The appellate judgment of the learned District Magistrate is not in compliance with the law and the authorities on the subject. He was dealing with the case of seventeen persons and the evidence of 70 witnesses for the prosecution and 54 for the defence. This mass of evidence he disposes of in a very, what we may call, stereotyped manner. The name of not one of the accused and the name of not a single witness appears in the judgment of the learned District Magistrate. We have not the slightest doubt, as he mentions in his explanation, that he made notes for his guidance with regard to each of the accused as to what the witnesses against him said, and what the witnesses in favour of him said, and that before writing the judgment he considered the evidence against each man. But this cannot be considered sufficient. It must appear on the face of the judgment that the case of each accused has been taken into consideration and reasons should be given, as far as necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused, &c, &c."

We are unable to accept the explanation that the appellate judgment may be read in connection with, and as supplementary to the judgment of the Court of first instance. The appellate judgment must be quite independent and stands by itself.

Babu Dasarathi Sanyal for the Petitioner.

B. C. *Rule made absolute and appeal directed to be reheard.*

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and CHITTY, JJ. CRIMINAL REVISION No 1025 OF 1907. SOBHNATH SINGH AND OTHERS, *v.* THE EMPEROR, Opposite Party. 24th September 1907.

Sec. 350, Criminal Procedure Code—Trial de novo *—Prejudice to the accused when there was no fresh examination-in-chief of the prosecution witnesses.*

The trial of the Petitioners on a charge of rioting commenced before a Sub-Deputy Magistrate and when the trial was nearly finished the Sub-Deputy Magistrate was transferred and the case was sent to an Honorary Magistrate for trial by the District Magistrate. The accused asked for a *de novo* trial under sec. 350, Cr. P. C. Then what happened was this: the witnesses for the prosecution were summoned but the prosecution Muktear declined to examine them, whereupon the Muktear for the defence without making any objection cross-examined them.

The trial resulted in the conviction of the accused under sec. 147, I. P. C., and they were sentenced to six months' rigorous imprisonment. The accused obtained this rule for setting aside the conviction and sentence on the ground *inter alia* that the trial was not in accordance with law.

Their Lordships observed :—

We think the provisions of sec. 350, Cr. P. C., were not duly complied with. It is impossible to say that the accused have not been materially prejudiced by the procedure adopted, for it is evident that the Honorary Magistrate has arrived at conclusions on the evidence the whole of which was not recorded by himself.

Under the circumstances we are obliged to set aside the convictions and sentences and we direct that the Petitioners be re-tried by some other competent Magistrate in the district to be nominated by the District Magistrate.

Mr. K. N. Chaudhuri with *Babu Ganesh Dutt Singh* for the Petitioners.

B. C. *Rule made absolute and retrial ordered.*

Notification, Rules, &c.

The Revised Rules under the Bengal Tenancy Act were published in the *Calcutta Gazette*, dated 6th November 1907; Part I, pages 1819 to 1847.

The following Rule has been inserted in Vol. I of the High Court's General Rules and Circular Orders, criminal, immediately under the heading "Return of Exhibits" :—

When an entry in a public register, or in a private account book, or other bulky record, not being itself an entry in respect of which an offence has been committed, or is alleged to have been committed, is produced in evidence, and made an exhibit in the case, and the retention of such register, account book, or record would cause inconvenience to the public, or the person producing the same, such register, book, or record shall not be retained by the Court but shall be returned to the person by whom it has been produced. Before returning the register, book, or record, the Court shall mark, for the purpose of indentification, such entry or entries as have been exhibited in evidence, and shall cause a certified copy of the entry or entries to be filed with the record of the case. The person to whom the register, book, or record is returned shall be bound to produce the same before the Court when required to do so, and may be required to enter into a bond to that effect. See *Calcutta Gazette*, dated 6th November 1907. Part I, page 1866.

Rules have been framed by the High Court under sec. 51 of the Provincial Insolvency Act III of 1907; see *Calcutta Gazette*, dated 6th November 1907. Part I, page 1866.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 451 OF 1905.

WOODROFFE, J.
COXE, J.
1907.
1, August.

BISHENDUT TEWARI and others, Plaintiffs, Appellants,
v.
NANDAN PERSHAD DUBAY, and anr., Defendants, Respondents.

*Limitation Act (XV of 1877), secs. 5, 12—Appeal filed out of time—*Bonâ fide *mistake of pleader in calculation—Application for admission granted* ex parte *by a Division Court—Application for discharge of order by Respondent—Delay—Costs incurred by Appellant.*

Where an application for the admission of an appeal which was filed out of time by two days was heard ex parte *before a Division Bench and admitted,*

Held—*That though the order was not conclusive on the Respondents and they are entitled to object to the admission of the appeal at a later stage the order of the Division Bench admitting the appeal should not be discharged when no facts which were not before that Bench are urged on behalf of the Respondents.*

Held, further, *that on the facts of the present case, the order admitting the appeal should not be discharged* inter alia *because the Respondents' application was made after the records had been printed and costs incurred by the Appellants, although the Respondents appeared to have become aware of the filing of the appeal out of time shortly after it was filed.*

Per WOODROFFE, J.—*Each case must be decided on its own facts. In this case besides the delay on the part of the Respondents in bringing their objections before the Court, there was a* bonâ fide *mistake of calculation on the part of the Appellants' pleader which led to the delay in filing the appeal.*

This was an appeal preferred on the 25th of November 1905, against the decree of Babu Annada Prosad Bagchi, Subordinate Judge, 1st Court of Zillah Gya, dated the 22nd of May 1905.

A preliminary objection was taken by the Respondents that the appeal was time-barred. The facts material to this contention were the following :—

The judgment of the Subordinate Judge was delivered on the 22nd May 1905. The Appellants applied for copies of the judgment and decree on the 24th May 1905. The decree however was not signed till the 27th May. Copy of the judgment was ready for delivery on the 31st May and the copy of the decree, on the 1st June 1905. The High Court closed for the long vacation on Friday the 1st of September 1905. The Court re-opened on Monday the 13th November 1905. The appeal was filed on the 13th November 1905, by Babu Bishen Pershad, Vakil. In two affidavits filed respectively by one of the Appellants and the vakil, it was explained that before the long vacation commenced, the former had called on Babu Bishen Pershad and asked to be informed if the appeal could be filed after the vacation, as, if it could, the Appellants would find it convenient to raise the necessary funds during the vacation, that the Vakil, Babu Bishen Pershad, assured him that it could be filed on the 13th November. He had, he stated, overlooked the fact that the decree was signed some days after the application for copies was made and was thus under the impression that

BISHENDUT TEWARI *v.* NANDAN PERSHAD DUBAY.

he could exclude the whole of the time from the 24th May to the 1st day of June. He further stated that his attention was drawn to the mistake in calculation committed by him by the vakil for the Respondent, Babu Kshetra Mohun Sen, on the 15th November 1905. That thereafter having satisfied himself about his mistake he applied to the Court for the admission of the appeal under sec. 5 of Limitation Act and the Court (Pratt and Geidt, JJ.) on the 23rd November passed an order admitting the appeal. The terms of this order are set out in the judgment of Woodroffe, J. On the 1st August 1907, the appeal came on for hearing and the above objection was taken.

Moulvi Shamsul Huda and *Babu Amulya Chandra Banerjee* for the Appellants.

Moulvi Sultan Ahmed (with him *Babus Golap Chandra Sarkar* and *Kshetra Mohun Sen*) for the Respondents took a preliminary objection to the hearing of the appeal. It was filed out of time and was therefore barred under Art. 156, Limitation Act. The mistake of the pleader in calculating the period of limitation could not be held a *bonâ fide* mistake sufficient to justify the Court to give to the Appellants indulgence under sec. 5 of the Act. The Statute of Limitation is a statute of repose, and the Respondents having got a "vested interest" after the judgment of the Subordinate Judge in their favour were entitled to greater protection than the Appellants, see *Gopal Lahiri* v. *Solomon* (2), *Jag Lal* v. *Har Naryan Singh* (3), *In re Helsby* (5), *International Financial Society* v. *City of Moscow Gas Co.* (4), *In re Coles and Ravenshear* (1).

Moulvi Shamsul Huda.—*Contra.*

Mr. S. Ahmed.—In reply.

The JUDGMENT OF THE CORUT was as follows :—

WOODROFFE, J.—A preliminary objection has been taken that this appeal is time-barred.

The Appellant contends that, under the provisions of sec. 12 of the Limitation Act, he is entitled to a deduction of 14 days on account of the time expended in obtaining copies of the judgment and decree.

I think, however, it is quite clear that he is not entitled to a deduction of this time inasmuch as the applications for a copy of the judgment and of the decree were made on the same day, *i.e.*, the 24th May 1905. Copy of the judgment was obtained on the 31st May 1905 and copy of the decree on the 1st June 1905. Therefore the time to be deducted would be the longer of those periods.

This also appears to be the view of the learned Judges who admitted this appeal. On that occasion two affidavits were filed, one by the Appellant and the other by his pleader and the Court was asked to allow the appeal to be admitted and registered as if it had been filed in time. The order of the Court passed on that application was as follows: "We are satisfied on the affidavit of Babu Bishen Pershad, Vakil, that the delay in filing the appeal was due to an excusable mistake on his part and not to any laches

(1) (1907) 1 K. B. 1 (1906).

(2) I. L. R. 13 Cal. 62 (1886).

(3) I. L. R. 10 All. 524 (1888).

(4) 7 Ch. Div. 241 (1877).

(5) (1894)1 Q. B. 742.

BISHENDUT TEWARI *v.* NANDAN PERSHAD DUBAY.

on the part of the Appellant. We think sufficient cause has been shown for allowing the appeal to be admitted and for filing it out of time. We order accordingly." This order which was dated the 23rd November 1905 was made *ex parte* and is therefore not conclusive on the Respondent who now objects that the appeal is barred.

At the same time, I should not be disposed, under the circumstances, to interfere with the order which my learned brothers passed on this appeal unless clear grounds were made out for an interference which would in effect amount to a reversal of their decision. No facts, I may say here, have been placed before us which were not before them As against the admission of the appeal, reference has been made by learned Counsel who appears for the Respondent to the decision of the Appeal Court in the matter of *In re Coles and Ravenshear* (1). However, it appears from the judgment given in that case that the Master of the Rolls and Cozens-Hardy, L. J., would have approved of a rule different from that which they laid down, were it not that they considered that they were constrained to the conclusion that the appeal was barred by the state of the authorities which were binding upon them. Reference has also been made to two Indian cases *Gopal Chandra Lahiri* v. *Solomon* (2) and *Jag Lal* v. *Har Naryan Singh* (3).

I think, however, that each case must be decided upon its own facts. In the present case, the appeal is out of time by only two days and the fact that it is out of time for this short period is due to what is undoubtedly a *bonâ fide* mistake made by the pleader for the Appellant. What happened was that in making the usual calculation for fixing the period of limitation in filing the appeal, he overlooked the circumstance that the application for copy had been made before, and not after the decree had been signed. There is no material before us nor has any affidavit been filed by the Respondent to show that there was any intentional desire to delay on the part of the Appellant. Further, this objection has been taken unnecessarily late and after the Appellant has incurred costs. It appears from paragraph 7 of Babu Bishen Pershad's affidavit that on the 15th November and possibly before that date, the pleader for the Respondent was aware that the appeal had been filed out of time. On the 23rd November 1905 the order was made *ex parte* admitting the appeal. On the 15th February 1906 the Respondent filed a vakalatnamah. On the 26th April 1906, he filed his list of papers. The paper-book of the Appellant was prepared and costs were incurred. From November 1905 until to-day, that is nearly two years, nothing was done for the purpose of enforcing this objection.

I think myself that the objection might have been enforced by an application made to this Court directly the Respondent became aware of the *ex parte* order asking that that order should be discharged. If the application had been successful it would have saved unnecessary costs. As I have said, each case must be decided on its own facts. There

(1) (1907) 1 K. B. 1 (1906).
(2) I. L. R. 13 Cal. 62 (1886).
(3) I. L. R. 10 All. 524 (1888).

BISHENDUT TEWARI *v.* NANDAN PERSHAD DUBAY.

is authority of this Court for the admission of this appeal. Though the order was made *ex parte* and is not conclusive on the Respondent, having regard to the facts of this case and to the circumstance that the decision in favour of the admission of the appeal was given on those very facts, I would not, even if I were disposed to do so, dissent from it. I am, therefore of opinion that the objection should be overruled and that this appeal should be heard upon the merits.

COXE, J.—I agree that the appeal should be heard. If this were an application for an admission of an appeal, I think it would be somewhat difficult to grant it, having regard to the judgment of James, L J, in *International Financial Society* v. *City of Moscow Gas Co.* (4), which has been quoted and followed in the ruling cited by my learned brother. But this is not an application for an admission of the appeal. The appeal was admitted almost two years ago by two learned Judges of this Court after consideration of all the facts which have been laid before us to-day. Since then, the record has been printed and costs incurred. After all this has been done and all this time has been allowed to elapse, it would be unduly hard on the Appellant to reject the appeal summarily because it was originally presented two days late.

[The appeal was then heard on the merits and judgment was delivered on the 6th August 1907 dismissing the appeal with costs.]

N. G. *Objection overruled.*

(4) 7 Ch. Div. 241 (1877).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 323 OF 1904.

MOOKERJEE, J.
HOLMWOOD, J.
1907.
Heard, 3, 4 & 5, April.
Judgment, 12, April.

MOHESH CHANDRA BOSU, Plaintiff, Appellant,
v.
RADHA KISHORE BHATTACHERJEE, Defendant, Respondent.

Pleader and client—Agency—Relation between co-mortgagors one of whom a pleader, if fiduciary—Accountability—Settled accounts—Suit to falsify—Specific averment of errors necessary—Changing suit for accounts into suit to falsify settled accounts—Procedure in account suits.

A person does not become the agent of another merely because he gives him advice in matters of business. The essence of the matter is that the principal authorises the agent to represent or act for the principal in bringing or aid in bringing him in contractual relation with a third person, that is to say there must be a recognition of the derivative authority of the agent.

A solicitor who has been employed as such in a transaction for investment of money may be liable for negligence in lending money on insufficient security. But the liability varies with the extent of the part he is employed to take in the transaction.

DOOBY *v.* WATSON (4) *referred to.*

Plaintiff jointly with one R, a pleader, advanced money on what turned out to be insufficient security. It was, however, found that the Plaintiff knew and approved of the security at the date of investment,

(4) 39 Ch. D 178, 185 (1888).

MOHESH CHANDRA BOSU *v.* RADHA KISHORE BHATTACHERJEE.

Held—*That the Plaintiff could not call upon R to recoup him any loss he sustained by reason of the insufficiency of the security, even though he might have obtained the advice of R as pleader on entering into the transaction.*

The requisites for making an account a settled account depend on the circumstances of each case and the mode of dealing between the parties.

CLANCARTY *v.* LATOUCHE (8), PARKINSON *v.* HANBURY (9), MCKELLAR *v.* WALLACE (10) *referred to.*

If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even when the account has been settled errors excepted.

Where the Plaintiff made no averment in his plaint that accounts had been settled but commenced action on the footing that no accounts had been rendered,

Held—*That the Plaintiff could not after the suit had been tried out on that footing be allowed to convert the case into one for reopening of accounts on the ground of errors contained therein.*

Procedure in account suits indicated, and that adopted in the present case condemned.

In a suit for account if liability to account is denied by the Defendant, the question of accountability is to be tried first. It is only after an adverse decision against the Defendant upon this question that he may be called upon to render an account.

HARRI NATH RAI *v.* KRISHNA KUMAR BAKSHI (14) *referred to.*

This was an appeal preferred on the 5th of July 1904, against the decree of Babu Aswini Kumar Guha, Subordinate Judge, 1st Court of Zillah Patna, dated the 29th of March 1904

The facts of the case are fully stated in the judgment.

Dr. Sarat Chandra Banerjee and *Babu Nagendra Nath Ghose* for the Appellant.

Dr. Rash Behary Ghose and *Babus Ram Chandra Mozumdar* and *Karunamoy Roy* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The circumstances which led to the litigation out of which the present appeal arises, were minutely investigated in the Court below and have been discussed before us at great length. They are by no means very complicated and may be briefly outlined.

The Plaintiff, Mohesh Chandra Bose, who is the Appellant before this Court, is an engineer by profession and in 1879 retired from the service of the Government. The Defendant, Radha Kishore Bhattacharya, who is the Respondent before this Court, is a member of the legal profession and for many years has been one of the leading practitioners in the District Court of Patna. For several years prior to the year 1894, the Plaintiff and the Defendant were on terms of closest intimacy; and it appears that the Plaintiff used to avail himself of the advice and experience of the Defendant in making investments of his money. On the 23rd June 1888, a mortgage was

(8) 1 Ball & Beatty 420 at 428.
(9) L. R. 2 H. L. 1 (1867).
(10) 5 Moo. I. A. 372; 8 Moo. P. C. 378 (1853).
(14) I. L. R. 14 Cal. 147 (1886).

executed in favour of the Plaintiff and of Srimati Kusum Kumari Debi, the wife of the Defendant, by one Radha Krishna Lal Sund. The sum secured by the mortgage was Rs. 25,000, half of which belonged to the Plaintiff and half to the Defendant. On the 26th and 29th June following, two supplemental bonds were executed the effect of which was to furnish additional security for the sum advanced. In 1890, the mortgagor was sued and on the 17th March of that year a decree was obtained against him for over Rs. 36,000. On the 2nd March 1894, the Plaintiff executed a power-of-attorney in favour of the Defendant and two other persons by which they were authorised to execute the decree, to manage the properties which had already been purchased in execution proceedings taken on the footing of that decree and generally to manage and look after his affairs. It is alleged on behalf of the Plaintiff that the Defendant has enforced the decree under the authority conferred on him by this power-of-attorney and that various properties have been acquired by him for his own benefit and for the benefit of the Plaintiff. It is an admitted fact that in spite of all these proceedings, the whole debt due under the mortgage has not been realised and that, in substance, the transaction has proved to be an unprofitable bargain. The Plaintiff asserts that this is due mainly to the fact that the mortgagor had not a good title to the properties covered by the security bonds and he attributes this to the negligence, if not the fraud, of the Defendant, who, according to him, was employed as a pleader to make this investment on behalf of the Plaintiff. The Plaintiff consequently asks for an account from the Defendant; but although he charges the Defendant with wilful neglect and default he does not expressly ask for damages on that account.

The Defendant resisted the claim substantially on the ground that he was not an agent of the Plaintiff, that he was not entrusted with the money of the Plaintiff to make an investment on his behalf, that they were in truth joint mortgagees and that although the Plaintiff may have asked and obtained his advice, he did not rely upon it but acted upon the result of his own enquiry and information. The Defendant further alleged that he was not liable to render any account, that the Plaintiff had already inspected whatever accounts existed and that if the Defendant was ever liable to be called upon to render an account, such account had been rendered.

The learned Subordinate Judge has found upon the evidence that the parties did not stand in the relation of principal and agent. He has also held that the Defendant did submit accounts to the Plaintiff which were examined and inspected by the latter. As regards the charges of fraud, misconduct and wilful neglect in connection with the loan transaction as also the execution proceedings, the Subordinate Judge has found that they were utterly groundless.

The Plaintiff has now appealed to this Court and on his behalf the decision of the Subordinate Judge has been assailed on four grounds, namely, *first*, that the Defendant was the agent of the Plaintiff in respect of the mortgage transaction; *secondly*, that the Defendant was the

MOHESH CHANDRA BOSU *v.* RADHA KISHORE BHATTACHERJEE.

agent of the Plaintiff in respect of the execution proceedings; *thirdly*, that the Defendant was liable for the loss which had resulted from his negligence if not fraud; and, *fourthly*, that he was liable to render an account of whatever property had come into his hands in the course of the execution proceedings. It has been argued on the other hand on behalf of the Defendant-Respondent, *first*, that he was not the agent of the Plaintiff in respect of the mortgage transaction; *secondly*, that he was the agent of the Plaintiff under the power-of-attorney of 1894 and liable to account for all sums and properties received thereunder but that such account had been rendered. In reply it was contended on behalf of the Plaintiff-Appellant, *first*, that the accounts which are alleged to have been rendered are not settled accounts and, *secondly*, that even if they are settled accounts, they ought to be re-opened on the grounds of errors.

We have carefully considered the arguments addressed to us on both sides and examined the evidence, and have come to the conclusion that there is no foundation for any of the contentions advanced on behalf of the Appellant.

As regards the position of the parties in relation to the mortgage transaction, there cannot be the remotest doubt that the Defendant was not the agent of the Plaintiff. The case for the Plaintiff was that he made over Rs 12,500 to the Defendant to be invested upon good security. In our opinion this case has entirely failed. The evidence shows that early in 1888 the Plaintiff had received back money from one of his debtors and was in possession of a large sum which he was anxious to invest. He appears to have communicated his wish to the Defendant and asked for his help in the matter. On the 21st June 1888, the Defendant wrote to Jadunath a common friend of the parties, and asked him to inform the Plaintiff that the transaction with Radha Kishen had been settled and that the Plaintiff, if he desired to make an investment, should immediately come with money to Bankipur. The Plaintiff alleges that this was the first intimation he received of the intended mortgage by Radha Kishen. We are satisfied that this is untrue. The evidence makes it abundantly clear that there must have been previous correspondence between the parties on the subject and we think it is beyond doubt that the Plaintiff must have been in Bankipur previously to the end of June to negociate this loan. We have it upon the testimony of Moulvi Khoda Bux, Moulvi Ahia and Durbari Lal that the Plaintiff was in Bankipur about a month before the mortgage bond was executed and that he made enquiries as to the sufficiency of the security offered. We see no reason to distrust this testimony. We are further unable to accept the statement of the Plaintiff that when he went with the money to Bankipur, he placed it in the hands of the Defendant to make the investment and to select the security for him. An examination of the evidence shows that the Plaintiff must have been present when the bond was executed and the money was paid to the debtor or his creditor. We are unable to accept his allegation that he was ignorant of the language in which the bond was

written as he himself is obliged to admit that he passed an examination in Hindustani. Upon a careful examination of the whole evidence we are satisfied beyond any doubt that although the Plaintiff may have asked for, and obtained the advice of the Defendant, he did not rely upon it, he made his own inquiry and did not treat the Defendant as his agent or solicitor employed to make the investment on his behalf. It is impossible under these circumstances to say that the Defendant is liable to the Plaintiff for the loss which has resulted from the insufficiency of the security. It is not necessary for our present purpose to determine the functions of an agent; it is enough to hold that a person does not become an agent on behalf of another merely because he gives him advice in matters of business. As is said by Chancellor Kent in his Commentaries, Vol II, 612, agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and to render an account of it.' The essence of the matter is that the principal authorities the agent to represent or act for him in bringing, or to aid in bringing, the principal into contractual relation with a third person. The element which differentiates an agent from a person in the position of the Defendant is the recognition of the derivative authority of the agent. We are unable to hold, as we have already stated that the Defendant was authorised by the Plaintiff to act on his behalf in relation to the mortgage transaction We may further observe that even if some reliance was placed by the Plaintiff on the Defendant, that would not necessarily make the Defendant liable to the Plaintiff for loss incurred by reason of the insufficiency of the security. It is neither alleged nor proved that there was any deceit on the part of the Defendant and in the absence of deceit it is impossible to fix liability on him. This view is supported by the decision in the case of *Dartnall* v. *Howard* (1). In that case it was pointed out by Chief Justice Abbot that the mere fact that Plaintiff employed the Defendant in laying out or investing a sum of money and that the Defendant undertook and promised to perform and fulfil that duty and that injury resulted by reason of the insufficient security is not sufficient to make the Defendant liable. The learned Chief Justice observed: "can we say that it is the absolute duty of any person so employed without payment and without remuneration, can we under the circumstance say that it is his absolute duty not to take a security of an insufficient nature? The only duty that is imposed under such retainer and employment as is here mentioned is a duty to act faithfully and honestly and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do so; but a man may when acting most faithfully and honestly happen to take insufficient security without gross or culpable negligence on his part: he may have been misled, he may have been deceived, he may have taken such care as an ordinary man would take without

(1) 4 Bar. & Cress. 345 (1825).

MOHESH CHANDRA BOSU v. RADHA KISHORE BHATTACHERJEE.

regard to the subject-matter entrusted to him and yet doing all that, his endeavours may have failed and it may so happen the security may without his knowledge and against his will, have turned out to be insufficient." In the present instance the Plaintiff himself invested in the mortgage transaction an equal amount with the Defendant and there is no foundation for the suggestion that there was either gross negligence or deceit on his part. It was assumed in the argument addressed to us on behalf of the Appellant that if it could be established that the Defendant had taken part in the mortgage transaction on behalf of the Plaintiff and that loss had resulted to the Plaintiff from the transaction the Defendant would be liable. This, however, is clearly unfounded. It is not disputed that a solicitor who has been employed as such in a transaction for investment of money may be liable for negligence in lending money on insufficient security. [*Craig* v. *Watson* (2) and *Pretty* v. *Fawke* (3)]. But it does not follow that the liability of a solicitor does not vary with the extent of the part he is employed to take in the transaction. As was pointed out by Mr. Justice Kekewich in *Dooby* v. *Watson* (4) a solicitor in a mortgage transaction may be employed either (1) to invest in a particular mortgage, or (2) to find securities to be approved by the client and then invest the money, or (3) to find securities and invest the money, the client taking little or no part in the business. No relation of trustee and *cestui que trust* exists between the parties in the first two events and the liability is evidently quite different in the third case from that in the other two. The case of the Plaintiff as laid in the plaint and as sought to be made out in the Court below was that the Defendant acted as legal adviser and that his liability fell within the last of the three classes just mentioned. That case, however, has clearly failed. The Plaintiff is consequently not entitled to make the Defendant liable upon that footing. The classification stated by Mr. Justice Kekewich is well established and based on intelligible grounds See *Mare* v. *Lewis* (5), *Power* v. *Power* (6) and *Hamilton* v. *Lane* (7). In the first of these cases, the Plaintiff gave a sum of money to a firm of solicitor to invest upon freehold security; they found a security and invested the money upon it. The security turned out valueless. It was ruled by Vice-Chancellor Chatterton that the giving of the money to the solicitor for the purpose of general investment did not in itself create the relation of trustee and *cestui que trust* so as to make the solicitor liable as trustee for a deficiency in the security and as this was a single isolated transaction, an action for an account as between principal and agent could not be maintained as against the solicitor. In the second case, it was ruled by the same learned Judge that where there is not merely an agency between the parties but a superadded fiduciary relation, the remedy of the principal who is then also the *cestui que*

(2) 8 Bevan. 427 (1845).
(3) 3 T. L. R. 845.
(4) 39 Ch. D. 179, 185 (1888).

(5) 4 Ir. Eq. 219.
(6) 13 L. R. Ir. 281.
(7) 25 L. R. Ir. 188.

MOHESH CHANDRA BOSU *v.* RADHA KISHORE BHATTACHERJEE.

trust is not one arising merely from contract, or duty springing from such contract where a common law liability would alone exist, but is one to be dealt with on the equitable relation of trustee and *cestui que trust*. The third case was one which fell within the third of the "three classes mentioned by Mr. Justice Kekewich in *Dooby* v. *Watson* (4); but it is important as showing that the decision would be different if the Plaintiff is shown to have known and approved of the investment. In the case before us, the evidence proves that even though the Plaintiff may have obtained the advice of the Defendant, he knew and approved of the security, and consequently cannot make the Defendant responsible. On these grounds we must hold that so far as the mortgage transaction is concerned, the Plaintiff cannot successfully call upon the Defendant to recoup him any loss which he may have sustained by reason of the insufficiency of the security.

As regards the liability of the Defendant under the power-of-attorney executed in his favour on the 2nd March 1894, it has not been denied by his learned vakil that he was liable to render an account; but he took up the position that accounts had been rendered and had been accepted by the Plaintiff. In our opinion this contention is amply sustained by the evidence on the record. It appears that after the execution proceedings had been taken out and after the Plaintiff had discovered that they were more or less infructuous and were sure to involve him in loss, he became anxious to obtain an account from the Defendant. On the 28th October 1895 the Defendant offered to render an account to the Plaintiff and shortly after repeated the offer. In December 1899, the Plaintiff proposed arbitration and in May of the following year he named two persons Khetra and Sham who, he suggested, might be empowered to settle the accounts. After prolonged correspondence, the whole of which has not been produced but the substance of which may fairly be gathered from the portion on the record, in July 1900 the parties agreed that Shama Charan Laha was to be invited to look through the accounts. The oral evidence proves conclusively that about September and October 1900 the Plaintiff, with the assistance of Shama Charan examined the whole of the accounts which in his opinion showed that he had received Rs. 700 in excess of what he was entitled to get. He appears to have given out this fact and when the Plaintiff heard of it, he at once enquired of Shama Charan whether according to him the Plaintiff had overdrawn to the extent of Rs. 700 only. Shama Charan replied on the 10th November 1900 and expressed his surprise and astonishment that the Plaintiff should have given out that Shama Charan had found out on adjustment of accounts that Plaintiff had overdrawn to the extent of Rs. 700 only. He further stated that the Plaintiff had himself gone through the account books and had found the accounts furnished to him correct except as to a few terms which he desired to submit for the consideration of the Defendant. The Defendant thereupon wrote to the Plaintiff and asked him to explain how

(4) 39 Ch. D. 179, 185 (1888).

he had found out from the accounts that he had overdrawn to the extent of Rs. 700 only. On the 15th November 1900, the Plaintiff replied and gave an abstract of the accounts stating that the accounts as audited by Shama Charan showed that the Plaintiff had received in excess Rs. 700. The Defendant does not appear to have accepted the view of the Plaintiff that the latter had overdrawn to the extent of Rs. 700 only, and his position throughout has been that the Plaintiff had overdrawn to a much larger extent. The Plaintiff, however, was apparently satisfied with the examination of the accounts and was content to accept the position that he had overdrawn to the extent of Rs. 700 only. There was further correspondence between the parties in 1901 but there is no tangible suggestion in any of the letters that the Plaintiff wanted to resile from the position he had taken up on the 15th November 1900; and it was not till the Plaintiff gave the Defendant notice of this suit, that he indicated in any way that he was not prepared to accept the accounts which had been submitted to him in October 1900 and had been minutely examined by him for many days with the assistance of the clerk of the Defendant. Under these circumstances, it is contended by the Defendant that there has been a settled account between the parties and that the Plaintiff is not entitled to maintain this action. In our opinion, this contention is well-founded. It is well-settled that the requisites for making an account settled, depend on the circumstances of each case and the mode of dealing between the parties. But although acquiescence in accounts furnished may not, by itself, amount to settlement [*Clancarty* v. *Latouche* (8)], where accounts have been delivered with opportunity for inspection, where they have been duly examined and no exception has been taken, and when they have been acquiesced in, they cannot be opened unless upon distinct and specific averment of errors properly proved [*Parkinson* v. *Hanbury* (9)]. The principle applicable to cases of this description was laid down by their Lordships of the Judicial Committee in *McKellar* v. *Wallace* (10). "Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; and if they mean to ascertain the exact balance, it may be necessary for that purpose and probably is necessary in most cases, that vouchers should be produced and that all the information which is possessed on one side and the other should be furnished in the settlement of those accounts; and if it afterwards turns out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If on the other hand, persons meet and agree not to ascertain the exact balance but agree to take a gross sum as the balance, a sum, which one is willing to pay, and the other is content to receive as the result of those accounts, it is obvious that the production of vouchers is entirely out of the question and errors in the account are so also; for the very object of the

(8) 1 Ball. & Beatty. 420 at p. 428.
(9) L. R. 2 H. L. 1 (1867).
(10) 5 Moo. I. A. 372: 8 Moo. P. C. 378 (1853).

parties is to avoid the necessity for producing those vouchers upon the assumption that there are or may be errors in the accounts so settled. Therefore it is either an account stated and settled in the formal sense of that expression, or it is case of settlement by compromise. In either case it may be vitiated by fraud; in either case it is good for nothing if, either from the collusion of the parties, upon the circumstances under which the settlement takes place, it is proved in a Court of Equity that the transaction was not so fairly and so fully understood between the parties either from the confusion in which it was involved or from the misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side." It is not very material for our present purpose to examine whether in this case the settlement of account was of the first or the second kind; because it is quite clear that it cannot be re-opened except on the ground of errors or on the ground of fraud, mistake or collusion none of which was alleged by the Plaintiff in the Court below. He has on the other hand acquiesced in the accounts ever since November 1900. It is shown that the accounts which were delivered to him at that time were thoroughly examined and that every opportunity was given to him for investigation. Under these circumstances, it is impossible for him to proceed on the assumption that no accounts have ever been rendered. It was suggested however in reply by the learned vakil for the Appellant that an examination of the accounts on the record shows that there are errors. We are unable to hold that the Plaintiff is entitled to take up this position at the present stage of the case. It cannot be disputed that if a settled account is impeached for errors, particular errors must be stated and proved and that the same rule holds even when the account is settled "errors excepted." [*Parkinson* v. *Hanbury* (9), *Kinsman* v. *Barker* (11)]. As observed by Lord Chelmsford in the former of these cases, "where a party seeks to open a settled account, there must be some direct, distinct and specific averment of errors to entitle the party to open the account." Having regard to the circumstances of the present case, it was specially necessary for the Plaintiff to state in his plaint the particular items of the account which he challenged. The accounts have been spread over so many years and they were so thoroughly examined by the Plaintiff that even if any errors were shown the Court would not be inclined to re-open the accounts in their entirety, the utmost which the Court might have done would have been, not to give leave to surcharge and falsify generally but only to rectify particular items. [*Two Good* v. *Swanston* (12), *Maund* v. *Allies* (13).]. The Plaintiff, however, has done nothing of the kind here. He commenced the action on the assumption that no accounts had been rendered: in fact, he ignored the settled accounts. The case proceeded in the Court of first instance upon the question of the liability of the Defendant to render an

(9) L. R. 2 H. L. 1 (1867).
(11) 14 Ves. 579 (1808).
(12) 6 Ves. 485 (1801).
(13) 5 Jur. 860: 62 R. R. 856 (1840).

account and the appeal has been argued before us precisely on the same footing. The learned vakil for the Appellant in his reply suggested for the first time that the case might be tried upon the assumption that there was settled account between the parties which ought to be re-opened on the ground of errors. To allow the Plaintiff to change his case at this stage of the proceedings would be obviously unfair to the Defendant. If the Plaintiff had taken up in the Court below the position which he now seeks to adopt, the Defendant would have obtained an opportunity to explain the accounts and we are by no means satisfied that if such a case had been set up on behalf of the Plaintiff, the Defendant might not have satisfactorily explained what are now alleged to be errors in the accounts. In our opinion the Plaintiff is not entitled to convert the suit into one for re-opening the accounts on the ground of errors contained therein. We must consequently hold that the accounts which were rendered to the Plaintiff in November 1900, which were examined by him in detail, which according to him showed that he had overdrawn to the extent of Rs. 700 and which have been subsequently acquiesced in by him, furnish a complete answer to the claim for accounts put forward in the present litigation.

We desire to point out that the mode in which this litigation has been conducted has led to a great deal of waste of time. Where a person seeks an account from another alleged by him to be his agent the first question to be decided is the *factum* of the agency. If that question is decided in favour of the Plaintiff, the next question to be tried is whether the Defendant as agent is liable to be to call upon to account. If he answers that accounts have been settled between him and his principal that question ought to be tried next. If the accounts have not been settled, they have then to be taken. In suits of this description if liability to account is denied, that is the fundamental question to be tried first. It is only after an adverse decision upon this question against the Defendant that he may be called upon to render an account. If this procedure had been followed as laid down by their Lordships of the Judicial Committee in *Harri Nath Rai* v. *Krishna Kumar Bakshi* (14) a great many irrelevant questions put to the witnesses in examination-in-chief and in cross-examination, might have been avoided.

In the view we take of the matter the claim of the Plaintiff is entirely unfounded and has been rightly dismissed by the Subordinate Judge. The appeal consequently fails and is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 178 OF 1907.

MOOKERJEE, J.
CASPERSZ, J.
1907.
Heard, 13 and 14, August.
Judgment, 26, August.

BIDHATA RAI, Plaintiff, Appellant,

v.

RAM CHARITER RAI and ors., Defendants, Respondents.

Partition suit—Court Fees Act (VII of 1870), Sch. II, Art. 17—Fixed fee or ad valorem *fee.*

(14) I. L. R. 14 Cal. 147 (1886).

BIDHATA RAI *v.* RAM CHARITER RAI.

A suit for partition of joint property is governed by Sch. II, Art. 17, cl. vi of the Court Fees Act and the plaint is properly stamped, if a Court-fee of ten rupees is paid upon it. A mere denial on the part of the Defendant as to Plaintiff's title and possession does not convert the suit into one for declaration of title and recovery of possession; the Plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay ad valorem *Court-fees upon a plaint appropriately framed for the purpose.*

This was an appeal preferred on the 15th of May 1907, against the decree of M. Smither, Esq., District Judge of Zillah Shahabad, dated the 19th of March 1907 and the 2nd of April 1907.

The facts fully appear from the judgment.

Babus Mahendra Nath Roy and *Kulwant Sahay* for the Appellant.

Babus Umakali Mukherjee and *Raghu Nath Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

On the 31st March 1905, the Plaintiff commenced the action, out of which the present appeal arises, for partition of properties moveable and immoveable, which he alleged, were jointly owned and possessed by a joint Hindu family of which he and the Defendants were the members. A Court-fee of Rs. 10 was paid upon the plaint, and the suit was instituted in the Court of the Subordinate Judge of Shahabad. It was subsequently transferred by the District Judge to his own file and some evidence was taken by him, but again it was retransferred to the file of the Subordinate Judge, before whom the remainder of the evidence was adduced by the parties without any objection. After the close of the case, however, the Defendants objected that the District Judge had no power to retransfer the case to the Subordinate Judge, and that the latter, consequently, had no jurisdiction to hear it. The Subordinate Judge overruled this objection, and made the usual preliminary decree for partition. The Defendants then appealed to this Court, and repeated their objection as to jurisdiction. This objection was allowed to prevail [*Ramcharittar Ray* v. *Bidhata Ray* (1)]. The decree of the Subordinate Judge was set aside and the case was sent back to the District Judge for trial. Before the District Judge, two new issues were framed at the instance of the Defendants, namely, *first*: Is the Court-fee paid by the Plaintiff sufficient? and, *secondly*, Is Plaintiff in possession of the properties in suit, if not, is the claim for partition tenable? Subsequently, the parties agreed that the evidence taken by the Subordinate Judge should be received, as if it had been adduced at the hearing before the District Judge. Some additional evidence also was adduced. The learned District Judge then held, that only a small part of the property in suit was admittedly joint property; that the remainder was denied to be joint property, and that there was no proof, that

(1) 10 C. W. N. 902 (1906).

BIDHATA RAI *v.* RAM CHARITER RAI.

the Plaintiff was in possession of the whole of the disputed properties. In this view of the matter, he held, that partition could be decreed only in respect of the undisputed properties; that in respect of the disputed properties, the Plaintiff must ask for declaration of title, recovery of possession and partition, and that consequently, *ad valorem* Court-fees must be paid on the plaint. The Plaintiff was then called upon to pay additional Court-fees, and to pay fees for the appointment of a Commissioner. Upon his failure to do so within the time specified the suit was dismissed with costs.

The Plaintiff has now appealed to this Court, and on his behalf, the decision of the District Judge has been challenged on two grounds, namely, *first*, that adequate Court-fees were paid on the plaint, and, *secondly*, that if the Court-fees were inadequate, the question ought not to have been allowed to be raised at that late stage of the litigation.

In support of the first contention reliance was placed by the learned vakil for the Appellant upon the cases of *Ragendro Loll* v. *Shama Churn* (2), *Kirty Churn* v. *Aunath Nath* (3). and *Mohendra Chandra* v. *Ashutosh* (4). These cases are founded on the principle, that a suit for partition of joint property is not a suit for recovery of possession and is governed, not by sec. 7, sub-sec. (*iv*), cl. (*b*) nor by sec. 7, sub-sec. (*v*) of the Court Fees Act, but by Art. 17, cl. (*iii*) or cl. (*vi*) of Sch. II of that Act.

The learned vakil for the Respondents on the other hand contended, that a suit for partition is in substance, a suit to enforce the right to share in any property, on the ground that it is joint family property, which is governed by sec. 7, sub-sec. (*iv*), cl. (*b*). In support of this view, he relied upon the case of *Reference under the Court Fees Act* (5).

It may be conceded, that if the matter were *res integra*, there might be room for considerable discussion. But after a careful examination of the arguments addressed to us on both sides, we are not prepared to dissent from the rule embodied in the cases cited on behalf of the Appellant; nor are we prepared to disturb what has been the uniform practice of our Courts ever since the Court Fees Act of 1870 was passed. As observed by the learned Judges who decided the case of *Ragindro Loll* v. *Shama Churn* (2) the effect of a suit for partition is not recovery of possession, but to alter the form of enjoyment of joint property by the co-owner. Strictly speaking, the value of such a suit is the value of the convenience of the change of the form of enjoyment, if indeed such relief is capable of any valuation. A similar view was taken by Sir Richard Garth in *Kirty Churn* v. *Aunath Nath* (3) where the learned Chief Justice stated that a co owner, who is already in possession of his share, obtains, by partition, a divided instead of an undivided share; it is impossible for a Plaintiff to put a market value upon this change in the nature of his property. The view thus indicated was adopted by Petheram, C. J., and

(2) 4 C. L. R. 417 (1879).
(3) I. L. R. 8 Cal. 757 (1882).
(4) I. L. R. 20 Cal. 762 (1893).

(2) 4 C. L. R. 417 (1879).
(3) I. L. R. 8 Cal. 757 (1882).
(5) 4 M. L. J. R. 110.

BIDHATA RAI v. RAM CHARITER RAI.

Norris, J., in *Mohendra Chandra* v. *Ashutosh* (4).

In that case, as here, there was a dispute between the parties as to what constituted the joint family properties. The title of the Plaintiff to share in many of the properties included in the plaint was denied by the Defendants. It was ruled, that the suit was maintainable upon payment of a Court-fee of ten rupees and it was pointed out, that for the purposes of the stamp duty, the cause of action alleged in the plaint and that alone must be looked at. If the only relief sought is the partition of property, which the Plaintiff says is family property, and of which he says, he is in possession jointly with others, because the possession of one member is the possession of all, the suit is for partition, and the plaint has to be stamped, as in a partition suit.

This view appears to us to be based upon a reasonable construction of the provisions of the Court Fees Act. The contrary view maintained by the learned Judges of the Madras High Court in *Reference under the Court Fees Act* (5) does not appear to us to be founded on principle or supported by the language of sec 7, sub-sec. (*iv*), cl. (*b*) of the Court Fees Act which is applicable to a suit to enforce the right to share in any property on the ground that it is joint family property. This clause seems to refer to a suit for joint possession and not to a suit for partition. Nor are we prepared to accept the construction placed upon that provision in *Velu* v. *Kumara Velu* (6). Besides, if reliance is placed upon sec. 7, sub-sec. (*iv*), cl. (*b*), the difficulty is not removed, because partition may be claimed of joint property which is not necessarily joint family property. On these grounds, we must hold that a suit for partition of joint property is governed by Sch II, Art. 17, cl. (*vi*) of the Court Fees Act, and the plaint is properly stamped, if a Court-fee of ten rupees is paid upon it.

The question next arises, whether this rule is affected if the Defendant raises any question of title. Such a question may be raised in one of two ways; the Defendant may deny, that some of the properties in respect of which partition is claimed, are joint properties, or the Defendant may question the extent of the share of the Plaintiff in some or all of the properties. If a question of title is raised, it is not denied that the Court is competent to adjudicate upon it, but it is contended on behalf of the Respondents, that this alters the nature of the suit, that the effect of the denial is to convert the suit into one for declaration of title and recovery of possession and that, consequently, Court-fees must be paid *ad valorem* on the plaint. The argument in substance is, that the scope of the suit is to be determined not upon the plaint but upon what may be the eventual allegations of the Defendant, with the result, that a dispute as to title raised not *bonâ fide* but merely as a sham, intended to delay and embarrass the Plaintiff, converts the suit into one for declaration of title and recovery of possession. In our opinion, there is no substance in this contention. The Plaintiff is entitled to maintain a suit for partition, if his possession to some part

(4) I. L. R. 20 Cal. 762 (1893).
(5) 4 M. L. J. R. 110.
(6) I. L. R. 20 Mad. 289 (1896).

BIDHATA RAI *v.* RAM CHARITER RAI.

of the joint property is admitted or established. It is essential, that he should be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle, that the possession of one co-owner is *primâ facie* the possession of all the co-owners, and his possession must be presumed to be in conformity with his right and title as co-owner. If it is established, that, he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition and pay *ad valorem* Court-fees upon a plaint appropriately framed for the purpose. This follows from the principle, that partition signifies the transformation of joint possession into separate possession If, however, the possession of the Plaintiff is admitted or established over what forms part of the joint estate, the suit does not cease to be one for partition, merely because the Defendant denies the title of the Plaintiff to a share of the estate or to specific lands of the estate, and asserts a hostile title and adverse possession therein.

The true distinction between the two classes of cases, is that, in the one class, the Plaintiff really prays for ejectment, in the other he claims a division of lands, of part of which he is in actual occupation, and over the remainder of which he is in constructive possession through his co-owners. This distinction is amply borne out by the cases of *Bolton* v. *Bolton* (7), *Slade* v. *Barlow* (8), *Potter* v. *Waller* (9), *Giffard* v. *Williams* (10) and is identical with that taken in the cases of *Balvant* v. *Nana* (11) and *Waliullah* v. *Durga Prasad* (12). No doubt, the difference between the jurisdictions of Courts of common-law and Courts of Equity in England does not obtain in this country, by reason of which a party out of possession cannot ordinarily get a disputed question of legal title litigated in a Court of Equity. But there is no foundation for the contention, that mere denial of the title of the Plaintiff converts a suit for partition into a suit for possession. If the contrary view were maintained, it would obviously lead to endless confusion. There might be numerous Defendants in a suit for partition, and they might not all be agreed as to the title and possession of the Plaintiff. The Court in this view would have to hold a preliminary investigation of the properties as to which the title of the Plaintiff was admitted or established. The Court would also have to determine the properties of which the Plaintiff was in possession; and if the Plaintiff was called upon to pay *ad valorem* Court-fees upon the other properties, a determination of their value might not improbably become necessary. In this way, the majority of the questions in controversy between the parties would have to be tried out before the Court could determine the preliminary question, whether adequate Court-fees had been paid upon the plaint.

Upon reason and principle, therefore,

(7) L. R. 7 Eq. 298 note (1868).
(8) L. R. 7 Eq. 296 (1869).
(9) 2 Deg. & Sm. 410 (1848).
(10) L. R. 5 Ch. App. 546 (1870).
(11) I. L. R. 18 Bom. 209 (1893).
(12) I. L. R. 28 All. 340 (1906).

BIDHATA RAI *v.* RAM CHARITER RAI.

we are not prepared to dissent from the view taken in the case of *Mohendra* v. *Ashutosh* (4). The fundamental rule is that partition is not a substitute for ejectment, because partition implies an existing joint possession and enjoyment, to be converted into possession in severalty. [*Claph* v. *Bromagham* (13), *Florence* v. *Hopkins* (14)]. When, therefore, the Plaintiff has possession of what is a portion of the joint estate, a denial of the extent of that estate or of the *quantum* Plaintiff's interest therein, does not convert the suit into one for recovery of possession of land.

If these principles are applied to the case before us, what is the position of the parties? The Plaintiff is admittedly in possession of what is joint property; that he is a co-parcener with the Defendants is conceded but it is denied that all the properties alleged by him to be joint properties have really that character. In our opinion, the suit as framed is one for partition, and the plaint was correctly stamped.

It may be observed that the interpretation to which we adhere is consistent with what has been the practice of our Courts for a long series of years. To adapt to this case the language employed by Sir Richard Garth in *Kishori Lal Roy* v. *Sharat Chandra Mozumdar* (15), where a somewhat similar question was raised, suits for partition are of constant occurrence the Government must have been well aware of the construction which has been put by the Courts upon the Court Fees Act, and if, being aware of it, they have desisted all this time, from any legislative action to change the practice, that seems a strong reason for believing that they considered the practice to be in accordance with the intentions of the Legislature. This principle is specially applicable, where the subject of interpretation is a matter of every day occurrence. When we find, that for thirty years, if not longer, a law which imposes a heavy tax upon litigation has received a particular interpretation in favour of the suitor, and a course of practice has prevailed for years in accordance with that interpretation, any Court of Justice ought to be very slow to change that interpretation or course of practice to the prejudice of the suitor, unless it sees clear and weighty reasons to the contrary. To such a case, the maxim fittingly applies, *optima enim est legis interpres consuetudo*, or in the words of Lord Coke, that exposition shall be preferred which is "approved by constant and continual use and experience." [See the observation of Lord Brougham in *Dunber* v. *Roxburghe* (16)]. The first contention urged on behalf of the Appellant must consequently prevail.

In view of the opinion we have expressed on the first question, it is not necessary to consider the second point taken on behalf of the Appellant, namely, that the Court below had no jurisdiction after remand to raise a question as to the deficiency of Court fees paid on the plaint. There has been some divergence of judicial utterance as to the stage up to which an objection as to the deficiency of Court-fees may be taken. It was held by the learned Judges of the Madras High

(4) I. L. R. 20 Cal. 762 (1893).
(13) 9 Cowen. 530
(14) 1 Sickels. 182.
(15) I. L. R. 8 Cal. 593 (1882).

(16) 3 Cl. & F. 335 at p. 354 (1835).

BIDHATA RAI v. RAM CHARITER RAI.

Court in *Valambalammal* v. *Vythilinga* (17), that where in a second appeal, it is discovered that by mistake insufficient Court-fees had been paid, on the plaint and on the memorandum of appeal in the lower Courts, it is competent for the High Court to direct payment of such deficiency within a time to be fixed. The contrary view appears to have been taken by the learned Judges of the Allahabad High Court in *Wilayat Ali* v. *Umar Daraz Ali* (18) while in *Mahadei* v. *Ram Kishen Das* (19), the Court was equally divided in opinion upon this point. Apart from the general question, however, of the effect of sec. 28 of the Court Fees Act, we are satisfied from the proceedings in the present suit, that when the order of remand was made by this Court on the last occasion, it was not the intention, that the Defendants should be at liberty to raise in bar a plea of this description. No doubt an objection as to the insufficiency of Court-fees had been taken in the written statement of the Defendants, but no issue was directed to the question, and the objection was apparently not even mentioned during the trial. The Subordinate Judge gave the Plaintiff a decree on the merits. The Defendants appealed to this Court, and paid a Court-fees of ten rupees only on their memorandum of appeal. No objection was then taken that the Court-fees paid on the plaint was insufficient; indeed such objection, if valid, could not have been entertained unless and until those Appellants had paid additional Court-fees on their own memorandum. In these circumstances, when this Court made an order for retrial of the suit, it would be unreasonable to hold that it was intended to leave open such a point with respect to which a new issue had to be raised. In our opinion, the learned District Judge ought not to have raised this point after remand at the instance of the Defendants.

The result, therefore, is that this appeal must be allowed, and the decree of dismissal made by the District Judge reversed. The case is remanded to him, in order that he may hear the arguments of both sides upon the whole evidence on the record as it stands (inclusive of the materials which were before the Subordinate Judge at the first trial) and then decide the case on the merits.

As regards the costs of this appeal, there can be no manner of doubt, that the Appellant has been harassed by the Defendants by every possible objection of an unsubstantial character. The Appellant will, therefore, have the costs of this appeal. He will also have five gold mohurs as costs of the hearing before the District Judge on the 19th March 1907. The order made by this Court on the last occasion, as regards the costs antecedent to the remand will stand. Under sec. 13 of the Court Fees Act, the Appellant will be granted a certificate for refund of the Court-fees paid on the memorandum of appeal to this Court.

S. C. S. *Case remanded.*

(17) I. L. R. 24 Mad. 331 (1900): I. L. R. 25 Mad. 380 (1900).
(18) I. L. R. 19 All. 165 (1896).
(19) I. L. R. 7 All. 582 (1885).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 31 OF 1906.

GHOSE, C. J.
CASPERSZ, J.
1906.
2, July.

GOBINDA CHUNDER GUPTA, Decree-holder, Appellant,

BENODE CHUNDER DUTT and ors, Applicants, Respondents.

Succession Act (X of 1865), sec. 111—Construction of Will—Bequest to daughter—Absolute estate.

Where in a Will a legacy was given in the following words :—" On my death, my daughter, Surjamoni, who has got sons, and who is a resident of . . . . . shall possess as owner and possessor of all the rights of gift, sale, etc., in respect of all my property moveable and immoveable, and on the death of my aforesaid daughter, the sons born of her womb will equally own all my property,"

Held, *upon a construction of the Will, that it was the intention of the testator to give to Surjamoni an absolute estate.*

This was an appeal preferred on the 24th of January 1906, against an order of P. E. Cammiade, Esq., Officiating District Judge of Sylhet, dated the 1st of November 1905, affirming that of Babu Jamini Kanta Banerjee, Munsif of Moulviebazar, 1st Court, dated the 17th of May 1905.

The question which was raised in this appeal was as to whether upon a construction of the Will the testator gave an absolute estate to his daughter, Surjamoni. In the following portion of the judgment of the lower Appellate Court that question has been discussed and the main provisions of the Will will also appear therefrom :—

"In paragraph (1) of the Will, the testator has stated 'on my death, my daughter, Surjamoni, who has sons, and who resides at Mouza Dattagram, Pargana Alinagar, will hold possession as *malik* and possessor of all rights of gift, sale, etc., in respect of all my property moveable and immoveable ; and in the event of the death of my daughter aforesaid, the sons born of her womb will become owners of all my property, taking in equal shares.' The words that I have translated as 'in the event of the death of' is—'অভাবে' in the text. 'অভাবে' strictly means 'in the absence of' or 'failing,' and if this paragraph of the Will were strictly construed, there is no doubt that the testator's bequest to the Respondents, would be invalid, because he would have conferred a full proprietary title to the property on his daughter, Surjamoni. But all authorities and rulings on Hindu testamentary documents agree that the intention of the testator has to be gathered from the whole of such documents and from attendant circumstances, and not merely from any single portion of the documents. We must, therefore, look at the whole of the Will for guidance.

"In paragraph (3) of the Will, the testator directs that his daughter, Surjamoni, is to maintain another daughter Kunjamoni, and goes on to say that should Surjamoni die before Kunjamoni, her sons are to continue to maintain Kunjamoni. The testator advisedly says in this paragraph 'should Surjamoni die before Kunjamoni, which God forbid.' From this, it will clearly appear that Surjamoni's demise contemplated in the first paragraph was not contemplated by the testator as an event likely to happen in his lifetime. In this paragraph also,

GOBINDA CHUNDER GUPTA v. BENODE CHUNDER DUTT.

he uses the word অভাব to mean death. It should be noted that the testator was seriously ill at the time of the execution of the Will, as the preliminary paragraph of the Will states. The Will was made when the testator evidently felt that his end was drawing near. As a matter of fact, however, he appears to have lived for two years after the execution of the Will. Nevertheless, the testator's intention at the time of the execution of the Will is what we have to discover; and from the preliminary paragraph it appears that the testator executed the Will in contemplation of his approaching demise.

"In paragraph (2) again the testator imposes upon Surjamoni, the duty of having his *sradh* ceremony performed; and he also directs her to pay, out of the estate, a sum of Rs. 100 to another daughter. No mention is here made of Surjamoni's death, or of her son's performing the duty or paying the legacy, in the event of her dying before the testator.

"From this, it will clearly appear that the testator did not contemplate Surjamoni's dying before him, and that the word অভাব in the 2nd paragraph refers to her subsequent death.

"This point having been settled, we must now enquire whether the testator intended by the Will, to convey full proprietary rights in the property to Surjamoni or not. It is true that in the second paragraph, the Will purports to convey to Surjamoni, the power to dispose of the property by 'gift, sale, etc.,' but at the same time, the testator says that Surjamoni is to 'possess' the property, whereas he says that after her death, the sons born of her womb are to 'own' it. It has several times been ruled with regard to Wills in which similar statements occur with reference to bequest to widows, that the estate bequeathed to the widow, was only a widow's estate and not a full proprietary title. In the present case however the beneficiary is not the widow, but a daughter There is no necessity for me in the present case to enquire into the applicability of those rulings in the present case, although it appears to me that the arguments applicable in those cases, apply with almost equal force here. It is sufficient for my present purpose to say that if the intention of the testator is what we have to look for in the Will, there can be no hesitation in finding that the testator intended that his property should pass to Surjamoni's sons. Any words in the text of the Will that appear to make against such a construction must be left out of consideration. The use of the terms 'possess' and 'own,' with regard to the manner of enjoyment of the property by Surjamoni and her sons, respectively, conclusively prove to my mind what the testator's intention was."

Babus Tara Kishore Chowdhury and *Gobind Chandra Dey Roy* for the Appellant.

Babu Nalini Ranjan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The question raised in this appeal is one of construction of the provisions of the Will left by one Rup Chand. The Will bears date the year 1305 corresponding to 1898. In the first paragraph of the Will, the testator said as follows:—"On

my death, my daughter Surjamoni who has got sons and who is a resident of Mouzah Duttagram Pergana Alinagore shall passess as owner and possessor of all the rights of gift, sale, etc, in respect of all my property moveable and immoveable and, on the death of my aforesaid daughter, the sons born of her womb will equally own all my property." It is this paragraph upon the construction of which the case really turns. There are, however, other paragraphs in the same Will which bear more or less upon the matter of construction; for instance, where the testator provided for the maintenance of another daughter of his, it being directed that Surjamoni, the daughter referred to in the first paragraph, should maintain her and that on her (Surjamoni's) death, her sons would similarly maintain her, and also where provision was made for the *sradh* of the testator. Surjamoni obtained possession of the estate left by Rup Chand and contracted debt for the purpose of his *sradh*; and, for this debt, the creditor brought a suit and obtained a decree after her (Surjamoni's) death, against the Defendants, her sons, as legal representatives of the deceased, the direction in the decree being that the decretal amount should be realised from the assets of the deceased. Subsequently, when in execution of this decree, the decree-holder sought to sell a portion of the property left by Rup Chand, the sons of Surjamoni objected upon the ground that their mother had only a life-interest in the property, and that the absolute estate was in them and that, therefore, it could not be sold. Thereupon, the question arose between the parties under sec. 244, C. P. C., as to whether the property attached by the decree-holder could be sold in execution of the decree in question, having regard to the provisions of the Will to which reference has already been made.

The Will, we may here mention, was executed after the Hindu Wills Act was passed, and one of the questions that have been discussed before us is whether we should not give effect to the provisions of sec. 111 of the Indian Succession Act which is made applicable to Hindus by the Hindu Wills Act in the matter of the question of title that has been raised between the parties. The true question, however, that arises for our consideration is what may have been the true intention of the testator in making this Will; whether it was his intention to give to his daughter Surjamoni an absolute estate; for, if such was his intention, there can be no doubt that in execution of the decree obtained by the decree-holder, he is entitled to sell the property which has been attached for the satisfaction of his claim. It will be observed that the concluding words of the first paragraph to which reference has already been made are to the effect that, upon the death of the said daughter, the vernacular used being অভাবে, persons would be the owners of his estate in equal shares. A question has been raised whether this uncertain event had reference to any time, during the life of the testator or to any time after his death. The Will seems not to have been drawn up by any trained lawyer, and it is rather difficult to gather what may be the exact time that the testator had in contemplation when

GOBINDA CHUNDER GUPTA v. BENODE CHUNDER DUTT.

writing the words to which we have just referred. If there is any ambiguity as to this matter, sec. 111 of the Indian Succession Act would settle the question. That section runs as follows:—"When a legacy is given if a specified uncertain event shall happen and no time is mentioned in the Will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable;" and one of the illustrations given to that section is—"A legacy is bequeathed to A and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect." Now in the present case, if Surjamoni had died during the lifetime of Rup Chand, the legacy to his daughter's sons would certainly take effect; but it would not take effect if she died (as it so happened) after the death of Rup Chand But as already stated, the true question we have to determine is not, whether the sons of Surjamoni took the legacy under the Will, but whether it was the intention of the testator to give to Surjamoni an absolute estate. We are of opinion, upon consideration of the several paragraphs of the Will in question, that it was his intention to give such an estate. And though there is a reference to the interest which Surjamoni's sons would obtain upon her death, yet we are of opinion that this was not intended to contract, as it were, the character of the estate which in the first portion of the document is unquestionably given to her. In this view of the matter, we are of opinion that the decree-holder who is the Appellant before us is entitled to seize and sell the property which was sought to be sold in satisfaction of his decree against the legal representatives of Surjamoni. The result is that this appeal is allowed. Each party will bear his own costs in this Court, but the Respondent will pay to the Appellant his costs in the lower Courts.

S. C. S. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 970 OF 1906.

MITRA, J. HOLMWOOD, J. 1906. 15, October.	SAKANBARI DEBI, Petitioner, v. ADAITYA GANGULI, Opposite Party.

Registration Act (III of 1877), sec. 82—Prosecution under—Time for ordering prosecution—Denial of execution of a document—Refusal to register—Appeal from the refusal—Limitation.

On the Petitioner denying the execution of a document in favour of A, before the Sub-Registrar, that officer refused to register the document. Thereupon A lodged a complaint against the Petitioner for cheating under sec 417, I. P. C, which was dismissed under sec. 203, Cr. P. C., on the 26th March 1906. On the 27th April 1906, A appealed to the Special Sub-Registrar, who rejected the appeal for not having been preferred within the prescribed period of 30 days from the Sub-Registrar's refusal to register but at the same time submitted a report to the District Registrar which ultimately led to an enquiry with the result that a proceeding was drawn up against the Petitioner under sec. 82 of the Registration Act (III of 1877),

SAKANBARI DEBI *v.* APAITYA GANGULI.

Held—*That under the circumstances the Petitioner should not be prosecuted under sec. 82 of the Registration Act.*

That the presentation of an appeal to the Special Registrar after the time limited therefor, against the refusal of the Sub Registrar to register a document on denial of execution, does not give any locus standi *for the institution of a proceeding for inquiry as to the execution of the document.*

This was a rule granted on the 27th of August 1906, against the proceedings under sec. 82 of the Registration Act pending against the Petitioner before the Joint Magistrate of Midnapur.

The facts of the case material to the report are briefly these:—

On the 5th of March 1906 two documents, dated 21st November 1905 and the 2nd March 1906, purporting to have been executed by the Petitioner in favour of Addaita Ganguli and Titurani in respect of 18 cottas and 1 bigha and 16½ cottas of land respectively were presented for registration before the Sub-Registrar of Pingla by the said Addaita and Tituram.

The Petitioner admitted the execution of the document in favour of Tituram but denied the execution of the document alleged to have been executed in favour of Addaita and the registration of the latter document was accordingly refused by the Rural Sub-Registrar of Pingla.

Thereupon on the 26th March 1906, Addaita lodged a complaint before Mr. Monmotha Krishna Deb, Joint Magistrate of Midnapur, charging the Petitioner with cheating under sec. 417, I. P. C., but the complaint was dismissed by the Joint Magistrate on the 26th March 1906.

On the 27th April Addaita Ganguli applied to the Special Sub-Registrar of Midnapur who is authorized by the Local Government under sec. 7 of the Registration Act to exercise and perform in addition to his own powers and duties all the powers and duties of the Registrar to whom he is subordinate to establish his right to have the document registered.

The Special Sub-Registrar refused the application for not having been made within 30 days after the making of the order of refusal by the Sub-Registrar of Pingla but on the same day he submitted the following report to the District Registrar.

"The accompanying deed is a deed of sale alleged to have been executed by Sakambari Debi of Nedhua in favour of Addaita Ch. Ganguli of Nedhua in Thana Sabang on the 6th Aughran 1312. The deed was presented by Addaita Ch. Ganguli on the 5th March 1906 before the Sub-Registrar of Sabang for registration. Sakambari Debi, the alleged executant, appeared before the Sub Registrar and denied the execution of the deed. The Sub Registrar, therefore, refused the registration of the deed on the 5th March 1906 and reported the matter to the District Registrar under sec. 73 of the Registration Act. No appeal was preferred within the prescribed time from the date of order of refusal. As the registration of the document was refused on the ground of denial of execution, I think a judicial enquiry is necessary under Circular No. 11 of 1893; one of the Deputy

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, NOVEMBER 25, 1907. [No. 3]

Contents.

NOTES.

MR. JUSTICE HOLMWOOD PRESIDES AT THE FIFTH Calcutta Criminal Sessions which will hold its sittings from date.

WE REPRODUCE BELOW A SHORT MEMOIR OF THE LATE Lord Davey from the pen of Lord Macnaghten and published in the pages of the *Journal of the Society of Comparative Legislation.*

THE QUESTION WHETHER AN OWNER of PROPERTY can make a valid enforceable contract binding himself not to dispose of his property by will and to permit his possessions to descend according to the law of intestate succession arose for decision in a recent American case (*Jones* v. *Abbott*, 81 North Eastes Reports 791). It was held in that case that such a contract is valid according to law and is legally enforceable. The legal consequence of such a contract would be that if the owner after making the contract, makes a will by which he disposes of his property, the dispositions would be null and void.

CL. 55 (2) OF THE NEW CIVIL PROCEDURE CODE Bill is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of certain railway servants, be attended with danger or inconvenience to the public. This we find stated in the notes of the Committee appended to the Bill. But in the clause itself it is the Local Government which is authorised to declare with regard to what persons or classes of persons arrest under the ordinary procedure may be attended with danger. We think the Legislature should after consultation with the Local Governments embody in the Bill the name of the several classes of persons answering to the above description. The Local Government may however be empowered with the previous sanction of the Government of India to declare any other person or classes of persons to whom the same privilege may be extended.

ACCORDING TO CL. 60 OF THE BILL, AMONGST OTHER properties such personal ornaments of women as, in accordance with religious usage should not be parted with cannot be attached in execution of a decree for money. But according to religious usages amulets or articles of a similar nature are worn by men also which they are loth to part with from religious scruples and these may also be exempted from attachment. It will, no doubt, be always open to the Court to consider in any case whether an article is being used *bonâ fide* as a personal ornament or amulet of the above description and to refuse relief whenever it is made out that an attempt is being made to evade legal process under cover of this provision.

ACCORDING TO CL. 59 WHERE A JUDGMENT-DEBTOR has been committed to the civil prison the committing Court may release him on the ground of his suffering from any serious illness. We think that powers should be given to the Court to excuse a person from being sent to jail on a similar ground. When an application is made for the arrest of a debtor and the Court issues notice on the latter to show cause why he should not be arrested he may be allowed to prove illness or advanced age or failing health as a ground for being excused.

A BILL TO AMEND AND SUPPLEMENT THE BENGAL Tenancy Act will shortly be introduced in the Legislative Council of the Lieutenant-Governor of Eastern Bengal and Assam. From the Bill as published in the Eastern Bengal and Assam Government *Gazette*, we find that the changes recently made in the Tenancy Act by the Bengal Legislative Council by the Bengal Act I of 1907 have been bodily adopted by the Legislative Council of East Bengal.

ON A COMPARISON OF THE BILL WITH THE BENGAL Act I of 1907, we find that only such superfluous matter as the definition of Calcutta has been left out in the Eastern Bengal and Assam Bill. While commenting on the Bill before the Bengal Council, we fully discussed its provisions and suggested certain additions and alterations some of which were adopted. Some of the suggestions which were not given effect to and which we think might with advantage be adopted we would not at all press before the Eastern Bengal Council. Uniformity in the statutory law of both the Provinces, specially in the law of land-tenures is of far greater importance than improvement in the substance or wording of any particular provision or provisions. We would therefore suggest to the non-official members that they should not try to improve on the Bill. The Bill as drafted should be passed into law without any alteration whatever. The confusion that is likely to arise in the rights and liabilities and in the interpretation of the law in case of any difference in the provisions of the Bengal Tenancy Act in the adjoining provinces has more than once been pointed out by us in these columns. The Eastern Bengal and Assam Government has done wisely in reproducing verbatim the Bengal Act I of 1907.

BUT WE CANNOT HELP OBSERVING THAT MEASURES OF this kind demonstrate conclusively that the Partition of Bengal has unnecessarily duplicated the legislative machinery for one and the same Province. If the function of the second Legislature be only to copy the measures that are passed in the Bengal Council no reasonable grounds can be advanced for the necessity of a second Legislature. Judging by the work done or contemplated by the new Legislature such as the Court of Wards Amendment Act, or the Bengal Tenancy Amendment Bill, it cannot but be said that a Legislature at Dacca is a mere surplusage.

WE MAY ALSO BE PARDONED FOR POINTING OUT THAT the Bill in question also lends support to our suggestion that so long as the Partition lasts it is preferable that measures which affect both Bengals should be brought up before the Legislative Council of the Government of India; for it is both a waste of time and energy to get the same measure passed through two local Councils. Further, in the case of any discrepancy in the laws in the adjoining provinces arising from legislation by two Legislatures, the Courts will find it difficult to reconcile them and the Supreme Council will surely have to intervene to restore uniformity in the laws affecting the same people. So looking at the anomaly of a second Legislature from this point of view as well it is not possible to justify its existence.

THE LATE LORD DAVEY.

[*Contributed by* THE RIGHT HON. LORD MACNAGHTEN, G.C.M.G.]

Even now, after the lapse of some months, it is difficult to measure the loss which the highest Courts of this realm and the whole domain of English law have suffered by the death of Lord Davey. It was not given to him to fulfil the promise of his earlier days and to reach that position which at one time we all thought he was destined to attain. But at least he is secure in the reputation of a consummate advocate, a great master of equity, and a courteous, patient, and most learned judge.

Lord Davey's professional career began and ended within the limits of my own, so that of men now living few, if any, have had better opportunities of judging of his ability and work. It is no little satisfaction to me, if I may be forgiven for speaking of myself, to be permitted to offer a tribute of admiration and affection to the memory of so old a friend and so valued a colleague.

I met Horace Davey first in the chambers of the late Vice-Chancellor Wickens, where I had been a year or two before. I recollect being told by my master and his that at last he had found a pupil of whose success he felt assured. His confidence was certainly not misplaced. In a very short time Horace Davey gained a commanding practice behind the Bar. But it was not until he took silk—a step on which he ventured with strange misgiving and much hesitation—that he outstripped all his companions in the race.

Not long after Davey became a Q.C. I well remember being in Court one day when a case was at hearing which created a great stir at the time. The famous question of Lord St. Leonards' missing will was in debate. It was only as an onlooker and an idler that I was there. The Court was crowded. The front row was crammed with leading counsels from the Court of Probate, the Common Law Courts, and the Equity Bar. There had been a good deal of talk going on for some time and no little repetition. The judges were getting impatient. Everybody was beginning to feel rather bored when Davey rose to address the Court. He was so self-composed, his language was so well chosen, his argument so lucid and concise, that the attention of every one present was riveted at once. I have always thought it was one of the best things I ever heard done. From that time onwards, until he became a judge more than twenty years later, there was no case of importance in the Court of Chancery in which he was not retained. In the House of Lords and the Privy Council his services were no less in request. He was never dull or tedious. He always knew his case thoroughly. Nothing came amiss to him. Nothing was too small for his attention. Nothing was too great for his powers. He seemed as much at home in arguing a point of practice as he was

in explaining a complicated invention or illustrating and applying one of the great principles of equity or dealing with the mysteries of ecclesiastical law or some constitutional question before the Privy Council or the Committee of Privileges?

During the short time he sat in the Court of Appeal the reputation of that tribunal, high as it was, was largely increased. And no one knows better than one of his colleagues how much he added to the strength of the House of Lords and the Privy Council, or what weight of authority was lost and what wealth of learning perished when the grave closed over the most accomplished lawyer of his day.—*Journal of the Society of Comparative Legislation.*

Notes of Cases.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD ROBERTSON. LORD COLLINS. SIR ARTHUR WILSON. 1907. 29, October.	BABU MAHOMED EWAZ ALI KHAN, Plaintiff, Appellant, *v.* MAHESHAR PERSHAD and others, Defendants, Respondents.

Privy Council—Special leave, petition for—Final order of a Revenue Court, if appealable—Commissioner or Board of Revenue, if final Court.

This was an application for special leave to appeal under the following circumstances.

The Petitioner, Mahomed Ewaz Ali Khan, is the talukdar of Mahona in Oudh which includes a village called Gadaria Dih.

At regular settlement Respondents' predecessors had claimed an under-proprietary right in that village This ended in a lease being granted by the Financial Commissioner on 6th January 1889 for 30 years.

On expiry of the 30 years Petitioner issued notice under Oudh Rent Act (XXII of 1886) of ejectment. Respondents then brought a suit in the rent Court for cancellation of the notice. Finally by order of Board of Revenue of 22nd July 1899, the notice was cancelled and Petitioner remitted to Civil Court for determination of rights of Respondents. Petitioner then instituted a suit in the Civil Court and was successful in that suit and it was declared that Respondents had no under-proprietary interest in the village. But those Courts did not determine whether the lease was for 30 years or a perpetual one, the rent alone being fixed for the term of 30 years.

Respondents had appealed to His Majesty in Council from such decrees against them and their appeal was pending.

On obtaining the said decree from the Court of the Judicial Commissioners of Oudh, Petitioner issued a fresh notice of ejectment which was again contested by the Respondents in the Court of the Deputy Commissioner of Sultanpur, which Court on the 9th May 1906 made a decree cancelling the said notice on the ground that the Respondents were perpetual lessees of the said village; and the said decree was confirmed on appeal by the Court of the Commissioner of Fyzabad by decree made on the 13th August 1906.

Against the said decree of the Court of the Commissioner of Fyzabad Petitioner appealed to the Board of Revenue, for the United Provinces of Agra and Oudh and the said Board on the 2nd January 1907 dismissed Petitioner's appeal on the ground that the Appellate Order by the said Commissioner was final and not open to appeal under sec. 116 of Act XXII of 1886 as amended by sec. 49 of Act XX of 1890.

As the questions involved in the appeal were questions of law and the value of the subject-matter of the suit is over Rs. 10,000, Petitioner on the 22nd January 1907 applied to the said Commissioner for leave to appeal to His Majesty in Council against the said decree dated the 13th August 1906 and on the 25th May 1907 leave to appeal was refused by an order in terms following:—"As there has been an appeal to the Board of Revenue in this case this Court is clearly not a Court of Final Appellate Jurisdiction under sec. 595 of the Code of Civil Procedure. The application therefore is dismissed with costs."

Mr. DeGruyther for the Appellant contended that under the circumstances and considering that the Respondents had an appeal pending as regards this same property he had a right of appeal to His Majesty in Council.

Mr. C. W. Arathoon opposed on the ground that the Petitioner had applied to the wrong Court, not to the Court of Final Appellate Jurisdiction. Leave was granted on a deposit of £150. It was understood that this appeal will be heard at the same time as the appeal pending between the same parties.

C. W. A. *Leave granted.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and CHITTY, JJ. CRIMINAL REVISION No. 1035 OF 1907. JAJNARAM AND 6 OTHERS, Petitioners *v.* THE EMPEROR at the prosecution of BHOLARAM KOCH, Opposite Party. 30th September 1907.

Criminal Procedure Code, sec. 239—Joint trial of several persons not accused of the same offence—Transaction—Subsequent.

The facts are briefly these:—

The complainant, Bhola Koch, was sleeping with his young wife Bibhi Kochini in his house on the night of the 20th April last. In the latter part of the night the Petitioner No. 1 Jajnaram, a neighbour, broke into the house, seized Bibhi and pressed her down. She raised an alarm and her husband awoke and seized Jajnaram. The neighbours, who came afterwards, tied Jajnaram to a post inside the house. Information was then sent to the thana. In the meantime the six other Petitioners came to the house of the complainant, rescued Jajnaram, assaulted the complainant, seized him and dragged him to the house of Jajnaram where he was kept confined. The Police after investigation sent up Jajnaram for trial under sec. 456, I. P. C., and all the 7 Petitioners including Jajnaram under secs. 224, 225, 342 and 147, I. P. C. These 7 men were jointly tried, Jajnaram on charges under secs. 224 and 342, I. P. C., and the others under secs. 225 and 147, I. P. C., and were convicted. They preferred an appeal to the Sessions Judge which was dismissed. This rule was issued to set aside the conviction on the ground *inter alia* that the trial was illegal because there was misjoinder of the different accused on different charges.

Their Lordships observed:—

"The precise irregularity complained of is that the first Petitioner Jajnaram Koch could not be tried on the charge under sec. 342 along with the other Petitioners as against them no such charge was preferred. That charge related to the confinement of the complainant, Bhola, after the rescue of the first Petitioner had been completed and the common object of the unlawful assembly had borne its fruit, that is to say, the confinement of Bhola was a subsequent transaction for which the first Petitioner ought to have been separately tried.

We are reluctant to order a retrial considering the length the proceedings have already gone in the Courts below. But we must administer the Code as we find it. Sec. 239 of the Code of Criminal Procedure does not warrant the joint trial of the seven Petitioners in the present case."

Mr. S. Roy (with *Babu Jadu Nath Kanjilal*) for the Petitioner.

Rule made absolute and a retrial of all the Petitioners under secs. 224, 225 and 147, I. P. C., and a separate trial of the Petitioner No. 1 under sec. 342, I. P. C., ordered.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J., and GEIDT, J. APPEAL FROM APPELLATE DECREE No. 639 OF 1906. KALI KUMAR MUKERJI, Defendant, Appellant *v.* BRAHMA BANDA MUKERJI AND OTHERS, Plaintiffs, Respondents. 13th November 1907.

Civil Procedure Code (XIV of 1882), sec. 331—Resistance or obstruction—Partition Act (IV of 1893), sec. 4.

In a previous suit in which judgment was ultimately given by the High Court, the present Plaintiff established his right to ⅓ share of the property and was held entitled to possession of that after partition. Having obtained that decree, he proceeded to execute it by having a commissioner appointed to partition the property so that he might obtain possession of his one-third. The Commissioner was resisted and obstructed by the present Appellant who was not a party to the previous suit. Consequently proceedings were taken under sec. 331, C. P. C., and the claim was registered as a suit between the decree-holders as Plaintiffs and Kali Kumar as Defendant.

The defence *inter alia* was that sec. 331, C. P. C., did not apply to the case. The Defendant offered to buy the share that the Plaintiffs might be found to have in the properties in suit.

The Munsif decreed the suit and ordered that Kali Kumar should purchase Plaintiffs' ⅓ share of the dwelling-house and tank as Plaintiffs were outsiders. On appeal, the lower Appellate Court set aside the latter portion of the order. The Defendant appealed to the High Court.

Held—That the words in sec. 331 "if the resistance or obstruction" refers back to the words in sec. 328, namely, "resistance or obstruction to the execution of a decree for possession."

Under the decree of the High Court, the Plaintiff was held entitled to possession, but he could not get possession until his share had been ascertained by partition, and to do that the Commissioner was appointed with the object of the Plaintiff obtaining possession under the decree. The Appellant resisted and obstructed him in that.

Held—That was a resistance and obstruction to the execution of the decree for possession.

Gopala v. *Fernandes* (I. L. R. 16 Mad. 127) referred to.

Held further—That the privilege conferred by sec. 4 of the Partition Act can be rendered available when the suit is for partition and not otherwise.

Babus Nil Madhub Bose and *Jadu Nath Kanjilal* for the Appellant.

Babu Jogesh Chandra Roy for the Respondents.

A. T. M. *Appeal dismissed.*

SAKANBARI DEBI v. ADAITYA GANGULI.

Magistrates of Sadar may be asked to enquire into the matter."

Accordingly Babu Satish Chandra Mukherjee held an enquiry and submitted a report, the concluding portion of which ran as follows:—

"I do not think that a case against Addaita would stand and as the petition of complaint against Sakambari has been dismissed under sec. 203, Cr. P. Code, we may drop the enquiry here and leave the parties to fight out their cause in the Civil Court if they like. Submitted to District Magistrate for orders."

On receipt of the report Mr. Weston, the District Registrar, on the 7th of June 1906, ordered the said report to be put up with the record of the case under sec. 417, I. P. C. Subsequently on the 19th June 1906 he passed the following order:—

"The record seen. The fact of dismissal of the case for cheating is not of any relevance here, I sanction the prosecution of Sakambari for denying execution before the Special Sub-Registrar, to draw proceeding."

Babu Atulya Churn Bose for the Petitioner.

No one appeared to show cause against the Rule.

The JUDGMENT OF THE COURT was as follows:—

This is a rule calling upon the District Magistrate of Midnapur to show cause why the proceedings complained of in the petition pending before the Joint Magistrate of that place should not be set aside.

The main ground on which we issued the rule was that the proceedings as regards the registration of the document, the execution of which was denied by the Petitioner, Sakambari, terminated, if not; with the holder of the document failing to appeal, at least, with the dismissal of the complaint under sec. 417 of the Indian Penal Code. The presentation of an appeal subsequently after the time limited therefor was not only useless but gave no *locus standi* for the institution of a proceeding for enquiry as to the execution of the deed. The case seems to be a peculiar one and we do not think, having regard to the circumstances stated above, that the Petitioner should be prosecuted under sec. 82 of the Registration Act. We accordingly make the Rule absolute.

We should note that the District Magistrate has submitted no explanation and no cause has been shown.

B. C. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2067 OF 1905.

MACLEAN, C. J.
HOLMWOOD, J.
1907.
21, May.

ANNADA KUMAR ROY, Plaintiff, Appellant,
v.
INDRA BHUSAN MUKHOPADHYA, Principal Defendant, Respondent.

Hindu Law—Hindu widow—Gift to reversioner for the time being if passes absolute title.

If a Hindu widow transfers her interest to the then reversioner, the latter can hold the property against the person who is the reversioner when the widow dies.

GUNGA PERSHAD KUR v. SHUMBHOO NATH BURMUN (1), NOBO KISHORE SARMA ROY v. HARI NATH SARMA ROY (2) *followed.*

(1) 22 W. R. 393 (1874).
(2) I. L. R. 10 Cal. 1102 (1884).

ANNADA KUMAR ROY *v.* INDRA BHUSAN MUKHOPADHYA.

This was an appeal preferred on the 13th of November 1905, against the decree of Babu Hari Nath Roy, Subordinate Judge, 2nd Court of Zillah Dacca, dated the 9th of June 1095, reversing that of Babu Atul Chandra Banerjee, Munsif, 1st Court of Manikgunge, dated the 21st of March 1904.

The Appellant instituted the present suit to recover a half share of the estate of one Gungadhar Roy, deceased, alleging that he was one of the reversionary heirs of the deceased upon the death of Gangadhar's widow, Brahmamoyi Debya. The lower Appellate Court found that he was the great-grandson of the great-grandson of Ram Bhadra Roy, the great-grandfather of Gangadhar and therefore a *sakulya* agnate of the deceased. The Respondent Indra Bhusar in defence alleged, and it was found by the lower Appellate Court, that his father Girish was the sister's son of Gangadhar, and Brahmamoyi during her lifetime made a gift of the disputed property to Girish, that Girish being the then nearest reversioner expectant to Gangadhar acquired an absolute estate in the said property and on his death was succeeded by the Respondent.

The lower Appellate Court reversing the decision of the learned Munsif dismissed the Plaintiff's suit. Hence this second appeal by the Plaintiff.

Babus Golap Chandra Sarkar and *Sarat Chandra Dutt* for the Appellant.

Babu Jnanendra Nath Sarkar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—I think the point of law raised upon this appeal, namely, if a Hindu widow transfers her interest to the then reversioner, the reversioner can hold the property against the person who is the reversioner when the widow dies, is concluded by authority which is binding upon us. It is sufficient to refer to the case of *Gunga Pershad Kur* v. *Shumbhoo Nath Burmun* (1) which was affirmed on appeal, and the Full Bench case of *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy* (2).

The appeal fails and must be dismissed with costs.

HOLMWOOD, J.—I agree.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 352 OF 1905.

RAMPINI, C. J
SHARFUDDIN, J.
1907.
2, August.

THE CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF SOUTH BARRACKPUR, Plaintiff, Appellant,
v.
AMULYA NATH CHATTERJEE, Defendant, Respondent.

Bengal Municipal Act (III, B. C. of 1884), secs. 34, 37—Lease taken in favour of Municipality—Execution—Validity.

Sec 34 of the Bengal Municipal Act should be read with sec. 37 of that Act.

Where therefore a Municipality purported to take a lease of lands involving a value exceeding Rs. 500, but the kabuliyat *was signed by the Chairman and was merely witnessed by two other*

(1) 22 W. R 393 (1874)
(2) I. L. R. 10 Cal. 1102 (1884).

Commissioners but not signed by them as contracting parties, and further the document was not sealed with the common seal of the Commissioners,

Held—*That the lease was not binding on the Commissioners.*

This was an appeal preferred on the 31st of August 1905, against the decree of Babu Jogendra Nath Mitter, Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 13th of June 1905.

The facts of the case material to this report will appear from the judgment.

Mr. A. Caspersz and *Babu Kali Kissen Sen* for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Siba Prosonna Bhattacharjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against a decision of the Subordinate Judge, second Court, Alipore, dated the 13th June 1905.

This appeal arises out of a suit brought by the South Barrackpur Municipality against the Defendant, Amulya Nath Chatterjee, to set aside a permanent *mourasi mokurari* lease granted on the 22nd March 1902 by the latter to the former in respect of 35 bighas, 15 cottahs of land. The Municipality had to pay a *salami* of Rs. 357-8 to the Defendant; and the rent reserved was one rupee per bigha per month. The Municipality in this suit prayed for cancellation of this lease, but the suit was dismissed by the Subordinate Judge.

The Municipality now appeal; and on their behalf it is contended, *first*, that the lease entered into by them with the Defendant was *ultra vires*; *secondly*, that it binds the executing persons, but not the rate-payers whom they represent; *thirdly*, that it is a contract entered into in fraud of the Bengal Municipal Act; *fourthly*, that it was not duly executed; *fifthly*, that it was illegal, because the Commissioners had no power to enter into any such contract without budgetting for it and obtaining the sanction of the higher authorities; *sixthly*, that the Defendant had no permanent right to convey to the Municipality, but only a temporary right; and, *seventhly*, that the higher authorities refused to sanction the expenses incurred in the transaction and declared all such expenses to have been illegally incurred and the transaction void.

In our opinion the first of these grounds of appeal cannot be sustained. The lease was taken by the Municipality for the purpose of using the land to which it related as a trenching-ground; and it does not appear to us that to enter into such a lease is beyond the powers of the Municipality. The lease, therefore, was not invalid on this ground, and does not seem to us to be one which binds only the executing parties and not the Municipal Commissioners who represent the rate-prayers. Then, we have not been shown any clause in the Municipal Act which prohibits the execution of such a lease.

The fourth contention of the learned Counsel for the Plaintiff-Appellant is that the lease has not been duly executed in accordance with the provisions of sec. 37 of the Municipal Act. That section lays down that "the Commissioners may enter into and perform any

contract necessary for the purposes of this Act." But it goes on to say:—"Every contract made on behalf of the Commissioners of a Municipality in respect of any sum exceeding five hundred rupees, or which shall involve a value exceeding five hundred rupees, shall, be sanctioned by the Commissioners at a meeting and shall be in writing and signed by at least two Commissioners, one of whom shall be the Chairman or Vice-Chairman, and shall be sealed with the common seal of the Commissioners." And the section winds up by saying:—"Unless so executed such contract shall not be binding on the Commissioners."

Now, there can be no doubt that the execution of the present contract was sanctioned by the Commissioners at a meeting, and that it involves a value exceeding Rs. 500. The amount of the *salami*, the payment of which was stipulated for in the lease, was Rs. 357-8 as. The amount of the rent agreed to be paid for the 35 bighas, 15 cottahs was Rs. 229 per annum. So that even one year's value of this contract constituted a value exceeding Rs. 500; and therefore the contract comes within the provisions of sec. 37 of the Act. That being so, it must be admitted, as it is admitted by the Respondent, that the *kabuliyat* executed on behalf of the Municipality was not duly executed in accordance with the provisions of sec. 37, because it was signed only by the Chairman; and although two of the Commissioners witnessed it, they did not sign it as contracting parties. Furthermore, it was not sealed with the common seal of the Commissioners. Hence, it would seem that, under the last clause of sec. 37, the contract is not binding on the Commissioners.

The learned pleader for the Defendant-Respondent, however, contends that the provisions of sec. 37 do not apply to leases or counterparts of leases, but merely to contracts executed on behalf of the Municipality for the execution of Municipal works; and he urges that, under sec. 34 "the Commissioners at a meeting may purchase or take on lease any land for the purposes of this Act, and may sell, let, exchange or otherwise dispose of, any land not required for such purposes;" and that, therefore, such a lease or counterpart of a lease, executed under sec. 34, does not require to be executed with all the formalities prescribed by sec. 37. We think, however, that this is not the case. Sec. 34, in our opinion, must be read along with sec. 37. Sec. 34 refers, no doubt, to certain classes of contract; and then sec. 37 applies to all contracts, of whatever nature; and provides that if these contracts involve a value exceeding Rs. 500, they shall be executed in accordance with the terms of that section.

That being the view we take, we must hold that the lease in this case was not duly executed and is, therefore, not binding on the Commissioners.

We do not, however, find it necessary to rest our decision upon this ground only. There are other grounds on which the contract must be set aside.

We may here allude, however, to the further contention of the pleader for the Respondent, which is to the effect that whether the lease was valid or not, it was ratified by the Commissioners' subsequent conduct. It is, no doubt, the

case that the Commissioners, after executing the contract, endeavoured to enter into possession of the land which formed the subject of it. They sub-let a few cottahs of it. They let a portion of it for the throwing of the carcasses of animals, and used another portion as a burying-ground. But, as soon as they did so, they were resisted by the tenants of the land; and they were ejected from some of the land by two tenants suing them. So that it appears that circumstances occurred, after they took possession of the land which justified the Municipality in praying for the cancellation of the lease.

The next contention of the Appellant is that the Municipality had no power to enter into this lease without having the expenditure provided for by budget and sanctioned by the superior authorities. We need only say that there is no provision in the Act to this effect; nor do we think the lease is invalid for this reason.

The sixth contention of the learned Counsel for the Appellant is that the Defendant had only a temporary right in the land, and no power, therefore, to convey a permanent right to his client. We think that this plea also is a good one. It is quite clear from the terms of the lease that the lessor, the Defendant, purported to convey to the Plaintiff a permanent *mourasi mokurari* lease of the land. Then the lease goes on to say: "From this day becoming possessor of the land, you shall continue to enjoy and possess the land peaceably by making *Mether* depôt, trenching ground, preparing bricks and excavating tanks, settling tenants on the said land and using it in any other way you like." Finally, the lease concludes by saying that the lessor grants "this permanent *mourasi mokurari pottah*, counterpart of the *kabuliyat*" for the land. Now, it is evident that the Defendant had no such right to convey to the Plaintiff. His title-deed is produced, (see page 79 of the paper-book) and this shows, that what he purchased from Bepin Behary Chatterjee on the 15th October 1901, was a *mourasi mokurari ganti jama*, which was, apparently, of an agricultural nature, and what he had apparently (which is shown by the proclamation of sale) was only an occupancy right. Then, it further appears from the evidence that the land was not only of an agricultural nature, but was in the occupancy of tenants; and as already observed, as soon as the Plaintiff endeavoured to take possession of the land and make use of it for the purposes of throwing carcasses, and as a burying-ground, two of the tenants, at least, resisted the Plaintiffs, brought suits against them, and obtained decrees for ejectment. The Defendant had, therefore, no right to convey to the Plaintiff *khas* possession of the land, as he did in the passage of the lease already cited, (see page 8 of the paper-book). In these circumstances, as the Defendant purported to convey to the Plaintiff a permanent lease of the land (and *khas* possession thereof which he evidently had no right, and must have known he had no right to do), and as the rent, moreover, was very excessive, it may well be held that the Defendant has been guilty of fraud. He must have known that there were tenants on the land, and he should not have given the Plain-

tiff *khas* possession, or the right to use it in any way he liked. When he did so, he certainly was guilty of fraud. Furthermore, the zemindar of the land has served notice on the Plaintiff forbidding the use of the land as a trenching ground and pointing out that the Defendant had no permanent right to convey to the Plaintiff which is further apparent from the fact established by the evidence that the rent of the land had recently been increased. That being so, the action of the Defendant was fraudulent, and the lease should be cancelled on this ground.

The learned pleader for the Respondent urges that no such plea was raised in the plaint nor was fraud of this nature alleged. But in para. 11 of the plaint it has been expressly pleaded that the Defendant had really no permanent right and therefore could not grant such right to the Corporation, and that his representation that he had a permanent right, was fraudulent. Then, in para. 12 it is said "that the Commissioners of the South Barrackpur Municipality have subsequently in the course of the current year enquired into the facts relating to the said lease, and have come to know of fraud in the matter." Further, in para. 14 (*a*) the Plaintiff prays "that the said lease be cancelled and declared illegal, fraudulent and inoperative." And in cl. (*c*) of the same paragraph it is prayed "that the Defendant be directed to refund to the said Corporation the moneys paid under the said lease and the sums expended from the Municipal fund in connection with the said land, and that a decree for the recovery of the total amount of Rs. 762-10 be passed against the Defendant." Then, in the particulars of the Plaintiff's pecuniary claim the expenses incurred in defending Suits Nos. 772 and 774 of 1902 in the Court of the 2nd Munsif of Sealdah, instituted by Bepin Behary Das and Upendra Nath Das, that is, the tenants who sued the Plaintiff, for ejectment which expenses amount to Rs. 50-11-3, have been claimed. The Plaintiffs further claim Rs. 139-3-6 paid to Bepin Behary Das and Upendra Nath Das in satisfaction of the decrees in the abovementioned suits. The Plaintiffs altogether claim Rs. 250 9-6 on this account. The fact, then, of the Plaintiffs having been ejected from the land demised to them by the Defendant has been expressly brought to the notice of the latter in the present suit; and as the plea of fraud has been thus raised in the plaint and as, moreover, the second issue framed by the Subordinate Judge is, "was the Defendant guilty of any fraudulent act, if not, is the lease liable to be cancelled?" we do not think we are debarred from decreeing this appeal on this ground. We accordingly do so, as prayed, setting aside the decree of the lower Court. This order will carry costs in both the Courts.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2437 OF 1907.

MOOKERJEE, J.
CASPERSZ, J.
1907.
Heard,
19, August.
Judgment,
26, August.

RAM NARAIN ROUTH and ors., Petitioners,
v.
LAL DAS ROUTH and ors., Opposite Parties.

Bengal Tenancy Act (VIII of 1885), sec. 171—Right of depositor to obtain possession—Procedure—Application or suit.

Where a deposit is made under sec. 171 of the Bengal Tenancy Act the depositor can, as against the judgment-debtor, obtain delivery of possession of the holding, advertised for sale, by application to the execution Court: but by such application the depositor is not entitled to invite the execution Court to oust a stranger to the proceeding. If he is met by a stranger, his remedy is by a regular suit for recovery of possession.

This was a rule granted on the 1st of August 1907, against an order of Babu Surendra Nath Mookerjee, Munsif of Patna, dated the 20th of May 1907, refusing the application of the Petitioners under sec. 171, Bengal Tenancy Act, to be placed in possession of the holding.

The facts of the case appear from the judgment.

Babu Lakhsmi Narain Singh for the Petitioners.

No one for the Opposite Parties.

The JUDGMENT OF THE COURT was as follows:—

This rule raises an important question on the construction of sec. 171 of the Bengal Tenancy Act. The circumstances leading up to the application to this Court are not in controversy. The Petitioners allege that one Babu Raj Narain brought a suit for rent against some of the opposite party in respect of a holding over a portion of which the Petitioners held a *zurpeshgi* lease under a deed executed on the 21st July 1900. The landlord obtained a decree, and took out execution and the holding was advertised for sale. The Petitioners with a view to protect their interest, which would be voidable upon sale, deposited the decretal amount, on the 20th June 1906, in accordance with the provisions of sec. 171 of the Bengal Tenancy Act. They then made an application to the execution Court on the 10th May 1907 and prayed that they might be placed in possession of such portion of the holding as was not covered by their *zurpeshgi*. On the 20th May 1907, the Munsif held that the applicants could not obtain a summary order for possession and that their remedy was by a regular suit for recovery of possession. It is this order which we are invited to revise on the ground that the Petitioners were entitled to be placed in possession of the holding under cl. (c) of sec. 171 of the Bengal Tenancy Act and that the Court below has refused to exercise a jurisdiction vested in it by law. The question, therefore, which calls for decision is whether, when a deposit is made under sec. 171 of the Bengal Tenancy Act, the depositor is entitled upon application to the execution Court, to be placed in possession of the holding advertised for sale.

Sec. 171 provides that when a tenure or holding has been advertised for sale under Chap. XIV of the Bengal Tenancy Act in execution of a decree for arrears of rent, any person who has in the tenure or holding an interest which would

RAM NARAIN ROUTH v. LAL DAS ROUTH.

be voidable upon the sale, may pay into Court the amount requisite to prevent the sale; the amount so paid is to be deemed a debt which carries interest and is secured by a mortgage of the tenure or holding; and such mortgage takes priority of every other charge on the tenure or holding other than a charge for arrears of rent. The section then lays down that the person who has made the deposit "shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with the interest due thereon, has been discharged." The provisions of the section, however, do not affect any other remedy to which the depositor may be entitled; in other words, the remedy is in addition to and not in substitution for any other remedy open to the depositor.

It is argued by the learned vakil for the Petitioners that the applicants are entitled to an order for delivery of possession of the tenure advertised for sale merely upon an application to the execution Court. It must be observed, however, that the section does not expressly provide that the depositor is so entitled to be placed in possession upon application to the execution Court. To determine whether the interpretation sought to be put upon the section on behalf of the Petitioners is well-founded, it is necessary to refer for a moment to the history of the legislation on the subject. Sec. 171 of Bengal Tenancy Act replaces sec. 62 of Act VIII (B. C.) of 1869 which, in its turn, took the place of sec. 6 of Act VIII (B. C.) of 1865. The provisions in the Acts of 1865 and 1869 were practically identical and were to the following effect: "If the sum due under the decree together with interest up to the date of payment and all costs be paid into Court at any time before the sale commences whether by the defaulting holder of the under-tenure or any one on his behalf or any one interested in the protection of the under-tenure, such sale shall not take place; and the provisions of sec. 13 of Regulation VIII of 1819 for the recovery of the sums paid by a person other than the defaulting holder of the under-tenure to stay the sale of the under-tenure, shall be applicable to all similar payments made under this section." Under this section (sec. 62 of Bengal Act VIII of 1869) it was held by a Full Bench of this Court in *Umbika Debia* v. *Pranhuree Doss* (1), that an under-tenant who has saved his superior tenure from sale by depositing the amount of rent due, not only has the security of the tenure which he preserves and of which he can obtain possession on application to the Collector, but he has also a right to recover, by an ordinary suit the amount deposited by him as a loan.

Statutory effect is now given to this view by sub-sec. 2 of sec. 171 of the Bengal Tenancy Act. It must be observed, however, that sub-sec. 1 of sec. 171 introduces important variations into the provisions of sec. 62 of Bengal Act VIII of 1869 which made the provisions of sec. 13 of the Putni Regulation applicable. Cl. 4 of sec. 13 of the Putni Regulation, to which reference is made, provided that if an under-tenant of the second-decree makes a deposit in order to stay

(1) 4 B. L. R. 77 (F. B.): 18 W. R. 1 (F. B.) (1869).

RAM NARAIN ROUTH v. LAL DAS ROUTH.

the sale of the superior tenure and if he is not himself in arrears, the deposit shall be considered as a loan to the porprietor of the tenure preserved from sale and the tenure so preserved shall be security for the advance and the depositor shall be entitled, *on applying for the same*, to obtain *immediate possession* of the tenure of the defaulter, in order to recover the amount so advanced, from any profits belonging thereto. Apart from the fundamental distinction that, under sec. 13 of the Putni Regulation a deposit can be made only by an undertenant, whereas under the Acts of 1865, 1869 and 1885 a deposit can be made by any person interested in the tenure or holding, it is worthy of notice that cl. 4 of sec. 13 of Regulation VIII of 1819 expressly provides that the depositor shall be entitled upon application to obtain immediate possession of the tenure of the defaulter. In Act VIII of 1885, however, where the language was recast, the provision is that the depositor shall be entitled to possession of the tenure or holding as a mortgagee of the tenant. It is impossible to say that this alteration in language was not intentional. In our opinion, the effect of this change is to make it no longer obligatory upon the execution Court to place the depositor in possession of the tenure or holding saved from sale, and it appears to us that there is an intelligible reason for this variation.

Under sec. 171 of the Bengal Tenancy Act, the deposit may be made by any person who has an interest which would be voidable on the sale. It is not inconceivable that a question may arise as to whether the depositor really has an interest in the tenure or holding, and, if so whether the interest is of a description which would be voidable upon the sale. Such question may be raised by a person other than the decree-holder or the defaulter judgment-debtor. For instance, the tenant against whom the decree for rent has been obtained, may have previously placed somebody else in possession of the holding under a lawful agreement, as for instance, under a lease or a usufructuary mortgage so that when a deposit is made under sec. 171 by some other person who claims an interest in the tenure, the person who has derived his title from the defaulter may question the right of the depositor. If he does so, a dispute might arise as between two persons neither of whom is a party to the execution proceedings. It is hardly conceivable that a question of this character could be investigated by the execution Court and a summary order made for delivery of possession as against a person who is not a party to the rent decree, who claims to hold possession of the property under a *primâ facie* good title from the tenant, and who denies the existence or validity of the interest claimed by the depositor. In such circumstances, the execution Court could not very well place the depositor in possession with the result that the other claimant is ousted from occupation.

Our attention was however invited to the decision of this Court in the case of *Umatul Fatimah* v. *Nemie Chandra Banerjee* (2) where a Division Bench

(2) Civil Rule No. 3124 of 1903 decided by Harington and Brett, JJ., on the 15th June 1904.

RAM NARAIN ROUTH v. LAL DAS ROUTH.

appears to have held that there is nothing in sec. 171, sub-sec. (1), cl. (c) to indicate that it is necessary that a person who has paid money under this section, should bring a separate regular suit to obtain possession. The learned Judges assumed the intention of the Legislature to have been that on payment of the sum, the depositor should make an application to the Court to be placed in possession of the tenure, and observed that the contrary view, namely, that such a person should be bound to bring a regular suit to obtain possession, would in fact defeat the object of the section itself. No reasons are assigned in support of this view and the attention of the learned Judges does not appear to have been drawn to the material difference in language between the provisions of sec. 171 and of sec. 62 of Act VIII (B. C.) of 1869, by which cl. 4 of sec. 13 of the Putni Regulation was made applicable. In our opinion, the view indicated in the case cited, is expressed too broadly. We are prepared to hold that as against the judgment-debtor, the depositor can obtain delivery of possession by application to the execution Court: but that by such application the depositor is not entitled to invite the execution Court to oust a stranger to the proceeding. If he is met by such a stranger, his remedy is by a regular suit for recovery of possession, and in such a suit the person in possession who is sought to be ousted may take any appropriate defence and may put the depositor to the proof of his alleged title. In other words, as soon as a person has made a deposit under sec. 171 of the Bengal Tenancy Act, if he makes an application to the execution Court, he is entitled to delivery of possession as against the judgment-debtor who is a party to the proceeding. But if, when the writ for delivery is attempted to be executed, the depositor is met by some other person who is in possession, such third party cannot be summarily ousted. The judgment-debtor is a party to the proceeding; he has admittedly made default and by reason of his failure to satisfy the decree obtained against him, the holding is advertised for sale. When the deposit is made by a person who claims an interest in the tenancy voidable upon the sale, it is open to the judgment-debtor to challenge his title, if he so chooses. But if he does not take any objection and allows the deposit to be made, with the result that the tenure or holding is saved from sale, he cannot subsequently resist an application for delivery of possession. It would be meaningless to drive the depositor in such a case to a regular suit for recovery of possession. This course would not only entail unnecessary delay which is likely to defeat the statutory object of this provision of the law; it would also foster an unreasonable multiplicity of suits. When, however, the depositor is met by a third person who is not a party to the proceeding, other considerations arise. The Legislature could not have contemplated, as is plainly indicated by the alteration in the language to which we have already adverted, that a stranger should be summarily evicted at the instance of a person who has made the deposit and whose title he had no opportunity to challenge by an appropriate proceeding.

RAM NARAIN ROUTH *v.* LAL DAS ROUTH.

On the whole, therefore, the conclusion seems to us to be reasonable that although the depositor under sec. 171 is entitled upon application to the execution Court to obtain delivery of possession as against the judgment-debtor who is a party to the proceedings, he is not entitled to an order for delivery as against a person who is a stranger to the proceeding; against such a person his remedy is by a regular suit.

In the case before us, it is admitted in the petition on which the rule was issued, that a portion of the holding is in the possession of the judgment-debtors (opposite party 1 to 3) and that other portions are in the possession of opposite parties 4 and 5, who are no parties to the decree or to the execution proceedings. The Court below, however, has not made any distinction between the different sets of opposite parties and has declined to entertain the application for delivery of possession on the broad ground that under sec. 171 the depositor is not entitled to possession upon application to the execution Court. As we have already explained, this view cannot be entirely supported.

The result, therefore, is that the rule is made absolute and the order of the Court below is discharged in part. As against the judgment-debtors, opposite parties who were parties to the decree for rent and to the execution proceedings, the rule is made absolute and possession will be delivered to the Petitioners as against them. As against opposite parties 4 and 5 who were not parties to the decree for rent or to the execution proceedings the rule is discharged. As no appearance has been entered on behalf of any of the opposite parties we make no order for costs.

S. C. D. *Order modified.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 421 OF 1906.

RAMPINI, C J. SHARFUDDIN, J. 1907. 26, July.	PITAMBAR GAIN AND ANR., Plaintiffs, Appellants, *v.* UDDHAB MONDAL, Defendant, Respondent.

Registration Act (III of 1877), sec. 17 (d)—*Petition of compromise containing a recital of a previous oral agreement for lease—Stamp —Registration—Evidence.*

Where a petition of compromise merely contained a recital of a previous oral agreement for lease,

Held—*That it did not require registration or stamp.*

It was evidence of an oral agreement but not an agreement in itself.

This was an appeal preferred on the 22nd of March 1906, against the decree of Babu P. C. Ghose, Subordinate Judge of Zillah Khulna, dated the 17th of January 1906, reversing that of Babu Bunwari Lal Gossami, Munsif of Khulna, dated the 19th of April 1905.

The Plaintiffs-Appellants brought this suit for the enforcement of an agreement for the delivery of a *potta*, &c., on the following allegations:

That the two Defendants had instituted a Suit No. 311 of 1900 against the Plaintiffs who were in possession for *khas* possession. That during the pendency of the suit, an agreement (oral) was concluded between the parties on the 4th

February 1901 to the effect that in case the Plaintiffs settled the suit amicably by a *solenamah* acknowledging the Defendant's title to the land, the latter would grant a *jamai* settlement of the land to the Plaintiffs, and after a decree should be passed ascertain the area by measurement, fix a rent according to the rate at which the tenants of the Plaintiff's class held land in the neighbourhood, and that the parties would duly exchange *pottas* and *kabuliyats*, &c.

The only defence which is material to this report was that the agreement was an agreement for lease and had been embodied in the *solenamah* petition which however had not been registered and would therefore be no evidence of the lease.

The material portion of the petition of compromise is set out in the judgment.

The Munsif decreed the suit, but the Subordinate Judge gave effect to the Defendant's pleas mentioned above, and dismissed the suit.

This second appeal was then preferred by the Plaintiffs.

Dr. Priya Nath Sen for the Appellants

Babu Sarat Chandra Ghose for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

In our opinion the Subordinate Judge was wrong in saying that the petition of compromise in this case was an agreement to lease and required to be properly stamped and registered. He says :—"I find that the petition is clearly an agreement to lease, as the Plaintiffs, who are the Defendants in that case, proposed certain terms, which were accepted and meant to be acted upon by the Defendant."

We have examined the petition of compromise; but we find no terms mentioned in it. The third paragraph says: "The Plaintiffs have consented to let out the disputed land to us. After this suit is decreed, *pottah* and *kabuliyat* will be exchanged between the parties. Filing this *solenamah* with the consent of the Plaintiffs, we pray that the suit may be ordered to be disposed of in pursuance of this compromise." That being so, this petition is not an agreement, but merely contains a recital of a previous oral agreement. It is evidence of an oral agreement but not an agreement in itself and therefore does not require either a stamp or registration. Moreover, it was admitted in the first Court without a stamp: so that it should not have been rejected by the lower Appellate Court because it was not stamped.

We, therefore, decree this appeal and remand the case to the lower Appellate Court to be decided on the merits.

The costs will abide the result.

N. G. *Appeal decreed.*

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 1819 OF 1905.

BRETT, J.
MOOKERJEE, J.
1907.
11, June.

GAJADHAR MAHTO and ors., Defendants, Appellants,
v.
RAGHUBAR GOPE and another, Plaintiffs, Respondents.

Contribution, suit for—Set off—Limitation.

GAJADHAR MAHTO v. RAGHUBAR GOPE.

Where in a suit for contribution by a co-sharer for a certain sum of money paid on behalf of his other co-sharers to discharge a decree for rent obtained against them jointly, the latter (i.e., *the Defendants) claimed a set off on account of previous payments by them of similar decrees for the benefit of the Plaintiff amongst others,*

Held—*That no question of limitation arose as regards the claim for set off. The remedy might have been barred but the right to the debt was not extinguished.*

MOHESH LAL v. BASANT KUMARI (1) *referred to.*

This was an appeal preferred on the 2nd of September 1905, against the decree of Babu Gopal Chandra Banerjee, Subordinate Judge of Patna, dated the 29th of May 1905, reversing the decree of Babu Ram Lal Dutt, Munsif of Patna, dated the 30th of September 1904.

The facts of the case appear from the judgment.

Babu Karunamoy Bose for *Babu Monmatha Nath Mukherjee* for the Appellants.

Babu Ganesh Dutt Singh for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The present appeal arises out of a suit brought by the present Respondents for contribution against the present Appellants. The case of the Plaintiffs-Respondents was that they and the Appellants were joint *thicadars* of a certain village, that on the 11th April 1898 their landlords obtained a decree against them and the Defendants for recovery of rent due for the *thica* for the years 1302 to 1305, and that the Plaintiff finding their land attached in execution of the decree had to pay the full amount of the decree in 3 instalments totalling Rs. 579-4 0 in the months of June to August 1899. They claimed to be entitled to recover from the Defendants Nos. 1 to 5 who held an eight anna share of the *thica* a proportionate share of the rent which they had paid on their behalf.

The Defendants Nos. 1 to 5 in their defence did not deny that a decree had been obtained against them and the Plaintiffs by their landlords and that the Plaintiffs had paid up the full amount of the decree: but they pleaded that on two previous occasions the landlords had obtained decrees for rent due for the *thica* against them jointly with the Plaintiffs and that on those two occasions they had paid off the full decretal amount and the Plaintiffs had paid nothing. They alleged that on the 17th December 1895 they had paid Rs. 855 which was the full rental of the *thica* up to the year 1297 and that on the 19th July 1897 they had paid up the sum of Rs. 577-13-0 which was the balance of the rent due upon the *thica* for the years 1298 to 1301. The Plaintiffs' had not subsequently repaid to them any of the money which they had on these two occasions paid on the Plaintiffs' behalf. The suit in which the decree was obtained and which the Plaintiffs paid off was for the rent for the years 1302 to 1305.

The Court of first instance on taking into consideration the plea of the Defendants Nos. 1 to 5 came to the conclusion that they were entitled to set off

(1) I. L. R. 6 Cal. 340 (1880).

GAJADHAR MAHTO *v.* RAGHUBAR GOPE.

against the claim of the Plaintiffs only a proportionate amount of the rent which the Defendants had paid on the 19th July 1897, the reason being that the amount was paid within three years before the date on which the payment was made by the Plaintiffs. So far as the payment made on the 17th December 1895 was concerned, the Munsif held that the Defendants' claim to set off any portion of it against the claim of the Plaintiffs in the present suit was barred by limitation. The Munsif accordingly gave the Plaintiffs a decree for the balance.

On appeal the lower Appellate Court has disallowed the amount which the Defendants had been allowed to set off by the Munsif and has given the Plaintiffs a decree for the whole amount of their claim.

The Defendants have appealed. The only question before us is whether in a case of this sort any question of limitation really arises. In our opinion no question of limitation arises on the facts. It does not appear to have been denied in the Court of first instance that the Defendants had satisfied the two decrees for rent in 1895 and 1897 and the sums which they then paid included money which the Plaintiffs as co-sharers were bound under the law to pay. It was not alleged or proved that the sums due on behalf of the Plaintiffs had afterwards been repaid to the Defendants by the Plaintiffs. The sums which the Defendants had on previous occasions paid on behalf of the Plaintiffs remained therefore as an outstanding debt due from the Plaintiffs to them. It is true that at the time when the Plaintiffs made payment in satisfaction of the decree in 1899 the remedy of the Defendants at law to recover from the Plaintiffs the sums which they had previously paid was barred by limitation. But though the remedy might have been barred the right to the debt was not extinguished, see *Mohesh Lal* v. *Busant Kumari* (1). When afterwards the Plaintiffs were in consequence of the decree obtained against them and the Defendants by their landlords and in consequence of the attachment of the property of the Plaintiffs in satisfaction of that decree compelled to pay on their own behalf as well as on behalf of the Defendants Nos. 1 to 5 the amount due under the decree, the Defendants Nos. 1 to 5 were entitled to appropriate the sum which was paid by the Plaintiffs on their behalf as money paid in discharge of the outstanding debt which was due from the Plaintiffs to them. We find that the debt due to the Defendants Nos. 1 to 5 from the Plaintiffs on account of the previous payments was Rs. 358 and that the amount which the Plaintiffs would have been entitled to recover from the Defendants as contribution for the amount paid by them to discharge the arrears of rent in 1899 amounted to Rs. 289. In fact, therefore, the Defendants at the time of payment were entitled to a sum in excess of that which the Plaintiffs paid for them. Under these circumstances we hold that the Plaintiffs have no right to claim contribution from the Defendants in the present suit.

In our opinion the view which the lower Appellate Court has taken is not correct, and we therefore set aside the

(1) I. L. R. 6 Cal. 340 (1880).

GAJADHAR MAHTO *v.* RAGHUBAR GOPE.

judgment and decree of the lower Appellate Court and decree the appeal with costs. The suit will stand dismissed with costs in all the Courts.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2518 OF 1905.

RAMPINI, C J.	NITYA GOPAL SEN
SHARFUDDIN, J.	PODDAR and anr.,
1907.	Plaintiffs, Appellants,
Heard,	*v.*
3, July	MANI CHANDRA CHAKRABUTTY and ors., De-
Judgment,	fendants, Respondents.
5, July.	

Debutter *property—Permanent lease by* shebait *void and not voidable—Adverse possession—Acceptance of rent, effect of.*

A permanent lease of debutter *property is void if not executed for legal necessity.*

Plaintiff's predecessor who had a karsha *lease obtained a permanent lease from the* shebait *of an idol, the predecessor of Defendant No. 2, on payment of a bonus, and the latter who is the present* shebait *continued to receive rent from Plaintiff. Subsequently Defendant No. 2 determined Plaintiff's lease and took possession. In a suit for possession by the Plaintiff,*

Held—*That Plaintiff's possession under the permanent lease which was found to have been executed without legal necessity and therefore held to be void cannot be regarded as adverse to Defendant No. 2 nor can the latter's acceptance of rent from the Plaintiff either operate as an admission of the Plaintiff's having a permanent right in the land or cause an extinction of his own previous title.*

This was an appeal preferred on the 21st of December 1905, against the decree of Babu Ambica Charan Dutta, Subordinate Judge, 1st Court of Zillah Backergunge, dated the 21st of September 1905, reversing the decree of Babu Bimal Chandra Chatterjee, Munsif of Backergunge, 7th Court, dated the 13th of June 1905.

The facts of the case appear from the judgment.

Babu Dwarka Nath Chuckerbutty and *Mr. G. Sircar* for the Appellants.

Dr. Priya Nath Sen and *Babu Gunada Charan Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit brought to eject the Defendants from certain land, after a declaration of the Plaintiffs' right thereto.

The Defendant No. 1 is the tenant of the land. The Defendant No. 2 is the *shebait* of the idol to whom the land belongs.

The Plaintiffs' predecessor in title, Nilu, had a *karsha* tenancy of the land. In 1262, he paid a bonus of Rs. 51 to the former *shebait*, Tarini, the predecessor of the Defendant No. 2 and obtained a permanent lease of the land. The rent payable under the lease was the same as under the *karsha pottah*. On the death of Tarini, the Defendant No. 2 succeeded as *shebait* to the property. He accepted rent from the Plaintiff or his predecessor for upwards of 30 years. He recently entered on occupation of the land with the assistance of the Defendant No. 1, and gave the Plaintiff notice to quit, and so determined his *karsha* right.

NITYA GOPAL SEN PODDAR v. MANI CHANDRA CHAKRABUTTY.

The Plaintiff now seeks for *khas* possession.

The lower Court has held that the permanent lease granted to Nilu in 1262 was void for want of legal necessity. He has accordingly dismissed the suit.

The Plaintiff appeals on the following grounds; (1) that the lease of 1262 was not void but voidable; (2) that the Defendants are barred by limitation from questioning the validity of this lease; and (3) that the Plaintiff has a title by more than 50 years' adverse possession under this lease.

There can be no question as to the want of substance in the first of these pleas. A permanent lease of *debutter* property is undoubtedly void, if not executed for legal necessity. The Judge has found as a fact that there was no legal necessity for the grant of the permanent lease and this would seem to settle this point. In support of the contention that the Plaintiff has been in adverse possession of the land under the permanent lease for more than 50 years and hence, that the Defendant No. 2's title has been extinguished, and that the Plaintiff has thereby acquired a valid title, the Appellant's pleader relies on the cases of *Shama Charan Nandi* v. *Abhiram Goswami* (1), *Ram Kanai Ghosh* v *Hari Narayan Singh Deo* (2), *Mahomed* v. *Ganapati* (3), *Nil Money Singh* v. *Jagabandhu Roy* (4) and *Duttagiri* v. *Duttatraya* (5), the principle underlying all of these cases apparently being that if a permanent lease of *debutter* and trust property is granted to a lessee who holds under such lease to the knowledge of the lessor's successor, the successor must sue within 12 years, or be barred by limitation.

On the other hand, the Respondent's pleader relies on the decision of their Lordships of the Privy Council in *Beni Pershad Koeri* v. *Dudhnath Roy* (6), in which it has been held that the possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a perpetual or hereditary tenure. This has been followed in *Srinivasa Ayyar* v. *Muthusami Pillai* (7), in which it has been laid down that a tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord, but until the landlord indicates that he intends to exercise his option, the tenancy subsists. The cases of *Seshamma Shettati* v. *Chickaya Hegade* (8) and *Rama Swami Naik* v. *Thayammal* (9) have been decided on the same principle. The learned pleader points out that the cases relied on by the Appellant are cases in which the lessees entered under the permanent leases they set up, and would be in the position of trespassers if the leases they held under were invalid, whereas in the case of *Beni Pershad* v. *Dudhnath* (6) and the cases in which it has been followed, the lessee was a tenant from before and therefore he could not by setting up a right different from that under which he entered

(1) 10 C. W. N. 738 (1906).
(2) 2 C. L. J. 516 (1905)
(3) I. L. R. 13 Mad 277 (1889)
(4) I. L. R. 23 Cal. 536 (1896).
(5) I. L. R. 27 Bom. 363 (1902).

(6) I. L. R. 27 Cal. 163 (1900).
(7) I. L. R. 24 Mad. 246 (1900).
(8) I. L. R. 25 Mad. 507 (1902).
(9) I. L. R. 26 Mad. 488 (1902).

the land acquire a title by adverse possession against his lessor or the latter's successor. In the present case, the Plaintiff's predecessor, Nilu, was a *karsha* tenant. He paid a bonus to the Defendant No. 2's predecessor, Tarini, and obtained from him an invalid and void permanent lease. He continued paying rent at the same rate as before. The Defendant No. 2 took rent from him no doubt for a long series of years, but seeing that Nilu was a tenant from before, his or the Plaintiff's possession cannot be regarded as adverse to the Defendant No. 2, nor can the latter's acceptance of the rent from the Plaintiff either operate as an admission of the Plaintiff's having a permanent right in the land or cause an extinction of his own title. We agree with these contentions of the learned pleader for the Respondent. We consider that the decree of the lower Appellate Court is right and we dismiss this appeal with costs.

S. C. S. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 1830 OF 1907.

BRETT, J.
COXE, J.
1907.
Heard, 1 and 2, July.
Judgment, 3, July.

MUSSTT. SATO KOER, Objector, Petitioner,
v.
GOPAL SAHU and anr., Applicants, Opposite Party.

Act XIX of 1841—Jurisdiction—Hindu Law—Joint family—Practice—Ex parte *order.*

The provisions of Act XIX of 1841 do not apply to the case of a family governed by the Mitakshara Law inasmuch as in the case of the death of a member the property passes not by way of succession but by survivorship.

Before it can be held that a Court has jurisdiction under Act XIX of 1841, it must be found that the provisions of law have been strictly complied with.

Case in which it was held that Act XIX of 1841 could not be applied under any circumstance.

No order can be passed against a person without allowing him to be heard and to adduce evidence in his defence.

This was a rule granted on the 13th of June 1907, against an order of L. Palit, Esq., District Judge of Zillah Gya, dated the 5th of June 1907, allowing the application of the opposite parties made under Act XIX of 1841 and declaring them to be entitled to possession of the properties left by the deceased Narain Ram.

The facts of the case appear from the judgment.

Babus Golap Chandra Sarkar and *Surendra Nath Ghosal* for the Petitioner.

Babus Umakali Mukherjee and *Jogesh Chandra Dey* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:

The present Petitioner is the widow of one Narain Ram who died on the 4th April 1907 leaving her as his widow, she being his second wife, and a daughter by his first wife.

On the 20th April 1907 Gopal Sahu and Sahadeb Ram, brothers of Narain Ram, put in application under Act XIX of 1841 alleging that they were members of a joint Hindu family under the Mitakshara law with Narain Ram, that

MUSSTT. SATO KOER *v.* GOPAL SAHU.

on his death all the joint property devolved by survivorship on them as members of the joint family, that the widow had no right to the property, and that the property was in danger of being wasted by her collusion with her relations. They therefore prayed for an order declaring their title to the property and directing that possession of the same should be delivered to them on their furnishing security in the sum of Rs. 5,000. They also asked for an order that an inventory should be taken. An inventory was taken by the order of the District Judge by his Nazir and a citation under sec. 4 of the Act was issued to the widow.

The widow appeared and denied the right of the applicants to the property left by her husband. She alleged that it descended by inheritance to her and her husband's daughter, that her husband was not a member of a joint Hindu family with his brothers and that he had separated from them some 20 years before his death.

The main point in dispute between the parties therefore was whether Ram Narain at the time of his death was a member of a joint family governed by the Mitakshara law with his two brothers. The District Judge, however, refused to allow the widow to adduce evidence on this point and declined himself to go fully into the question whether there was a separation of the three brothers or not because that would have amounted on his part to trying the regular suit which might afterwards be brought by one or other of the parties, and it would also frustrate the object of the Act which demands a speedy and summary decision.

On the written application of the brothers and some income-tax returns which they put in and without examining the brothers or any witnesses on their behalf the District Judge on the 5th June 1907 passed an order declaring the applicants to be entitled to possession of the property left by the deceased.

On the 13th June last the present Petitioner applied to this Court and obtained a rule on the opposite party to show cause why the order passed by the District Judge purporting to be one under Act XIX of 1841 should not be set aside.

In support of the rule it has been contended that the District Judge in passing the order which he has passed has exercised a jurisdiction not vested in him by law and has acted in the exercise of his jurisdiction illegally and with material irregularity. In the first place it has been argued that the provisions of Act XIX of 1841 cannot apply to the case of a family governed by the Mitakshara law. Sec. 1 of the Act provides that whenever a person dies, leaving property, moveable or immoveable it shall be lawful for any person claiming a right by succession thereto or any portion thereof, to make application to the Judge of the Court of the District where any part of the property is found or situate for relief, either after actual possession by another person or when forcible means of seizing possession are apprehended. It is argued that on the death of a member of a Hindu family governed by the Mitakshara law the other members take the property left by the deceased by survivorship and not by succession. There is in fact no passing

MUSSTT. SATO KOER v. GOPAL SAHU.

of the property from the deceased to any body else; there is only an accession to the property of the survivors and no succession by inheritance. It is pointed out that in the present case if there could be held to be any succession at all it would be succession by the widow and daughter as heirs who would have succeeded by inheritance. In our opinion this contention is sound and in the present case the Act cannot be taken to have any application.

Further, we think that this was not a case in which under any circumstances the Act should have been applied, and in support of this view we would refer to the case of *Jasoda Kunwar* v. *Baboo Gouree Byjnath Pershad* (1) which was decided so long ago as 1866 and in which the learned Judges expressed opinions on a case almost identical with the present with which we entirely agree. We hold that the present case was not one in which the District Judge should have taken any action under Act XIX of 1841, but should have left the parties to seek their remedy by a proper suit for establishment of their title. It was not a case, as contemplated by the Act, in which the widow had taken possession upon any pretended claim of right or by force or fraud.

Further, we may observe that there is no finding arrived at by the District Judge that the applicants would have been materially prejudiced by being compelled to bring a regular suit to establish their title.

The learned Judges who decided the case of *Jasoda Kunwar* v. *Baboo Gouree Byjnath Pershad* (1) were, however, of opinion that they were unable to interfere in that case as they could not hold that the Judge had exercised a jurisdiction not vested in him by law after the widow had appeared and had submitted to the jurisdiction. We may, however, observe that Act XIX of 1841 empowers a District Judge to interfere with the ordinary rights of parties by means of a summary procedure, and that the view which has always been adopted by this Court with reference to other similar Acts or provisions of Acts of a similar nature must be taken to apply to proceedings taken under its provisions, that is to say, that before it can be held that a Court has jurisdiction it must be found that the provisions of law have been strictly complied with. In the present case we find that the applicants were not examined in support of their application as we think is clearly contemplated by the provisions of sec. 3 of the Act, nor were any witnesses examined to support their case. The present Petitioner also was not allowed to examine her witnesses to disprove the most important allegation in the application, namely, that Narain Ram was joint with his brothers when he had died—a finding on that allegation in favour of the applicants being essential to give the Court jurisdiction to pass the order on the application It is an elementary principle of law that no order can be passed against a person without allowing him to be heard and to adduce evidence in his defence. The reasons which the District Judge has given for refusing to examine the witnesses for the Petitioner in the present case do not in our opinion appear to be sufficient to warrant a de-

(1) 6 W R, Mis. Rugs p 53 (1866)

MUSSTT. SATO KOER v. GOPAL SAHU.

parture from this principle. In our opinion, therefore, the District Judge has acted in the exercise of his jurisdiction, supposing him to have had jurisdiction to hear the present application, illegally and with material irregularity and the Petitioner was prejudiced thereby. His order therefore as it stands cannot be maintained. We think that this is not a case which under any circumstances we ought to send back to the District Judge in order that he may record the evidence which the Petitioner desired to produce. We think the proper course to follow is to make the rule absolute and to set aside the order of the District Judge.

We may further observe that in the cases of *Fulchand* and *Soboranchand* v. *Musstt. Kismesh Koer* (2) and *Abdul Rahiman* v. *Kutti Ahmatl* (3) the learned Judges appear to have had no hesitation in interfering on the ground that the provisions of Act XIX of 1841 had not been strictly complied with. We are of opinion therefore that in the present case we have full jurisdiction in revision to set aside the order of the District Judge.

The result, therefore, is that we make the rule absolute and set aside that order. We assess the hearing fee at 5 gold mohurs.

S. C. S. *Rule made absolute.*

(2) 4 C. W. N. ccxvi (1900).
(3) I. L. R. 10 Mad. 68 (1886).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 643 OF 1907.

MITRA, J.
COXE, J.
1907.
24, June.

PANCHU GHOSH, Accused, Petitioner,
v.
KHODEL SARKAR, Complainant, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 203 and 257 and 437—Jurisdiction of District Magistrate under sec. 437—Order directing that the accused should not be proceeded against and the processes against him be withdrawn—Legality of—District Magistrate's power to revise such order.

Where on the acquittal of a co-accused, the other accused against whom process of arrest had been issued, surrendered before the Deputy Magistrate who tried the co-accused and that officer passed an order directing that the accused should not be proceeded against and that the warrant and other processes issued against him be withdrawn,

Held—*That this order of the Deputy Magistrate was bad in law and should be set aside. The proper course for him was to send notice to the complainant requiring him to proceed with the case and then dispose of the case according to law.*

Held further—*That the District Magistrate had no jurisdiction under sec. 437, Cr. P. C., to set aside the order and direct a retrial of the accused, as it was not an order dismissing a complaint or discharging the accused.*

This was a rule issued on the 7th of June 1907, calling on J. A. Ezechiel, Esq., the District Magistrate of Nuddia, to show cause why the order passed by him on the 14th of May 1907, directing that

the case under secs. 143 and 426 of the I. P. C. against the above Petitioner, against whom the warrants and other processes were withdrawn by the order of H. Van Gricken, Esq., Deputy Magistrate of Krishnaghur, dated the 28th of March 1907, must proceed according to law and that he must appear to take his trial, should not be set aside.

Facts material to the report are briefly these :—

On the 8th of August 1906, on the complaint of one Khosdel Sarkar summonses under sec. 426, I. P. C, were issued against Sri Nath Halder and the Petitioner by Babu S. K. Mukherjee, Deputy Magistrate of Krishnaghur.

The case was transferred by the District Magistrate to the file of the Deputy Magistrate, Mr. H. Van Gricken, on the application of the complainant.

Sri Nath Halder appeared before Mr. H. Van Gricken, the trying Magistrate, but the Petitioner did not appear, and the Deputy Magistrate after a protracted trial disbelieved the entire story of the complainant and acquitted Sri Nath Halder by his judgment, dated 19th December 1906.

After this order of acquittal the Petitioner against whom a warrant had been issued and against whose property an order of attachment was made under sec. 88, Cr. P. Code, appeared before the trying Magistrate on 28th March 1907 and applied for withdrawal of warrant and also of the order of attachment on the ground that the other accused had been acquitted and the whole story of the complainant had been disbelieved and the Magistrate passed the following order :—

"From the evidence in the case I don't think the accused, Panchu Ghosh, should be proceeded against. The warrant and other processes are withdrawn."

Thereupon the complainant moved the District Magistrate of Nuddia to have the order of the Deputy Magistrate set aside, and the District Magistrate, purporting to act under sec. 437, Cr. P. Code and without giving any notice to the Petitioner, set aside the said order of the Deputy Magistrate with the following remarks :—

"This second class Magistrate had no power to stay proceedings under sec. 249, Cr. P. Code, or any other section. The case must therefore proceed against Panchu according to law, and he must appear to take his trial. The finding as regards Sri Nath Halder does not affect Panchu."

Against this order of the District Magistrate, the Petitioner obtained the present rule.

Babus Sarat Chandra Roy Chowdhury and *Charu Chandra Bhattacharjee* for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows :—

There has been considerable irregularity in the proceedings in this case. On the complaint of one Khosdel Sarkar, two persons Sri Nath Halder and Panchu Ghosh were summoned. Sri Nath appeared and, on a trial before the Deputy Magistrate, he was acquitted on the 19th December 1906. In the meantime, process for arrest was issued against Panchu. He subsequently surrendered and the Deputy Magistrate, on the 28th March

PANCHU GHOSH v. KHOSDEL SARKAR.

1907, passed an order to the following effect:—"From the evidence in the case, I do not think the accused Panchu Ghosh should be proceeded against. The warrant and other processes are withdrawn." It does not appear under what section of the Code this order was made. It was certainly not an order under sec. 203, C Cr. P., because the case had already gone beyond the stage of sec. 203, C. Cr. P. Processes had already been issued against both the accused. It was not also an order of acquittal because no order of acquittal under sec. 245, C. Cr. P., could be passed unless evidence was taken. No opportunity was given to the complainant to attend and give evidence. The judgment in favour of Sri Nath could not be evidence in favour of or against Panchu.

The District Magistrate by his order, dated the 14th May 1907, set aside the order of the Deputy Magistrate and directed a retrial. As the order of the Deputy Magistrate was not one either under sec. 203 of the Code of dismissal of the complaint or an order of discharge of the accused, the District Magistrate had no jurisdiction under sec. 437 of the Code to make an order for retrial. He should have referred the case to this Court. That order is, therefore, set aside.

The order of the Deputy Magistrate, dated the 28th March 1907, should also be set aside. The proper course for the Deputy Magistrate was to send notice to the complainant and direct him to proceed with the case. He could not make any order in the case without notice to the complainant because the case had not been disposed of under sec. 247 of the Code. He should have proceeded regularly and passed orders according to law. Under these circumstances, we are of opinion that the Deputy Magistrate or any other Magistrate to whom the case may be transferred by the District Magistrate should proceed according to law after giving notice to the complainant. We order accordingly.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

No. 128 OF 1907.

MITRA, J.
FLETCHER, J.
1907.
7 August.

SHEO SARAN LAL,
First Party, Petitioner,

LAL MOHAMAD LAL
and FAIZULLA MIAN,
Second Party,
Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 133—Burial ground, order closing—Jurisdiction.

An order prohibiting the use of a grave-yard is not such an order as can be made under sec. 133 of the Code of Criminal Procedure.

This was a reference by H. W. C. Carnduff, Esq., Sessions Judge of Patna, recommending that an order of the Sub-divisional Magistrate of Dinapore, dated the 21st of November 1906, be set aside. Material portions of the letter of reference are set out below.

"On the 22nd November last one Sheo Saran Lal presented a petition to the Sub-divisional Magistrate of Dinapore alleging that a Mahomedan grave-yard, which had existed in Mouzah Samsara "from time immemorial," had become "very objectionable from a sanitary point of view," that night-soil and refuse

SHEO SARAN LAL v. LAL MOHAMAD LAL.

were freely deposited on it, that it was used as a public latrine, and that the pigs of Dusadhs and Domes frequented it in large numbers. In these circumstances the Petitioner prayed that the grave-yard should be closed and offered to provide another site for the burial of Mahomedan dead in some more suitable place. He at the same time complained of a totally different matter, namely, the unauthorised extension of the old grave-yard so as to encroach upon his land, named 36 persons (including the present Petitioners) as having caused this encroachment in the course of the last eight years, and stated that a civil suit on the subject had been lately instituted by him.

"On this somewhat confusing petition the Sub-divisional Magistrate issued a conditional order under sec. 133 of the Code of Criminal Procedure requiring the 36 persons named in connection with the alleged encroachment to "close the grave-yard" or show cause why they should not be called upon to do so: and eventually on the 21st December, he made the order absolute entirely on the strength of a so-called petition of compromise filed on behalf of Sheo Saran and Najaf Ali, one of the thirty-six.

"It seems to me that this order is wholly bad. In the first place, the conditional order ought not to have been addressed to the encroachers, but to the Dusadhs, Domes and others who were responsible for the nuisance of the grave-yard. In the second place, the agreement on which alone the order absolute was based, bound no one but Sheo Saran and Najaf Ali and certainly did not bind the present Petitioners. Thirdly, had an effective agreement to relinquish the grave-yard in favour of a new had been arrived at, the necessity for action under sec. 133 must, *ipso facto*, have disappeared, and the Magistrate ought to have discharged the conditional order instead of making it absolute. And, *fourthly*, an order closing a grave-yard is not, I submit, such an order as can be made under the section referred to.

"As regards the last of these grounds it seems to me that the ruling in *Indra Nath Banerjee* v. *Queen-Empress* (1) is in point and supports my contention; and I need not do more than refer to the concluding paragraph of the judgment of Hill and Wilkins, JJ. I would, however, also point out that on Sheo Saran Lal's own showing there was no urgency in the matter, and I venture to question as the Punjab Chief Court seems to have done in *Mir Imam Abdulaziz* v. *Queen-Empress* (2) the applicability of sec. 133 of the Code of Criminal Procedure where it is not shown that imminent danger to the public is involved.

"For these reasons I recommend that the Sub-divisional Magistrate's order of the 21st December 1906 be set aside. The cause shown by the Magistrate, which is submitted with the record, does not, in my opinion, meet the chief objections raised by the Petitioners."

Babus Dasarathi Sanyal and *Chandra Sekhur Prosad Singh* for the 1st Party.

Babu Hari Bhushan Mukherjee for the 2nd Party.

The JUDGMENT OF THE COURT was as follows :—

This is a reference by the Sessions

(1) 2 C. W. N. 113 : s. c. I. L. R. 25 Cal. 425 (1897).

(2) No. 4 Punjab Rec. 1897.

SHEO SARAN LAL v. LAL MOHAMAD LAL.

Judge of Patna asking us to set aside an order of the Sub-divisional Magistrate of Dinapore, dated the 21st of November 1906. The order of the Sub-divisional Magistrate was made under sec. 133, Cr. P. C, prohibiting the use of a burial ground by Mahomedans, and according to a petition of compromise presented by some of the second party he directed that another ground might be used for burial purposes.

We do not see how the present case can come under sec. 133 of the Code. It is not a case of the removal of nuisance from a public place as has been contended for by the learned vakil for the first party. We agree with the learned Sessions Judge in the reasons given by him and we accordingly direct that the order of the Sub-divisional Magistrate of Dinapore, dated the 21st November last, be set aside.

S. L.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 777 OF 1907.

MITRA, J.
FLETCHER, J.
1907.
15, August.

ABINASH CHANDRA GANGULI, Petitioner,
v.
THE CORPORATION OF CALCUTTA, Opposite Party.

Calcutta Municipal Act (III, B. C. of 1899), secs. 408, 419 and 575—Bustee improvement—Failure to make road as in standard plan of bustee—Bustee ceasing to be so.

After huts have been removed from a bustee land, the land ceases to be a bustee land and the provisions of sec. 408 of the Calcutta Municipal Act can then no longer have any operation on the owner.

This was a rule granted on the 5th of July 1907, against an order of Babu Amrita Lal Mukherjee, Municipal Magistrate of Calcutta, dated the 26th of June 1907, convicting the Petitioner under sec. $\frac{419}{575}$ of the Municipal Act and sentencing him to pay a fine of Rs. 5 a day for three days.

The facts of the case are as follows:—

One Abinash Chandra Ganguli, proprietor of the premises Nos. 82 and 83, Ripon Street, which was bustee land before the year 1904, was served with a notice, on the 29th November 1904, under sec. 408 of the Calcutta Municipal Act for making certain improvements according to the standard plan kept in the office of the Municipal Corporation. He failed to comply with the notice and was prosecuted on the 24th December 1905 and fined Rs. 10 In the meantime and before the conviction, the proprietor had removed all the huts on the land and on an application being made by him for the erection of a building, sanction was given and the proprietor raised a two-storied masonry building on the 10th day of May 1907.

Many months after the first conviction the proprietor was served again with a summons from the Municipal Magistrate to appear to answer to a complaint made against him by the Corporation of Calcutta under sec. 575 of the Calcutta Municipal Act for failing to comply with the said notice, dated 29th November 1904, under sec. 408 to carry out the improvements in the bustee at Nos. 82 and 83, Ripon Street, as specificed in Sch. A of the report attached to the standard plan of the said bustee within 3 months after having

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, DECEMBER 2, 1907. [No 4

Contents.

NOTES

A QUESTION OF CONSIDERABLE IMPORTANCE WAS recently raised before the Criminal Bench of the High Court then composed of Geidt and Sharfuddin, JJ. Several criminal appeals were presented in the office of the Criminal Appellate Side of the High Court on the 11th November last and were returned to the vakils concerned as time-barred. It appears that the 60 days allowed by the Limitation Act for presenting such appeals expired during the long vacation which came to a close on the 9th of November last. (*Vide* Notification printed at p. 289, Notes portion, 11 C. W. N.). The following day, the 10th of November, was a Sunday and it was argued before the Bench that under sec. 5, Limitation Act, the appeals had been preferred within time. It was submitted that the terms of the Notification make no distinction between civil and criminal appeals, that the vacation judges are appointed for attending to all urgent matters, whether civil or criminal, though it is no doubt the case that criminal cases, affecting as they do the liberty of persons, are generally treated as more urgent. The "vacation judges" did not, it was argued, constitute the ordinary Criminal Appellate Bench and the Court was closed for all ordinary criminal business as effectually as for ordinary civil business. Their Lordships however ruled that the appeals were time-barred.

IT MAY BE SAID THAT THE OFFICE OF THE CRIMINAL Appellate Side was open during several days of the vacation when the appeals if presented might have been received there. But the same may be said to be the case with Civil appeals. The office on the Civil Appellate Side remained open for several days after the long vacation commenced, and parties had the option to present appeals either during such time or on the re-opening of Court. It is also a matter of ordinary practice, that civil appeals may be presented during the long vacation when the office on the Civil Appellate Side is open to receive them and yet such appeals are not thrown out if presented on the re-opening day merely on the ground that the period of limitation expired on one of the days on which the office was open. We certainly do not find anything in the provisions of the Limitation Act, or in the terms of the High Court Notification to justify a contrary practice in respect of Criminal Appeals. Their Lordships evidently relied on the practice prevailing in the offices on the Criminal Appellate Side of treating the Vacation Bench as the Ordinary Criminal Appellate Bench of the High Court. But if this practice is contrary to the law as laid down in sec. 5 of the Limitation Act, it should be altered and brought into conformity with the law.

ACCORDING TO SEC. 316 OF THE PRESENT CODE OF Civil Procedure the title to immoveable property vests in the purchaser from the date of the confirmation of sale and not from the date of sale. This has created serious difficulties when the question to be decided is which of two successive auction-purchasers should have priority when the later purchaser has had his sale confirmed first. In deciding such questions of priority the Courts have been constrained to overlook the provisions of the section and act upon general principles of equity. The section really can have no intelligible application to such cases. This rule has therefore been altered by cl. 65

of the present Bill which provides that the title to such property vests from the time when it is sold and not from the time when the sale becomes absolute.

THE ALTERATION HOWEVER WILL BE OPEN TO OTHER objections. This is evident from the fact that if the debtor's title is extinguished on the day of sale he will not be entitled to recover any arrears of rent or profits from it nor will he be bound to pay up arrears of rent or profits that may be due from him from that day. The purchaser on the other hand, whose title begins from the date of sale, will find it very difficult, if not impossible, to realise rents or profits before obtaining possession. The result will be that the property will be in arrears and will be liable to be sold in execution of a decree for arrears of rents or other dues by third parties by the time the sale is confirmed and possession delivered to the purchaser. Auction-purchases at present are found in the majority of cases to be risky and speculative transactions. It may be fairly assumed that the suggested alteration will make them even more so. Probably the difficulties will be met by introducing a clause making it obligatory on a judgment-debtor, when a sale has been set aside, to indemnify the purchaser for all just payments made by him and the Court of execution should be given summary powers to award such indemnity to the auction-purchaser.

CL. 36, SUB CL. (3) PROVIDES THAT NO APPEAL SHALL lie on a matter of costs only where by law such costs are left to the discretion of the Court, except by leave of the Appellate Court obtained on an application accompanied by a memorandum of appeal. This provision requiring a party to obtain leave seems superfluous when it is provided in the rules that every appeal may be heard by the Appellate Court for admission before notice is sent out to the Respondent (Rule No. 11, Order No. XII, which is a rule similar to sec. 551 of the present Code). When there is this provision for a preliminary hearing, it seems to be wholly unnecessary that special leave should be sought and a separate application made for purposes of such appeals.

THE PROVISION IN THE BILL HAS NO DOUBT BEEN borrowed from the Judicature Act of 1873. But English decisions show that no leave is required in cases where the judge has failed to exercise "judicial discretion." This is evident from the recent case of *Edmund* v. *Martell*. We publish below the comments on this case in the columns of the English *Law Journal* of the 2nd November last.

The judgment of the Court of Appeal on Monday in *Edmund* v. *Martell* is only the last of a series of cases in which it has been held that the discretion of the Judge to deprive a successful party of his costs must be exercised judicially. In view of the previous cases in which the disallowance of costs has been reviewed by the Court of Appeal, it is rather surprising that the point should have been raised that sec. 49 of the Judicature Act, 1873, absolutely precludes an appeal without leave on a question of costs. No leave is required when the Judge has not exercised a 'judicial' discretion or when no materials exist for the exercise of his discretion. Thus it has been held that misconduct which has no relation to any issue between the parties is no ground for depriving a successful party of his costs; nor can he be visited with this penalty because he has raised what the Judge considers a shabby defence—*e.g.* the Gaming Acts—or because he refuses to let the Judge decide what should be done as a matter of fairness, irrespective of his legal rights. In *Edmund* v. *Martell* Mr. Justice Sutton disallowed the Defendant's costs on the ground that before making certain alterations to the premises of which she was tenant (which he held she was entitled to make) she ought to have communicated with her landlord. This, said the Court of Appeal, was disallowing the costs because the Judge thought that the successful party might have acted with more consideration, and no power exists to disallow costs on such a ground.

THE PROVISIONS OF THE CIVIL PROCEDURE CODE relating to revision as embodied in sec. 622 are not substantially altered. But having regard to the conflict of authorities as to the interpretation of this section it is desirable that the conflict should be set at rest. Some judges are of opinion that gross and palpable errors of law do come under sec. 622 whereas others think that they do not. The Privy Council case of *Amir Hassan*, 11 Cal. 6, has been differently interpreted in different Courts. The views expressed in the following cases amongst others deserve consideration. (*Mohunt Bhagwan* v. *Khettar Moni*, 1 C. W. N. 617; *Mathura Nath* v. *Umesh Chandra*, 1 C. W. N. 626; *Raghu Nath* v. *Chattrapat*, 1 C. W. N 633; *Enat Mondal* v. *Baloram Dey*, 3 C. W. N. 581).

IT IS A WELL ESTABLISHED PRACTICE IN ENGLAND that the executive Government never interferes with the judiciary and the judiciary on the other hand hold themselves scrupulously aloof from all possible political influence in the discharge of their duties on the Bench. The following account of Lord Ellenborough's protest against the combination of executive and judicial functions written by a K. C. M. P. and published in the *Law Times* is both interesting and instructive. The conclusion of the writer also seems to suggest that in times of political trouble it is the duty of the judiciary to keep the placid stream of justice unpolluted by political bias.

The remarks of Lord O'Brien, the Lord Chief Justice of Ireland, in the Irish King's Bench Division, on Tuesday last week, with respect to the attitude of the executive Government in not instituting proceedings against persons who by speeches incited to "cattle driving," and a reference to his own line of action, when Attorney-General, in ordering prosecutions, which elicited from the Irish Attorney-General the disclaimer of having "shirked" his duty, constitute a somewhat regrettable departure from the salutary practice

by which judges hold themselves precluded from interference with the executive, more specially in matters relating to the administration of criminal law, in cases in which by virtue of their judicial position they may be called on to stand indifferent between the subject and the Crown. When, in 1806, on the formation of the Ministry of All the Talents, Lord Ellenborough, as Chief Justice of England, consented to be a member of the Cabinet, the anomalous character of his position as a Minister of the Crown and a judge was the subject of controversy between him and Mr. Perceval, a former Attorney-General, who was subsequently Prime Minister. Lord Ellenborough stated that he had made it a condition precedent to his entering the Cabinet that in all matters relating to the administration of the criminal law, or in any way, however indirectly, bearing on the policy of criminal prosecutions, he was to take no part whatever in consultations, of which he was not even to be informed. The union, however, of judicial and executive functions, subject even to this reservation, was regarded as open to such serious inconvenience that the precedent in the case of Lord Ellenborough has never since been followed. The cases are few in which a member of the judiciary has adopted the *rôle* of a critic of the Government, which is responsible for the peace of the country, with reference to the prosecution of alleged offenders. In 1798, indeed, a Chief Justice of Ireland came into collision with the Government of the day in the interest, not of the restriction of liberty, but of its defence. In 1798 Wolfe Tone, an Irishman, took part in a French invasion of Ireland. The French ship of war in which he sailed was captured, and Wolfe Tone was brought to trial in Dublin before a court-martial. He was thereupon sentenced to be hanged; he held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place, application was made to Lord Kilwarden, the Lord Chief Justice of the Irish Court of King's Bench, for a writ of *habeas corpus*.

CURRENT INDIAN CASES.

PUTTANNA *v.* RAMAKRISHNA, I. L R. 30 Mad. 195. *Specific Relief Act, sec. 42—Declaratory suit.*

On the death of the last male owner leaving a widow, the presumptive reversioner brought a suit for a declaration that the alleged Will of the last male owner is invalid and does not bind his reversionary interest. *Held*, that such a suit is maintainable under sec. 42 of the Specific Relief Act.

DURGOZI *v.* FAKEER SAHIB, I. L. R, 30 Mad. 197. *Mahomedan Law—Sale of minor's property by mother.*

The sale by the mother, though made by her as *de facto* guardian of the minor—the parties being Mahomedans—is not binding on the minor. There is no rule of Mahomedan law which precludes Mahomedans from claiming the benefit of the principle of equity embodied in sec. 51 of the Transfer of Property Act.

DHOORJETI *v.* DHOORJETI, I. L. R. 30 Mad. 201. *Limitation Act, Sch. II, Art. 127.*

Art. 127 of Sch. II of the Limitation Act is no bar to a suit brought by a person for partition of joint family property in his natural family after his adoption in another family is found to be invalid.

KARUPPAN *v.* KANDASAMI, I. L. R. 30 Mad. 207. *Attached property, wrong done to—Remedy—Transfer of Property Act, sec. 91 (f)—Right to redeem, of attaching creditor.*

The right given in sec. 91 (*f*) of the Transfer of Property Act is not one given to attaching judgment creditors by the Code of Civil Procedure. Where certain crops which had been attached were wrongfully carried away by a third person the remedy of the creditor is to move the executing Court and not to bring a separate suit.

RAMINEEDI *v.* LAKKOJI, I. L. R. 30 Mad. 210. *Limitation Act, Sch. II, Art. 178.*

Where an execution sale is set aside and the decree-holder obtains refund of the money deposited by him, time runs from the date of refund for making a fresh application for execution.

MAVULA *v.* MAVULA, I. L. R. 30 Mad. 212. *Civil Procedure Code, sec. 586.*

Where in a suit for contribution the debt became due by virtue of the payment of the co-sharer, sec. 586, C. P. C., will apply. In determining whether second appeals lie in execution proceedings of suits of a Small Cause Court nature the test is not the amount claimed in execution but in suit.

APPAYA *v.* KUNHATI, I. L. R 30 Mad. 214. *Civil Procedure Code, sec. 310A.*

The words "whose immoveable property has been sold" in sec. 310A, Civil Procedure Code, should be so construed as to include cases where a party acquires an interest in the property, such as would otherwise entitle him to apply under the section where the interest has been acquired after the sale and before the expiration of the thirty days.

KURELLA *v.* POLISETTI, I. L. R. 30 Mad. 217. *Jurisdiction—Application for execution of Small Cause Court decree.*

Where a Small Cause Court is abolished after passing a decree, the Court in which the decree is to be executed is the Court in which the suit had to be brought at the date of the suit if no Court of Small Causes had been in existence.

ALRAJA NAIDU, IN THE MATTER OF, I. L. R. 30 Mad. 222—*Witness—Prosecution—Defamatory words.*

It is against public policy that a person should be liable to prosecution for having used defamatory language in answer to questions put by a Court to a witness.

MUTHIA v. EMPEROR, I. L. R. 30 Mad. 225. *Criminal Procedure Code, secs. 215, 436.*

Sec. 215, Criminal Procedure Code, refers only to commitment actually made. It is open to the High Court to consider whether the Sessions Judge has or has not exercised a proper judicial discretion under sec. 436, Criminal Procedure Code, in setting aside a Magistrate's order of discharge; though the High Court has this power it will only exercise it where it is manifest that the Session Judge's order is improper.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH — *Warren* v. *The London Road Car Company.* Before MR. JUSTICE DARLING. 24th October 1907.

Solicitor—Preparation of brief—Solicitor's responsibility—Costs, order against solicitor for.

In this case which now came on upon the application of the Defendants, that the Appellant's solicitor, Mr. F. C. Appleton of Portugal Street, should be ordered to pay Defendant's costs for the reason that the facts reflected the gravest discredit upon him as an officer of the Court, Mr. Justice Darling in delivering judgment said :—

"The real question which led to the litigation was whether the Plaintiff had been hurt or not. He (the learned Judge) held there was no evidence of negligence and the jury agreed with him. Before acceding to this application he must see that the delinquency was thoroughly brought home to Mr. Appleton. The case was taken up absolutely on speculation. If Mr. Appleton believed that the Plaintiff was a man of some substance it was remarkable that he did not ask him for some money. The Police report said no one was injured and there was no suggestion in Plaintiff's proof that the Plaintiff was injured and yet Mr. Appleton went on with the action. The brief stated that the Plaintiff complained of being hurt at the time. Mr. Frazer (the clerk) put that in the brief but he did not know where he got it. Into the proof of Plaintiff as set out in the brief he put a statement of which there was no evidence whatever that the Plaintiff was pinched between his van and the horse trough. The excuse made by the clerk—and this threw a flood of light on the way in which some people get up briefs—was that if it was not true the witness would not say it. There was nothing to bring this home to Mr. Appleton but the brief was handed to Counsel with his name upon it and the gravest injustice would follow if briefs were prepared in this way. This action was brought on the flimsiest evidence and with an exagge-tion and falsification of the proofs and if he was at Mr. Appleton knew of it he would have tion in ordering him to pay the Defendant's costs. Even in regard to him the case was one of the gravest suspicion. As however he was not certain that Mr. Appleton was cognisant of the reprehensible conduct of his clerks he could not make the order asked for. The application would therefore be dismissed but without costs as the Defendants in bringing the application before the Court had performed a great public service."

Mr. A. J. Simon for the Defendants in support of Application.

Mr. Shearman, K. C., and *Mr. Wickham* for the Plaintiff's Solicitors.

C. W. A.

KING'S BENCH.—*Re Arthur Morris.* Before MR. JUSTICES PHILLIMORE and WALTON. 29th October 1907.

Intoxicated juryman—Affidavit by solicitor or juror required.

A writ of certiorari was sought for by a rule *nisi* upon the Justices of Monmouthshire to show cause why that writ should not issue in the case of Arthur Morris It was said upon the affidavit that while he, Morris, was acting as a juryman he was under the influence of liquor. Immediately after the verdict (the prisoner under trial being found guilty of misdemeanour) another case was being tried when it was discovered that Arthur Morris was asleep. An officer of the Court had to shake him and it was without doubt that he was under the influence of liquor. In that case consequently the jury was discharged In the previous case too it was seen that the juryman was resting his head on his hands and was not taking much notice of what was going on. The cases of *R.* v. *Murphy* (L R. 2 P. C. 535) and *R.* v. *Woodfall* (5 Burr. 2661) were cited and the case of *R* v. *Rothwell* heard in August 1895, where when it was discovered after a man had been convicted and sentenced that a son had taken the place of his father, the latter being the qualified juryman the matter was brought to the Court's notice. The Court in refusing the rule *nisi* said in *Rothwell's* case the rule *nisi* was discharged on the ground that the objection ought to have been made at the time. The solicitor here was the prisoner's solicitor. While there was a chance of acquittal he took no exception to the man though he had noticed his behaviour. That was the time to call the attention of the presiding Judge. All the solicitor's affidavit says was that the man did not speak at the time, not that owing to his condition he could not speak. It was difficult to say that in this case there was not a verdict of 12 men. There were not sufficient materials before the Court. The application may be renewed. If it was to succeed there ought to be an affidavit of the circumstances made by a juryman. It was not sufficient to have the affidavit of a solicitor acting upon information given by a member of the jury.

Mr. Bosanquet in support of the Application.

C. W. A. *Refused with liberty to apply.*

ADMIRALTY COURT. *The Welsh Girl.* Before MR. JUSTICE BARGRAVE DEANE. 11th April 1906.

Dispute between owner and underwriters—Conflict between decision of United States Court and English Court—Valuation in policy.

The Welsh Girl was sunk and totally lost. This was owing to a collision with the steamship *Commonwealth.* In the policy she was valued at £1,350, but the owners insured her with the Dee Ship-Owners Mutual Insurance Club at only £1,000. Her owners were therefore her underwriters for £350. The owners of the *Commonwealth* having denied that their ship ran down *The Welsh Girl,* the said Insurance Club paid £1,000 to the owners of *The Welsh Girl.* Their allegation was that they did so on the understanding that the owners of *The Welsh Girl* would surrender to them any rights they recovered against the wrong-doers. The Insurance Club being convinced upon evidence they gathered, that the owners of the *Commonwealth* were the wrong-doers, issued a writ against them in the name of the owners of *The Welsh Girl* and thereafter the owners of the *Commonwealth* admitted liability. The Registrar assessed the value of *The Welsh Girl* at £1,000, with freight and interest, the amount was made up to £1,348, recoverable from the owner of the *Commonwealth.* The question now was of this amount paid into Court how much the Insurance Club was entitled to and how much the owners of *The Welsh Girl.* The former claim the £1,000 they had paid and the remainder under the said agreement to surrender all rights. The latter on the basis of the valuation of *The Welsh Girl* at £1,350 said that they ought to receive $\frac{350}{1350}$ while the Insurance Club should have $\frac{1000}{1350}$ or £740 odd. They denied the fact of any surrender agreement. Costs to be borne proportionately to the total amount recovered. The learned Judge held that the alleged surrender agreement had not been made out It must be remembered that once the value of the ship was fixed in the policy, neither owner nor underwriter had any right to depart from it. He held that the owners of *The Welsh Girl* were right in the proposed way of dealing with the money paid into Court. There was a conflict of authority between the United States decision (*Zevingston* v. *Maryland,* 130 Fed. Rep. 747) and of the English Court decision (*North Eastern Insurance* v. *Armstrong,* L. R. 5 Q. B. 333). Upon such conflict the learned Judge preferred to follow the English Courts.

Mr. Horridge, K. C., and *Mr. Hill* for Owners of Welsh Girl.

Mr. Scrullon, K. C., and *Mr. Stephens* for the Underwriters.

C. W. A. *Judgment for the Welsh Girl Owners*

PROBATE COURT. *Wallis* v. *Brown and others.* Before MR. JUSTICE BARGRAVE DEANE. 18th April 1907.

Probate—Triple murder—Will of murdered woman —Judge acting on medical evidence of wife having survived husband and sister.

Probate was claimed of the Will of Mrs. Maria Catherine Brown. There was only a formal defence. Mr. Brown a congregational minister suddenly went mad, and on 30th July 1906 murdered his wife and her elder sister Miss Mary Rider Elliott. The crime was known as the Wanborne triple tragedy, Mr. Brown having immediately after committed suicide The question was whether Mrs. Brown had survived her said sister and husband. Dr. Crossman gave evidence that from the position of the bodies he was in no doubt that she had survived both her husband and her sister.

The learned Judge acting on that evidence made the grant *cum testamento annexo* and declared that she had survived her sister and her husband.

Mr. Norton, K. C., and *Mr. Grazebrook* for the Applicants

Mr. Bayford for the executors of husband's Will.

C. W. A

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD ROBERTSON. LORD COLLINS SIR ARTHUR WILSON. 1907. 29, October.	SHEIKH ALI HUSAIN, Defendant, Appellant, *v.* MAKHAN LAL, Plaintiff, Respondent.

Appeal struck off for default—Application for restoration.

In this case Appellant applied to have his appeal restored

The facts disclosed that Appellant had mortgaged his village Khandanian without possession to the Respondent in 1899 for an advance of Rs. 6,500 and afterwards a further charge was given for Rs 600.

Respondent commenced this suit for possession as "mortgagee of *Khandanian*" The Sub-Judge of Biswan dismissed the suit for possession but gave a decree for sale of property on default of payment of Rs. 996 which he found was due. Upon the Respondent's appeal that decision was reversed in November 1904 by the Court of the Judicial Commissioner and Plaintiff was awarded a decree for possession.

Appellant was allowed in due course to appeal to His Majesty in Council. The order was dated 10th June 1905.

On 5th June 1907 the Registrar of the Privy Council wrote to Appellant's London Solicitors Messrs. Dawning Handcock & Co., that he did not see his way to granting Appellant any indulgence, that the record had arrived in England on the 22nd August 1906 and unless effectual steps were taken

before the 14th June 1907, the appeals would be dismissed. On the 6th June 1907 Appellant's said solicitors wrote to Appellant to that purport and effect. Appellant now submitted that long before he could have received that letter, the 14th June had gone past. That he took steps immediately to despatch Rs. 4,000 to his solicitors through the Bank of Allahabad, but he was informed by the officials of the local Court that on 2nd July 1907 his appeal was struck off.

He now prayed for its restoration upon the ground that from February 1907 plague had been raging, in his town, and had nearly depopulated it. That his wife, a child, in all 13 members of his household had died of it.

Mr. C. W. Arathoon supported the application to restore the appeal under such circumstances, as also another appeal of the Petitioner against other Respondents which was in a suit concerning a mouzah known as Baragaon.

Mr. Ross opposed in the one case.
Mr. DeGruyther in the other.

After hearing the arguments Lord Robertson intimated that the applications would be refused with costs.

C. W. A. *Application refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION Before CASPERSZ and CHITTY, JJ. CRIMINAL REVISION No. 1022 OF 1907. IN THE MATTER OF GOURHARI SADHU KHAN, Petitioner. 31st October 1907.

Rule nisi for further enquiry—Failure to serve rule on accused—Proper order.

The Petitioner, Gourhari Sadhu Khan, obtained a rule upon the District Magistrate to show cause why his complaint against one Amar Kristo Dutta which was dismissed by the Joint Magistrate should not be heard according to law. This rule was at first issued only upon the District Magistrate, but subsequently the High Court directed a fresh rule to issue calling upon the District Magistrate as well as the accused, Amar Kristo Dutta, to show cause why the complaint should not be heard according to law. Efforts were made to serve a notice of the rule upon the accused, but it was not served as according to the District Magistrate's report the accused could not be traced.

Their Lordships observed :—

"In the circumstances we think the proper order to pass will be that the rule be discharged with liberty to the Petitioner Gourhari Sadhu Khan to make a fresh application to the Court when the whereabouts of the accused Amar Kristo Dutta have been ascertained. The present rule is discharged."

Babu Dasarathi Sanyal for the Petitioner.

B. G. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER No. 555 OF 1905. KUNJ LAL MARWARI, Plaintiff, Appellant *v.* LACHMAN PROSAD SINGH AND OTHERS, Defendants No. 2 to 5, Respondents. 11th November 1907.

Sec. 583, Civil Procedure Code—Restitution—Trespasser.

Kunj Lal Marwari brought a suit for recovery of land against one Rampal Singh. A Receiver was appointed pending the suit who reported that he could not get peaceful possession as Lachman Prosad Singh and others claimed the land as tenants The Plaintiff thereupon added the said Lachman Prosad and others as Defendants No. 2 to 5 to the suit but the plaint was not amended nor any allegations made or reliefs claimed against them in the plaint. No issue was raised as to the status of the added Defendants but the Subordinate Judge who heard the case found that they had no title to the land and gave the Plaintiff a decree for *khas* possession against all the Defendants. The Defendants appealed to the High Court. The appeal of Defendant No. 1 was compromised but the appeal of Defendants 2 to 5 were decreed on the ground that there was no cause of action against them and Plaintiff adduced evidence to prove that he and not the Defendants 2 to 5 were in possession. The decree of the Subordinate Judge was set aside so far as Defendants No. 2 to 5 were concerned and the suit against them dismissed. Pending that appeal the Plaintiff executed the decree of the first Court and took delivery of *khas* possession. After the decree of the High Court the Defendants 2 to 5 applied for restitution under sec. 583, Civil Procedure Code. The Subordinate Judge directed that they should be restored to possession by ousting the Plaintiff. The Plaintiff filed the above appeal against that order and it was contended on his behalf (1) that Defendants 2 to 5 having been found by the Subordinate Judge in the original suit to have no title to the land they could not get back possession and at best they were trespassers and could not get the benefit of sec. 583, C. P. C. (2) Evidence ought to have been taken who was in actual possession on the date of delivery of possession. It was argued for the Respondent (1) that rightly or wrongly the Defendants 2 to 5 were in possession as tenants and *khas* possession was taken against them in execution of the decree of the first Court which was subsequently set aside and they are entitled to get

back their previous possession. Sec. 583 contemplates that *status quo ante* should be restored. Assuming Defendants 2 to 5 were trespassers when *khas* possession was taken against them they are entitled to be restored to possession. (2) The petition under sec. 583 and the Nazir's report thereon prove that Defendants 2 to 5 were in possession on the date of delivery of possession and Sub-Judge relied on them.

Held—Under sec. 583, C. P. C, a trespasser should be restored to possession if he had been dispossessed in execution of a wrong decree which was subsequently set aside. The Court below must find on the evidence, that may be adduced, whether Defendants No. 2 to 5 were in actual possession of the disputed land either as tenant or as trespasser on the date the Plaintiff took delivery of possession in execution of the decree of the first Court and if they are found to have been in such possession they should be restored to their previous possession.

Babu Monmatha Nath Mukherjee for the Appellant.
Babu Kshetra Mohun Sen for the Respondents.

A. T. M. *Case remanded.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM APPELLATE DECREE No. 307 OF 1906. MAKHODA DEBI AND ANOTHER, Appellants *v.* UMESH CHUNDER BANERJI AND OTHERS, Respondents. 12th Novmber 1907.

Ghatwali tenure—Mortgage—Mortgage deed describing the tenure as jaigir*—Decree on mortgage—Decree absolute—Mortgagor subsequently acquiring mokurari lease—Mortgagee purchaser—Transfer by mortgagor—Transfer of Property Act (IV of 1882), sec. 43—Mortgagee purchaser and subsequent purchaser, contest between.*

The land covered by this litigation was a portion of *ghatwali* land which was in the possession of Defendant No. 4 as a *ghatwal.* In 1898, he mortgaged the land to the Defendant Nos. 2 and 3 alleging that it was *jaigir* land. There was nothing in the mortgage deed which would indicate that the mortgagor had no alienable interest in the land. It was not described in the deed as *ghatwali.* The mortgagees instituted their suit on the mortgage and obtained a preliminary decree on the 17th August 1901 and a final decree for sale on the 15th March 1902. In the meantime, the mortgagor entered into a contract of sale with the Plaintiffs; but no sale took place until the 30th April 1902. The contract of sale had not the effect of conveying the property. At the time of the mortgage, the mortgagor had no other right than that of a *ghatwali* tenure-holder; but on the 30th September 1901, the mortgagor obtained a *mokurari* right from the Burdwan Raj, the land having been resumed in the meantime and settled with the Raj. The mortgagee Defendants purchased the property on the 22nd May 1902 and succeeded in obtaining possession. The Plaintiffs brought this action for possession of the land covered by the mortgage and purchased by the mortgagee Defendants.

The Defendant No. 1 was a tenant on the land and he pleaded the right of the mortgagee Defendants in a suit which was instituted for rent against him by the Plaintiffs.

The first Court came to the conclusion that the mortgagee Defendants had right to possess the land by virtue of the mortgage, the mortgage decree and the sale thereunder. The lower Appellate Court, while holding that the mortgage was good and that the decree and the sale were neither fraudulent nor collusive came to the conclusion that the Plaintiffs were entitled to the reliefs claimed on two grounds; first, that it was not made out that the land covered by the plaint was identical with the land purchased by the mortgagee Defendants and, second, that under sec. 43 of the Transfer of Property Act, those Defendants had not the right to resist the Plaintiffs. The Defendants appealed to the High Court.

Held—That as the mortgagee Defendants had the right, they having obtained a final decree for sale before the purchase by the Plaintiffs, that right can not be defeated by the application of the rule laid down by sec. 43 of the Transfer of Property Act. It was a legal right created by a decree which cannot be disturbed and the mere fact that the Plaintiffs purchased subsequently would not, unless the mortgage and the decree were fraudulent, defeat the right of the mortgagee Defendants.

The rule of law which underlies sec. 43 of the Transfer of Property Act is that as between the transferor and the transferee the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the well-known rule of estoppel.

Held also—That as the question of identity was not distinctly raised in the pleadings, it should not have been given effect to.

Mr. B. C. Seal for the Appellants.

Babus Mahendra Nath Roy and *Latit Mohun Banerjee* for the Respondents.

A. T. M. *Appeal decreed.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J., and GEIDT, J. APPEAL FROM APPELLATE DECREE No. 2128 OF 1905. SYED ABDUL RAB, Defendant, Appellant *v.* MR. H. C. EGGAR AND ANOTHER, Plaintiff, Respondents. 12th November 1907.

Mutwallis, *suit against—All mutwallis to be made parties—Infant mutwalli not properly represented, effect of.*

The suits were brought to realise arrears of rent. The rent was created by a putni pottah. The interest under that putni pottah subsequently became vested in the two Defendants as *mutwallis*. One of these *mutwallis* was a minor He was a Defendant. Guardian *ad litem* was appointed on his behalf for the purposes of the suit. It was found that the summons was not properly served upon him. An objection was taken at the hearing that the minor Defendant was a necessary party to the suit and that he was not properly represented before the Court. The Plaintiffs did not ask the Court to allow the suit to stand over for a short time to enable a guardian to be properly appointed.

The suit was dismissed by the first Court but was decreed by the Appellate Court. On appeal to the High Court,

Held—That both the *mutwallis* are necessary parties and as they were not brought on the record, the Plaintiffs' suit must fail.

Dr. Priya Nath Sen for the Appellant.

Babu Surendra Nath Guha for the Respondents.

A. T. M. *Appeal allowed*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ., APPEAL FROM APPELLATE DECREE No. 332 OF 1905, UPENDRA NARAYAN ROY, Plaintiff, Appellant, *v.* RADHA RAMAN MUNSHI AND OTHERS, Defendants, Respondents. Heard, 11th November. Judgment, 20th November 1907.

Possession, suit for—Diluvion—Onus of proof—Survey Map—Presumption.

The Plaintiff sued for a declaration of his talukdari right in and possession of certain land which he alleged was a part of his Mouzah Brahmachari. His case was that the land in question diluviated while it was in his possession, and had in part reformed adjacently to the Defendants' two mouzahs, and was in part represented by a *kole*, occupied by the Defendants and he alleged that the Defendants had dispossessed him both of the reformed land and the *kole*. To this the Appellants-Defendants pleaded that the Plaintiff's predecessor in title were never in possession of the land in question and that they enjoyed adverse possession thereof for more than 12 years. The Sub-Judge decreed the suit in the Plaintiff's favour as regards two of the plots of the land claimed on the ground that the Plaintiff's title before diluvion must be presumed from facts and the Defendants failed to prove possession of the land for 12 years before suit. The District Judge set aside this part of his decree on the ground that it was for the Plaintiff to prove possession within 12 years before suit and that this he had failed to do. The Plaintiff appealed to the High Court.

The evidence of diluvion was supplied solely by a Survey Map of 1854, in which the boundary of the Plaintiff's mouzah was shown as crossing the river Hoora Sagar and following the course of the opposite bank in such a way as to enclose the space occupied by the two plots in question. The lower Court presumed that the two plots were in the possession of the Plaintiff at the time of the survey in such a way that they would still be in his possession when they become capable of being possessed.

Held—That the Plaintiff should lay a foundation for his case by proving that he was in possession of the land from which he was dispossessed in order to satisfy the requirements of the first two propositions laid down by Wilson, J., in *Mono Mohun Ghose* v. *Mathura Mohun Roy* (I. L. R. 7 Cal. 225).

Held further—The survey map cannot be taken as showing that the site of the river was ever dry land. The lower Court is wrong in presuming that there was ever such a possession of land as was found to have existed in the Plaintiff's predecessor in title.

Babus Jogesh Chunder Roy, Surendra Nath Guha, Sarat Kumar Mitra and *Anilendra Nath Roy Chowdhury* for the Appellant.

Babus Lal Mohun Das, Mohini Mohun Chuckerbutty and *Biraj Mohun Mozumdar* for the Respondents.

A. T. M. *Appeal dismissed.*

been convicted under sec. 574 on the 20th December 1905. The proprietor was tried by the learned Municipal Magistrate, who, by his order dated 26th June 1907, convicted him under secs. 408 and 575 of the said Act and sentenced him to pay a fine of Rs. 5 a day for 3 days.

Against the order the said proprietor moved the Hon'ble High Court and obtained a rule against the Municipal Magistrate to show cause why the conviction and sentence should not be set aside on the ground of, *first*, that the prosecution was barred by limitation and, *second*, that the land having been taken out of the category of bustee land, the proprietor was not bound to make streets in accordance with the bustee plan.

Mr. A. Chaudhuri with *Babu Jatindra Nath Ghose* for the Accused, Abinash Chandra Ganguli.

Mr. Stokes with *Babu Debendra Chunder Mullik* for the Corporation.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner is the proprietor of premises Nos. 82 and 83, Ripon Street, which was bustee land before the year 1904. On the 29th November 1904, a notice under sec. 408 of the Calcutta Municipal Act was served on him for making certain improvements according to the standard plan kept in the office of the Municipal Corporation. The Petitioner failed to comply with the notice and he was prosecuted and convicted on the 24th December 1905 and fined Rs. 10. In the meantime and before the conviction, the Petitioner had removed all the huts on the land and, on an application made by him for the erection of a building, sanction was given; but it is said that the sanction was clogged with the condition that a certain road should be made. The road is shown in the standard plan as E. E. After the removal of the huts and the erection of the building in accordance with the plan submitted by the Petitioner, the land ceased to be bustee land under sec. 419 of the Act which says that, after the huts are removed, the land shall cease to be bustee land, and it is found by the Municipal Magistrate and it is also stated in his explanation to this Court that the land has ceased to be bustee land. The provisions, therefore, of sec. 408 of the Act ceased to have any operation and the Petitioner could not, after the land ceased to be bustee land, be convicted under that section read with sec. 575 of the Act. The provisions of sec. 414 as to streets and passages also ceased to have any operation against the Petitioner.

It appears to us that there could be no conviction of the Petitioner under any of the sections of the Act, far less under sec. 408, for his not making the road according to the standard plan when the land had ceased to be bustee land. The Municipal Magistrate has convicted the Petitioner and sentenced him to pay a fine of five rupees for 3 days on account of his continual refusal to comply with the notice under sec. 408 of the Act. But under the circumstances stated above, there was no offence, far less a continuing offence, committed by the Petitioner.

The learned Counsel for the Corporation has relied on the proviso of sec. 419; and that is also the law which the

Magistrate in his judgment and also in his explanation has relied on. The proviso, however, does not empower the Corporation to prosecute a person who was the owner of a bustee but who has ceased to be the owner of the land as a bustee under sec. 408. It does not appear, that the proviso compels the owner of a bustee to make a road according to the road indicated in a standard plan after the land has ceased to be bustee land. It only says, supposing it refers to roads indicated in the plan, that they shall continue to be private streets and shall be subject to the provisions of sec. 416, sub-sec. (2) Neither this proviso nor any other section of the Act authorizes the Corporation to bring a criminal action under the Act against the proprietor of a bustee. For these reasons, we are of opinion that the conviction and sentence must be set aside.

It is not necessary for us to express any opinion on the question of limitation raised by the rule.

The fine, if paid, will be refunded.

Messrs. G. N. Dutt, Attorney for the Accused.

Mr. M. L. Sen, Solicitor for the Corporation.

A. N. C.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD MACNAGHTEN.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
1907.
31, October.

BAJRANGI SINGH (since deceased, and now represented by Drigpal Singh and Gulab Singh) and anr., Appellants, Plaintiffs,

v.

MANOKARNIKA BAKHSH SINGH, Respondent, Defendant.

Hindu Law—Widow's estate—Alienation of husband's estate without legal necessity—Consent of reversioners—Consent ex post facto—Bhale Sultan Chattri *tribe of Oudh—Custom excluding daughter and her issues from inheritance—Proof—General custom—Evidence Act (I of 1872), sec. 48.*

In the absence of legal necessity a Hindu widow can alienate property to which she has succeeded on the death of her husband with the consent of the nearest reversioners for the time being. Ordinarily the consent of the whole body constituting the next reversioner should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

The consent of the reversioners is effective even when given after the execution of the deed of transfer.

RADHA SHYAM *v.* JOY RAM SENAPATI (5) *approved.*

RAMPHAL RAI *v.* TULA KUARI (3) *disapproved.*

NOBOKISHORE SARMA ROY *v.* HARI NATH SARMA ROY (4), MARUDAMUTHU NADAN *v.*

(3) I. L. R. 6 All. 116 (1888).
(4) I. L. R. 10 Cal. 1102 (1884).
(5) I. L. R. 17 Cal. 896 (1890).

BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH

SRINIVASA PILLAI (6), VINAYAK *v.* GOVIND (8) *referred to.*

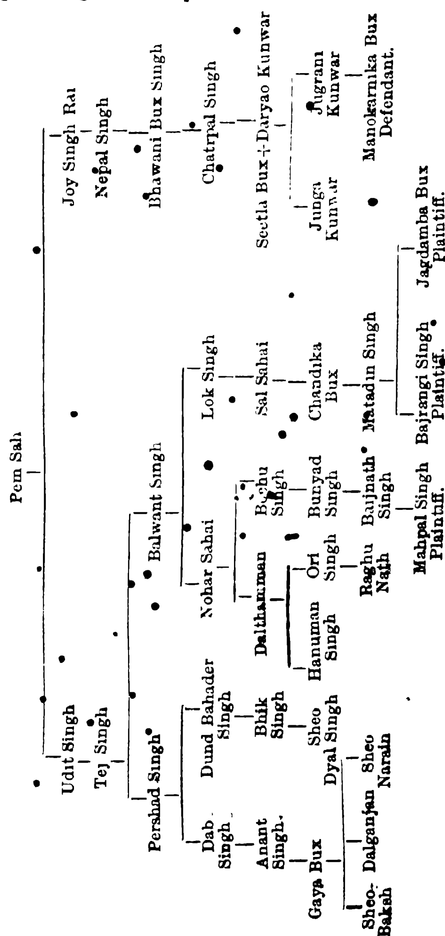
Held—*That the evidence adduced in this case proved the existence amongst the Bhale Sultan Chattris in Oudh of a general custom excluding daughters and their issue from inheritance.*

This was an appeal from a judgment and decree of the Court of the Judicial Commissioners of Oudh, dated the 6th March 1900, which affirmed a decree of the Court of the District Judge of Rae Bareli, dated the 23rd January 1899.

The property in dispute is an estate comprising the villages of Karnai, Pindara, Rampur, Surpur, Mansahpur, Misirpur and Rambagar, and shares amounting to 5 annas 4 pie in each of the villages of Kishundaspur and Math Sarastigir, all being situate in the District of Sultanpur. The Appellants claimed to recover possession of the said estate as next heirs to one Seetla Bux, who died prior to the annexation of Oudh, leaving him surviving a widow, Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. The widow succeeded to possession of the estate, and died on the 6th August 1892; and the main question raised on the present appeal was whether the Appellants on her death became entitled to the immediate possession of the said estate to the exclusion of the daughters and their issue. The Respondent was the son of the said Jagrani Kunwar, who married one Maheshar Bux Singh.

Daryao Kunwar had during her lifetime executed several conveyances of portions of the estate. On the 21st October 1872, she sold the said village of Surpur to Maheshar Bux for Rs. 1,000. On the same date she sold the villages of Misirpur and Mansahpur to the same person for Rs. 900 and Rs. 1,000 respectively. On the 24th July 1875, she sold the remaining portion of the estate to Maheshar Bux for Rs. 9,000. In pursuance of these sale-deeds the purchaser was placed in possession and his name duly recorded in the revenue registers.

The following pedigree which was set out in the plaint is material to explain the litigation which then arose and the pleadings in the present case:—



(6) I. L. R. 21 Mad. 128 (1898).
(8) I. L. R. 25 Bom. 129 (1900).

BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH.

In 1873 Matadin, the father of the Appellants, instituted a suit against Daryao Kunwar to obtain a declaration that the said sale-deeds, dated the 21st October 1872, should be cancelled and set aside. On appeal to the Court of the Judicial Commissioner by judgment and decree, dated the 6th May 1874, his suit was dismissed.

A suit of a similar nature by Janga Kunwar, one of the daughters of Seetla Bux, was also dismissed on the 25th August 1876.

Subsequently on the 4th May 1877, some of the possible reversioners to the estate including Baijnath, the father of Mahpal Singh, executed a deed by which they expressly ratified and confirmed the said deeds of sale executed by Daryao Kunwar, and on the 29th January 1878, a similar deed was executed by Janga Kunwar and Matadin Singh, the father of the Appellants, Bajrangi and Jagdamba.

After the death of Daryao Kunwar, on the 6th August 1892, no dispute arose. Maheshar Bux however died on the 23rd April 1893, and the usual quarrel then occurred as to possession and the alteration of names in the Collector's register. By order made on the 28th June 1893 the Deputy Commissioner of Sultanpur directed the name of the Respondent, Maheshar Bux's son, to be entered in the Revenue Records, and placed him in possession of the estate in dispute. In consequence of the said order, Mahpal Singh and Jagdamba Bux Singh, on the 17th February 1894, instituted the present suit in the Court of the District Judge of Rae Bareli. By order, dated the 30th July 1895, Bajrangi Singh was added as Plaintiff; and Mahpal Singh having died *pendente lite*, the suit was continued by Jagdamba Bux Singh and Bajrangi Singh alone, who were substituted on the record as representatives of Mahpal Singh.

The Plaintiffs made title to the property as the next heirs to Seetla Bux Singh on the death of Daryao Kunwar. The sale-deeds executed by the said lady in favour of Maheshar Bux Singh it is pleaded were not executed under circumstances which would bind the reversioners. It was further contended that daughters and their issue were excluded from succession by the custom of the Bhale Sultan tribe, to which the parties belonged.

The Defendant denied the pedigree propounded by the Plaintiffs and it was also denied that they were the next heirs to the estate. It was alleged that the succession was governed by the ordinary Hindu law, and not by custom. It was pleaded that Daryao Kunwar had an absolute estate in all the property in suit except one house, and that the suit was barred by limitation. As to the moveable property, the Defendant set up a title by Will, executed by Daryao Kunwar on the 18th November 1887. It was lastly contended that the sale-deeds executed by Daryao Kunwar were binding on the Plaintiff, not only because of the circumstances under which they were executed, but also in consequence of the affirmance of the said deeds by the deeds executed by Baijnath and Matadin on the 4th May 1877, and 29th January 1878.

On the 13th February 1896, the District Judge recorded a preliminary judg-

BAJRANGI SINGH v. MANOKARNIKA BAKHSH SINGH.

ment, by which he decided that the Plaintiffs were not barred from suing by the said deeds executed by Baijnath and Matadin: and after recording further evidence, final judgment was delivered, on the 23rd January 1899.

The questions for determination were:—

(*a*) Whether on the pedigree the Plaintiffs were the next reversioners?

(*b*) Whether a custom excluding daughters and their issue from succession was proved?

(*c*) Whether the sale-deeds executed by Daryao Kunwar were binding on the Plaintiffs?

(*d*) Whether the suit was barred by limitation?

On these points the final judgment of the District Judge decided (a) that the Plaintiffs were not the nearest heirs, (b) that the custom was not proved, and (c) that the sale-deeds were not binding as having been executed under legal necessity, and (d) that the suit was not barred by limitation. On these findings, a decree was made dismissing the suit with costs.

From the said decree the Plaintiffs appealed to the Court of the Judicial Commissioners of Oudh, and on the 6th March 1900, the said Court delivered judgment, and decided (a), that the Plaintiffs were on the pedigree the nearest male heirs of Seetla Baksh Singh (b), that the custom excluding daughters and their issue was sufficiently proved, and (c), that the conveyances executed by Daryao Kunwar in favour of Maheshar Baksh Singh having been ratified and confirmed by Baijnath and Matadin were binding on the Plaintiffs. In accordance with these findings, a decree was made affirming the decree of the District Judge and dismissing the appeal with costs.

Mr. DeGruyther for the Respondent conceded at the outset that he would not dispute that Plaintiffs were the next reversioners.

Mr. Ross for the Appellants referred to *Sumbhoolall* v. *Collector of Surat* (10) as to restrictions on widow's power of alienation, *Bahadur Singh* v. *Mohar Singh* (11), Mayne, 7th Edn., p. 855, 6th Edn., pp. 637-8; *Bhagwanta* v. *Sukhi* (12), *Lekraj Kuar* v. *Mahpal Singh* (13), *Uman Parshad* v. *Gandharp Singh* (14). As to value of wajib-ul-arz.

Mr. DeGruyther went into evidence to show that the custom excluding daughters was not made out. Has a Hindu widow power to alienate the absolute estate? She can in such a case pass the estate. In 1856 it was considered settled law, *Rany Srimuty Dibeg* v. *Rany Koond Luta* (15). It depends in the concurrence of heirs, *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1); alienation may be made with consent of heirs, *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2): may be validated by consent of reversioners, *Nobokishore Sarma Roy* v. *Hari*

(1) 8 Moore I. A. 551 (1861).
(2) 13 Moore I. A. 228 (1869).
(10) 8 Moore I. A. 1 (1859).
(11) 6 C. W. N. 169: s. c. L. R. 29 I. A. 1 (1901).
(12) I. L. R. 22 All. 33 (1899).
(13) L. R. 7 I. A. 63 (1879).
(14) L. R. 14 I. A. 127: s. c. I. L. R. 15 Cal. 20 (1887).
(15) 4 Moore I. A. 292 (1847).

BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH.

Nath Sarma Roy (4), *Behari Lal* v. *Madho Lal* (7).

Mr. Ross replied. *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (4) is a case of ratification not of consent at the time of alienation. Comments on *Behari Lal* v. *Madho Lal* (7) and the cases cited by Mr. DeGruyther from Moore's Indian Appeals. Indian Evidence Act, secs. 5, 32 (4) read as to admissibility of statements of deceased persons.

[SIR ARTHUR WILSON referred to sec. 48 of that Act as to existence of custom.]

Their LORDSHIPS' JUDGMENT was delivered by

SIR ANDREW SCOBLE.—Sitla Bakhsh Singh, a Hindu of the tribe of Bhale Sultan Chhattris, resident in Sultanpur, died some time before the annexation of Oudh, leaving him surviving, a widow named Daryao Kunwar, and two daughters, Janga Kunwar and Jagrani Kunwar. He was absolute owner of an estate known as Pindara Karnai and other property, which at his death passed to his widow and, at her death, would have passed to his daughters, but for a custom of the tribe excluding daughters and their issue from succession. The widow died on the 6th of August 1892, having previously sold the whole of the estate to her son-in-law, Maheshar Bakhsh Singh, the husband of her daughter Jagrani Kunwar, and mutation of names in the Revenue Registers was effected in his favour. After the death of Maheshar, which occurred on the 3rd of April 1893, the name of his son, Manokarnika Bakhsh Singh, the present Respondent, was entered in the Government Records as proprietor of the estate; and the present Appellants (with one Mahpal Singh, who died while the case was pending) brought the suit now under appeal, claiming that, by reason of the custom of the Bhale Sultan Chhattris, they were the next heirs in reversion to the estate of Sitla Bakhsh.

In the Courts below, and before their Lordships two main questions were raised. First, whether the custom had been proved; and, secondly, whether certain deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the Appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death. In the Courts in India, the District Judge held the custom not proved and the deeds not binding; the Judicial Commissioner came to the exactly opposite conclusion on both points. The conflict of opinion in the Courts in India upon the question of custom has made it necessary for their Lordships to examine carefully the evidence in this case, in order to ascertain whether the alleged custom has been satisfactorily proved. In making this examination, their Lordships have been materially assisted by the elaborate analysis of the evidence made by both the learned Judges below, and by the learned Counsel who argued the appeal. They will briefly state the grounds on which they consider the judgment of the Judicial Commissioner on this point must prevail.

(4) I. L. R. 10 Cal. 1102 (1884).
(7) L. R. 19 I. A. 30 (1891).

BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH.

The Bhale Sultan clan appear to have derived their name, some three centuries ago, from their warlike exploits in the service of the Emperors of Delhi. They are now settled in considerable numbers in the district of Sultanpur in Oudh, in several villages in which they constitute the bulk of the population. In the language of the Indian Evidence Act, 1872 (secs. 48) they form a "considerable class of persons." The evidence in support of the custom was mainly oral, and no document was produced of an earlier date than the British annexation. Thirty-five witnesses were examined on behalf of the Appellants. They were all members of the Bhale Sultan clan, mostly men of mature age and of good position. They all gave evidence that in their clan it was the custom that daughters and their issue were excluded from succession to the separated estate of their father, and put forward thirty-nine instances in which this exclusion had taken place. The Judicial Commissioner held that twenty of these instances had been satisfactorily proved. For the Respondent no evidence was given in contradiction of these instances, though ample time was allowed for the production of such testimony had it been available; but six witnesses were called, one of whom had signed a *wajib-ul-arz* in which the custom was set up, and two gave evidence in support of the custom.

In corroboration of the oral evidence, a number of village administration papers (*wajib-ul-arz*) were produced, of which seven were admitted by both Courts to be relevant, as relating to Bhale Sultan villages. In all these the rule is stated that a daughter and her issue do not *alal-umum* (that is, as a general rule) obtain the share. One of them is attested by 44 Zemindars and Lambardars of the village, another by 49, others by 8 or 10. The dates of these documents are not given, but they were all officially recorded prior to the institution of this suit, and quite independently of the parties thereto.

One other piece of evidence remains to be noticed. It has been stated that Sitla Bakhsh left two daughters, Janga Kunwar and Jagrani Kunwar. In 1876, Janga Kunwar filed a suit against her mother Daryao Kunwar and her brother-in-law Maheshar Bakhsh for a declaratory decree that she was entitled to succeed to half her father's estate; and in answer to her claim, the vakil for the Defendants put forward the plea that "among Bhale Sultans a daugther never succeeded to the inheritance of her father." The Court came to no decision on the point, but disposed of the suit on another ground, reserving Janga Kunwar's right to put forward her claim on the death of her mother. The fact, however, that this defence was raised shows that the existence of the custom was present to the mind of Daryao Kunwar at the date of the transactions to which their Lordships will now proceed to refer.

Although Daryao Kunwar appears to have been willing to invoke the custom as a defence against the claim of her unmarried daughter, she was at the same time endeavouring to defeat the operation of the custom in regard to her married daughter, Jagrani Kunwar, and her husband, Maheshar Bakhsh Sing,

the father of the present Respondent. During the period from 21st October 1872 to 24th July 1875, she executed five deeds of sale, by which she purported to transfer, for valuable consideration, successive portions of her husband's property to Maheshar Singh. The District Judge has found that these deeds were executed without "legal necessity"; and it is certain that the preliminary consent of her husband's reversionary heirs was not obtained. One of these heirs, Matadin Singh, the father of the Appellants, Jagdamba Singh and Bajrangi Singh, brought a suit in the Court of the Deputy Commissioner of Sultanpur in 1873 to set aside three of the deeds; but on appeal this suit was dismissed on a technical ground by the Judicial Commissioner on the 6th May 1874. Janga Kunwar's suit, already referred to, was dismissed on the 25th August 1876. Having thus succeeded, for the time being, in the Courts, Daryao Kunwar entered into negotiations with the persons who were at that time admittedly the nearest reversionary heirs to her husband's estate, and obtained from them two documents, called deeds of relinquishment, one dated the 4th May 1877 and the other dated the 29th January 1878. The first of these was signed by five persons, four of whom died without issue in Daryao Kunwar's lifetime, and the fifth, Baijnath Singh, is the father of the Plaintiff Mahpal Singh, who died while this suit was pending in the Court of the District Judge, and who is now represented by the Appellants. The second was signed by Janga Kunwar, Matadin Singh (the father of the present Appellants), and Hanuman Singh, who is still living, but is not a party to this suit. In these documents, which are identical in terms, after enumerating the sales by Daryao Kunwar to Maheshar Singh, the executants go on to say:—

"We all have given our full consent to all those sale-deeds which the Thakurain has executed in favour of the Babu, and will ever remain so satisfied. And after the death of the Thakurain we shall bring no claim against the Babu on account of the moveable and immoveable property owned by her; hence we have executed this deed of agreement so that it may serve as an authority, and be of use in time of need."

"It was not disputed," says the Judicial Commissioner in his judgment, "that the executants of these deeds received consideration for ratifying the transfers and agreeing not to dispute their validity. Indeed it was said that they were paid to execute the deeds." Upon these facts, the Judicial Commissioner found that the transfers to Maheshar Singh were valid, and dismissed the appeal.

The restrictions imposed by the Hindu law upon the widow's power to alienate her deceased husband's estate have frequently been the subject of consideration by this Committee.

"For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate may become so if made with the consent of her husband's kindred." [*Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1)].

"The kindred in such case," their Lordships

(1) 8 Moo. I. A. 529 at p. 551 (1861).

BAJRANGI SINGH *v.* MANOKARNIKA BAKHSH SINGH.

observe in a later case, "must generally be understood to be all those who are likely to be nterested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." [*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2)].

Upon the practical application of this general principle there has been much discussion in the High Courts in India. A Full Bench of the High Court at Allahabad, in the case of *Ramphal Rai* v. *Tula Kuari* (3) considered that :—

"The plain principle deducible from these rulings of the Privy Council is that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by the Hindu law, it must have the consent of all those among his kindred who can reasonably be regarded as having an interest in questioning transaction."

And they accordingly held that the consent of the heir presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir presumptive had no greater effect in her favour than it would have had if he had been a stranger. "We think," say the learned Judges,

"that the spir of the Hindu law is to keep the right of succession to the deceased husband's estate open until the widow's death, free of any control by her, except in such cases as she has a power to adopt; and that no reversioner possesses such a present vested interest as enables him to combine with her in defeating his co-reversioners. In other words, her right and theirs have one common basis, that of survivorship to the widow, and it is incapable of anticipation."

The High Court of Calcutta has taken different view, based upon a long current of authority in that Court, albeit two of the learned Judges—Garth, C. J., and Pigot, J.—considered that the principles on which the decision was founded were open to great objection. In the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (4), a Full Bench held that under the Hindu law current in Bengal—

"transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property."

The ground of the decision is thus shortly stated by Garth, C. J. :—

"If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make.

And more fully by Mitra, J. :—

"Whatever conflict there may be upon the question whether a Hindu may sell the whole inheritance without any legal necessity, merely with the consent of the next male heir, there is no conflict in the decisions, since the case of *Jadamoncy* was decided in the late Supreme Court of Calcutta, upon the question whether the relinquishment by a Hindu widow of her estate to the next male heir of her husband is valid or not. Such relinquishment by the widow has been held for a long series of years to be valid. . . . But if the widow is competent to relinquish her estate to the next male heir of her husband, it follows as a logical consequence, that she can alienate it merely with his consent without any legal necessity."

In a subsequent case [*Radha Shyam* v. *Joy Ram Senapati* (5)] the same High

(2) 13 Moo. I. A. 209 at p. [illegible]
(3) I. L. R. 6 All. 116 (1888).
(4) I. L. R. 10 Cal. 1102 (1884).
(5) I. L. R. 17 Cal. 896 (189)

BAJRANGI SINGH v. MANOKARNIKA BAKHSH SINGH

Court held that the consent must be of the whole body of persons constituting the next reversion.

The Calcutta decision, of course, is not binding upon other High Courts, but it has been followed in Madras. In the case of *Marudamuthu Nadan* v. *Srinivasa Pillai* (6), decided by a Full Bench of the Madras High Court in 1898, Subramania Ayyar, J., says:—

"I think it unnecessary to go into the question whether the Hindu law, according to the texts or the commentaries, lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule, as stated by the Judicial Committee in *Behari Lal* v. *Madho Lal* (7), should, I think, be taken to be equally applicable to this Presidency too, subject, no doubt, to the restriction pointed out by their Lordships, viz., that the surrender should be absolute and complete, and that the whole limited estate should be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified."

The question was also considered by the High Court of Bombay in 1901 in the case of *Vinayak* v. *Govind* (8). In the course of his judgment Jenkins, C. J., says (at p. 133):—

"There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some difficulty as to this doctrine. . . . . The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances, and it finds support in the texts . . . . This view has too, in a measure, the sanction of the Privy Council."

And he quotes the cases in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (1) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (2), which have been already referred to. "Turning then to Bombay," he goes on to say, "the High Court here appears to have accepted this view rather than that which finds favour in Calcutta. In the same case Ranade, J., observes (at p. 139):—

"The Bengal theory that the widow's interest was a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title has never met with much acceptance on this side of India. Our leading case—[*Varjivan Rangji* v. *Ghelji Gokaldas* (9)]—lays down that the consent must be of all the kindred, but that does not mean that every single member who is a kindred must actually join in the conveyance."

And the conclusion to which he comes is that, in order to validate an alienation

(6) I. L. R. 21 Mad. 128 (1898).
(7) L. R. 19 I. A. 30 (1891).
(8) I. L. R. 25 Bom. 129 (1900).

(1) 8 Moo. I. A. 529 at p. 551 (1861).
(2) 13 Moo. I. A. 209 at p. 228 (1869).
(9) I. L. R. 5 Bom. 563 (1881).

BAJRANGI SINGH v. MANOKARNIKA BAKHSH SINGH.

by a widow otherwise than from legal necessity,

"The consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one."

The principle being thus admitted by the High Courts in India, the question of the *quantum* of consent necessary only remains. The High Court of Allahabad, indeed, does not recognize the validity of surrenders in favour, or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. Their Lordships have not been referred to any cases in the Province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitation which the Allahabad High Court has sought to establish. They agree with the High Court of Calcutta [*Radha Shyam* v. *Joy Ram* (5)] that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.

Applying this rule to the case now under consideration, the Judicial Commissioner has found that "of the reversionary heirs who executed the deeds, Hanuman Singh and Sheo Dayal Singh were four degrees removed, and Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh, and Matadin Singh were five degrees removed from Jai Singh, the common ancestor of themselves and Sitla Bakhsh Singh. There do not appear to have been any other reversionary heirs alive at the time of the transfers superior in degree to Hanuman Singh and Sheo Dayal Singh, or equal in degree to Sheo Bakhsh Singh, Sheo Narain Singh, Baijnath Singh and Matadin Singh, or indeed any other reversionary heirs at all in the line of Jai Singh Rai." Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur.* The Appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the Judicial Commissioner, dated the 6th March 1900, confirmed. The Appellants must pay the costs of the appeal.

Solicitors: *Messrs. Barrow, Rogers and Neville* for the Appellants.

Solicitors: *Messrs. Watkins and Lempriere* for the Respondents.

Appeal dismissed with costs.

C. W. A.

(5) I. L. R. 17 Cal. 896 (1890).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 169 OF 1905.

BRETT, J. MOOKERJEE, J. 1907. Heard, 4 and 5, June. Judgment, 20, June.	MAHAMED ISHAQ and others, Plaintiffs, Appellants, *v.* SHEIKH AKRAMUL HUQ and others, Defendants, Respondents.

Mahomedan Law—Wife's death in husband's lifetime—Deferred dower—Right accrues to heirs of wife after her death—Cause of action not joint—Suit by one of heirs—Other heirs, necessary parties—Joinder of an heir after time—Limitation—Limitation Act (XV of 1877), sec. 22—Joint covenant—Right of action when joint and when several.

When a Mahomedan wife who has not been divorced by her husband dies during the husband's lifetime, the right to sue for her deferred dower accrues for the first time to her heirs.

The cause of action is not a joint one and any of the heirs may sue the husband separately for his or her share.

But in such a suit the presence of all the heirs is necessary in order effectually and completely to adjudicate upon the claims of the several heirs.

Where in a suit by one such heir, one of the remaining heirs was not made a party Defendant till after the period of limitation applicable to the suit had expired,

Held—*That sec. 22 of the Limitation Act was no bar to the suit, as no relief was sought against the latter and her presence was only required for the effectual and complete adjudication of the claims of the several heirs.*

Semble—*Even if the interest of the heirs of the deceased was a joint interest as the Defendant, the husband, was himself one of the heirs, the cause of action must be taken to have been split up.*

MOOKERJEE, J.—*The question whether a contract is joint or several or joint and several is a question of intention to be determined by considering not only the language but also the interests and relations of the parties.*

If it is the intention of the parties that the obligation is to be indivisible there is a joint right which is vested in several persons and which must be enforced by them jointly.

This was an appeal preferred on the 1st of February 1905, against the decision of T. W. Richardson, Esq., District Judge of Patna, dated the 4th of January 1905, reversing the decision of Babu Purno Chandra Roy, Subordinate Judge of Patna, dated the 8th of July 1904.

The facts of the case are fully set out in the judgment of Mookerjee, J.

Moulvies Syed Shamsul Huda and *Mahommed Mustafa Khan* for the Appellants.

Moulvi Mahommed Ishfaq for the Respondents.

THE JUDGMENT OF THE COURT was as follows:—

BRETT, J.—The facts of the present case have been set out at length in the judgment of my learned colleague, which I have read, and it is not necessary for me to burden my judgment with a repetition of them. The main question which has come before us for determination in this appeal is whether the Plaintiff No. 1 and after his death his heirs and representatives as heirs of Musst. Bashiran, their grandmother, and Plaintiff No. 2 as assignee of the original Plaintiff No. 1,

MAHAMED ISHAQ v. SHEIKH AKRAMUL HUQ.

are entitled to sue separately to recover the share to which they claim to be entitled under the Mahomedan law of that share in the deferred dowers of Musst. Zainab which on her death devolved on Musst. Bashiran, her grandmother. The suit is brought against Defendant No. 1, the husband of Musst. Zainab, and all the other persons who as heirs of Musst. Zainab are entitled to share in the dower have been brought on the record as *pro formâ* Defendants. One of them however, Musst. Mahmudan, was not brought on the record till the 1st June 1904, Musst. Zainab died on the 8th September 1900, and Musst. Bashiran died on the 5th January 1901.

The case of Defendant No. 1, the husband, was that the Plaintiff could not bring the suit without making all the persons who were entitled to any share of the deferred dower parties, that the suit so far as Musst. Mahmudan was concerned was barred by Art. 104, Sch. II of the Limitation Act at the time when she was brought on the record as more than 3 years had then elapsed from the death of Musst. Zainab, and therefore that the whole suit was barred under the provision of sec. 22 of the Limitation Act.

The Court of first instance held that the omission to make Musst. Mahmudan a party within the period of limitation was not fatal to the case as the claim was not against her but against Defendant No. 1 only, that no relief was sought against her and that she and the Defendants other than the Defendant No. 1 were *pro formâ* Defendants only.

Finding this point and the others raised in the issues in favour of the Plaintiff the Subordinate Judge gave the Plaintiff a decree for the full relief claimed.

On appeal the District Judge has come to a different conclusion on the point noted above and has reversed the judgment and decree of the Subordinate Judge and has dismissed the Plaintiffs' suit. The Plaintiffs have appealed.

The District Judge held that there was only one cause of action against Defendant No. 1 for the dower due by him to his deceased wife, Musst. Zainab, and that the claim being founded on a single cause of action all the heirs are necessary parties to a suit for the enforcement of the claim. In support of this view he relied on the cases of *Ahinsa* v. *Abdul* (1) and *Kandhiya* v. *Chander* (2), as also on the cases of *Ram Sebuk* v. *Ram Lall Koondoo* (3), *Ramdoyal* v. *Junmenjoy Coondoo* (4), *Durga Charan Sarkar* v. *Jotindra Mohan Tagore* (5).

Though he confirmed the findings of the Subordinate Judge on the other points in issue between the parties he decreed the appeal because he thought that the suit ought to have been dismissed because Musst. Mahmudan was not made a party in time.

The arguments in support of this appeal have been confined to attacking this finding of the District Judge and after consideration of the facts and the arguments advanced on both sides, I am of opinion that the view taken by the District Judge is not correct.

In the first place I am unable to agree

(1) I. L. R. 25 Mad. 26 at p. 35 (1901).
(2) I. L. R. 7 All. 313 (1884).
(3) I. L R. 6 Cal. 815 (1881).
(4) I. L. R. 14 Cal. 791 (1887).
(5) I. L. R. 27 Cal. 493 (1899).

MAHAMED ISHAQ *v.* SHEIKH AKRAMUL HUQ.

with the District Judge in holding that the claim is founded on a single cause of action and therefore I hold that the cases on which he relies cannot be taken as authorities for determining the present case. No doubt if the cause of action were one and indivisible the remarks of the Judges of the Madras High Court in *Ahinsa Bibi* v. *Abdul Kader Saheb* (1) would apply and the cause of action could not be divided against the Defendant the obligee, without his privity. But in this case he is himself one of the persons entitled with the Plaintiffs and the other Defendants to a share in the dower as one of the heirs of his deceased wife and so far as he is concerned he could hardly join in a joint cause of action with the others against himself. Clearly in a case like the present the cause of action must be divisible.

The agreement to pay dower is certainly not one which in the present case gave a cause of action to the wife which cause of action passed to her heirs.

Until her death no cause of action arose and her death, followed apparently by the refusal of her husband to pay the deferred dower, gave rise to a cause of action, not to her but to her heirs. The observation of Tindal, C. J., in *Decharms* v. *Horwood* (6) quoted by the learned Judge of the Madras Court in the judgment referred to above, do not therefore apply to the present case. This is not a case in which a right accruing to a single person from a covenant in his favour has devolved on her death on two or more of her heirs in several shares, in which case the only difference caused by the death of the covenantee is that the cause of action which resided in one person is by operation of law transferred to a number of parceners who constitute, one heir. In a case like the present where the right to the deferred dower accrues on the death of the wife the agreement must be taken to be one between the husband and the heirs of the wife to pay over to them the money which becomes due after her death.

The interests which the heirs have in the dower are not joint but different, and each on the basis of the facts which constitute him an heir has a distinct title on which cause of action is based. The title of all is not common, and in fact a case might arise in which the title of one as heir might be disputed by one or more of the other persons claiming to be heirs.

For the above reasons I have no hesitation in holding that the Plaintiffs are entitled to bring a separate suit to recover from Defendant No. 1, the share in the deferred dower of Musst. Zainab to which they claim to be entitled through Musst. Bashiran. The next question which has been raised is whether all the other persons who claim to be entitled as heirs to shares in the dower of Musst. Zainab are necessary parties to the suit together with the husband, against whom alone relief is claimed, and if they are necessary parties whether the 4th clause of sec. 32 of the Code of Civil Procedure applies so as to make the addition of them as parties on the record, subject to the provisions of sec. 22 of the Limitation Act.

The District Judge has held that all

(1) I. L. R. 25 Mad. 26 at p. 35 (1901).
(6) 10 Bingh. 526 at p. 529 (1834).

MAHAMED ISHAQ v. SHEIKH AKRAMUL HUQ.

these persons are necessary parties to the suit and that view appears to me to be correct. Each and all of these persons claiming to be entitled to shares in the dower are in my opinion necessary parties to the suit because each and all are interested in the result of the trial and in seeing that the Plaintiffs do not obtain a decree for a larger share than they are entitled to, and, it may be in disputing the claim of the Plaintiffs to any share at all in the dower. They are therefore persons whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

Musst. Mahmudan was therefore a necessary party to the suit. It seems that the Plaintiffs omitted to add her as a party when the suit was brought because she was hostile to their claim. She was brought on the record afterwards on the death of Faizul Huq, Plaintiff No. 1, and as she refused to join as a co-Plaintiff she was made a *pro forma* Defendant. She then filed a written statement supporting the defence of Defendant No. 1. After she had been brought on the record, it was for the purposes of the suit immaterial in what capacity she had been added as a *pro forma* Defendant.

The fact however that she was brought on the record in the manner stated above as representative of Faizul Huq would not be sufficient to save limitation if it were held that for the purposes of this suit it was necessary that she should have been brought on the record as a party in her personal capacity within 3 years from the date of the death of Musst. Zainab.

In the present case no relief was sought against her by the Plaintiffs which relief would have been barred by the omission to make her a party to the suit in time.

The question however arises whether if she was a necessary party in order to enable the Court to effectually and completely adjudicate on the suit, the provisions of sec. 22 of the Limitation Act would bar the suit because she was not made a party within 3 years of the death of Musst. Zainab. I think not and for the following reason.

Limitation merely bars the remedy by suit, and the only parties in a suit between whom question of limitation can possibly arise, are those who seek relief and those against whom relief is sought. This indeed seems to be the view taken by the Judges in the case of *Durga Charan Sarkar v Jotindra Mohan Tagore* (5) for they held in that case that the persons should have been added as parties as they were persons who had an interest in the suit and they were persons against whom a right to relief existed in the Plaintiff if the suit were well-founded.

Musst. Mahmudan was brought on the record as a *pro forma* Defendant in ample time to enable the Court to determine the matters in issue before it and it was therefore immaterial whether she was or was not brought on the record within the time fixed by the law within which the Plaintiffs were bound to bring their suit against Defendant No. 1 to secure the relief which they sought against him.

The suit therefore was not in my opi-

(5) I. L. R. 27 Cal. 493 (1899).

MAHAMED ISHAQ v. SHEIKH AKRAMUL HUQ.

tion bad for any defect of party. It was correctly framed and all the necessary parties were before the Court in time to enable the Court to adjudicate on the matters before it. It was not barred by limitation as held by the Judge of the lower Appellate Court because Musst. Mahmudan was not made a party within 3 years from the death of Musst. Zainab.

For the above reasons the judgment and decree of the lower Appellate Court must be set aside and the judgment and decree of the Court of first instance restored.

The appeal is decreed with costs.

MOOKERJEE, J.—The circumstances which gave rise to the litigation out of which the present appeal arises, were not disputed before this Court, and may be briefly outlined. One Musst. Zainab, the wife of the first Defendant Sheikh Akramul Huq, died on the 8th September 1900. At the time of her marriage the Defendant had agreed to pay a deferred dower of Rs. 41,025. Upon her death she left her husband, two sons, two daughters, a maternal grandmother, Bashiran, two step-brothers and a step-sister. Her grandmother died subsequently on the 5th January 1901. On the 4th September 1903, her step-brother Faizul Huq and a transferee from him, instituted the present action to recover a share of Zainab's dower, which had been taken by inheritance by her maternal grandmother. The Plaintiffs joined as parties Defendants all the persons, who were the heirs of Zainab at the time of her death excepting his step-sister, Mahmudan, who was left out for some unexplained reason. The claim was resisted on various grounds of fact and law, one of which was that the frame of the suit was defective inasmuch as Mahmudan had not been joined as a party Defendant. During the pendency of the suit in the Court of first instance, the Plaintiff died, leaving as heirs her step-brother and step-sister. Of these the former applied to be substituted on the record as Plaintiff; as the latter did not join as co-Plaintiff, she was brought on the record on the 3rd May 1904, and made a *pro formâ* Defendant on the 1st June following. It was then contended on behalf of the first Defendant that as Mahmudan had been made a party more than three years after the death of Zainab, *i.e.*, the date when the right to sue accrued, the suit was barred by limitation, not only as against the added Defendant, but also as against the husband. The Court of first instance overruled this objection on the ground that as no relief was claimed against the added Defendant and as she disclaimed all interest in the subject-matter of the litigation, sec. 22 of the Limitation Act had no application. Upon the merits, the Subordinate Judge found in favour of the Plaintiffs and gave them a decree. Upon appeal the District Judge affirmed the conclusions of the Subordinate Judge on the questions of fact but dismissed the suit on the ground that it was not properly constituted till the expiry of the period of limitation. The Plaintiffs have appealed to this Court and on their behalf the decision of the District Judge has been challenged, on the ground, that as no relief is claimed against Mahmudan who disclaims all interest in the dower-debt and as the suit was instituted

MAHAMED ISHAQ v. SHEIKH AKRAMUL HUQ.

within time against the husband who is the person solely liable for payment of the dower, the claim is not barred by limitation. On the other hand, it has been argued, on behalf of the husband, that the suit has not been properly framed, that the right of the heirs to recover the dower-debt is a joint right, that even though it be open to one of several heirs to bring a suit for recovery of the debt, the claim must include the whole of the dower-debt, and that assuming that the Plaintiff may sue in respect of his share only, the suit is barred by limitation under sec. 22 of the Limitation Act, inasmuch as it was not properly constituted till the expiry of the period of limitation. In order to determine which of these contentions ought to prevail it is necessary to examine the nature of the right which the Plaintiff seeks to enforce, and the relief which they are entitled to claim, in respect thereof.

As has been already stated the dower in question was a deferred dower, in other words, it was payable only upon dissolution of marriage, either by divorce, or by death of one of the contracting parties. *Meer Meher Ali* v. *Amanee* (7). There was no dower-deed executed and consequently the terms of the contract must be assumed to have been such as are consistent with the principles of the Mahomedan law on the subject. The terms, therefore, must be assumed to have been as follows :—(*a*) if the marriage tie was dissolved by divorce, the husband would pay to the wife the dower due, (*b*) if the marriage was dissolved by the death of the husband, the heirs of the husband would pay the dower to the widow, (*c*) if the dissolution of the marriage was caused by the death of the wife, the husband would pay to the heirs of the wife the amount of dower he had agreed to pay.

The first two contingencies have not happened but the third contingency has come to pass. We may assume, therefore, that there was an implied agreement by the husband to pay to the heirs of the deceased wife the amount of the dower-debt. He himself, however, is under the Mahomedan law one of the heirs. The position, therefore, is that, the debtor is bound to pay to the creditors, in which category he himself must be included, the amount of the dower-debt. Under these circumstances, it has been argued on behalf of the Appellants that the right of the heirs to receive the dower-debt was not a joint right and that in reality their rights were several and distinct inasmuch as the shares in which they are entitled to receive the debt are specified by the Mahomedan law of inheritance. It has been contended on the other hand that the right is a joint and indivisible right, enforceable only by all the creditors acting jointly and further that in any view of the matter, if it be treated as enforceable at the instance of one creditor that creditor must sue to enforce the entire claim. The question raised turns upon the determination of the nature of the obligation of the husband to pay the dower-debt to the heirs of his deceased wife, who have, as is well settled, a simple money claim founded solely on the contract entered into by the husband, [*Meer Meher Ali* v. *Amanee* (7)]. In dealing

(7) 11 W. R. 212 (1869).

(7) 11 W. R. 212 (1869).

MAHAMED ISHAQ v. SHEIKH AKRAMUL HUQ

with this question it is necessary to bear in mind the distinction between a promise by two or more persons to perform an act and a promise to two or more persons to perform an act. A promise by two or more persons to perform an act is a promise that they or some or one of them will perform it, *Addison* v. *Gibson* (8); but a promise to two or more persons to perform an act is not a promise to them or some or one of them but a promise to them all to perform it, [*Rolls* v. *Yate* (9)]. In the former case, the entire promise may be performed by one. In the latter case the entire promise cannot be enforced by one. In the former case, the parties to the agreement contemplate that the obligation may be discharged by one, for a man who agrees in conjunction with others to pay A a sum of money does not agree with A that he will only pay the sum in such conjunction and not otherwise, in other words, a joint agreement by several to perform an act may be resolved into an agreement by all or some or one of them to do it and an agreement *inter se* as to how the debt is to be distributed amongst themselves. The case of an agreement by one person to pay a sum to two is very different, for this does not imply an obligation to pay the sum to the separate account of any; payment to two persons and a payment to one are different and inconsistent things, and a promise to two and a promise to one are equally different and inconsistent. It is obvious, therefore, that a right may belong to two or more individuals severally but not to two or more jointly and severally. but it may belong to two or more jointly. On the other hand, an obligation may be imposed upon two or more persons severally or jointly or jointly and severally at the same time. [*Slingsby's* case (10), Harriman on Contracts, p. 137]. If we remember these principles, it follows that there can be nothing more clear than that the question whether a contract is joint or several or joint and several is a question of construction, *i.e.*, a question of the intention of the parties to the contract. The rule applicable to cases of this description was thus stated by Baron Parke, in *Sorsbie* v. *Park* (11): "The rule is that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it could be expressly joint." In other words, as stated in a work of almost conclusive authority, [Notes to Saunder's Reports by Williams, Vol. I, p. 162, notes to *Eccleston* v. *Clipsham* (12)], though a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees; on the other hand, if the interest and cause of action be several, the action may be brought by one only. As stated in Bullen and Leakes Precedents and Pleadings, 6th Edn., p. 20, whether a contract is joint or several depends primarily on the language used. It is a question of intention to be determined by considering

(8) 10 Q. B. 106 (1847)
(9) Yelverton 177 (1611).
(10) 5 Coke 18*b* (1588).
(11) 12 M. and W. 146 (1843).
(12) 1 Saund 158.

MAHAMED ISHAQ *v.* SHEIKH AKRAMUL HUQ.

not only the language but also the interests and relations of the parties; accordingly the contract will be construed to be joint or several so far as regards the contracties, according as the interests of the parties are joint or several, respectively, and will be deemed to be joint if the interests are joint, and several if the interests are several, *Pugh* v. *Stringfield* (13), *Thompson* v. *Hakewill* (14), *Palmer* v. *Mallet* (15), *White* v. *Tindall* (16). This is well illustrated by the cases of *Withers* v. *Bircham* (17) and *Palmer* v. *Sparshott* (18). In each of these cases it was ruled that where a man covenants with two or more jointly, yet if the interest and cause of action of the covenantees be several and not oint, the covenant shall be taken to be several and each of the covenantees may bring an action for his particular damages; in other words the action follows the nature of the interest, if the interests of the covenantees is joint, the action must be brought in the name of all the covenantees, if the interest is several they may maintain separate actions [see also Williams' Saunders, Vol. II, p. 383, notes to *Coryton* v. *Lithebye* (19)]. In the present case, there can be no doubt, that the interest of the heirs in the dower-debt, though joint as to the whole, is several as to the share of each. This is established conclusively by two circumstances, *viz.*, *first*, that the share of each is fixed unalterably by the law of inheritance; and, *secondly*, as the husband himself is the debtor as well as one of the creditors, none of the creditors could bring an action to recover the whole of the dower-debt. In such a case it is impossible to hold that the right of the creditors is joint and several, so as to entitle one to sue for the whole debt or to make it obligatory upon him to do so. In my opinion, each of the heirs is entitled to bring an action for recovery of his share of the dower-debt. This view is amply supported by an examination of the nature of a joint obligation. Thus in Domat on Civil Law [Part I, Book 3, Tit. 3, secs. 1 and 2, Vol. X, pp. 712 to 718], it is stated that, if there is solidity among two or more creditors, the result is that every one of the creditors is entitled alone and by himself to exact the whole debt and to discharge the debtor of it with respect to all the other creditors although ultimately there may be a contribution amongst the creditors themselves. Whether, however, there is such solidity or not, depends upon the intention of the parties, namely, whether it was intended that what is owing to several persons is due to every one of them in the whole, that is, whether the intention is that they will be creditors, each of them for the whole. In the absence of such intention, however, if it were only said that a debtor should owe a sum of money to two creditors without mentioning any thing of the solidity, in that case, each creditor could demand no more than his own portion. To the same effect is the exposition of Pothier in his Treatise on Obligations. [Translated by Evans, Part 2, Ch. 3, Art. 7, Vol. I, p. 144]: "regularly when a

(13) 3 C. B. N S. 2 (1857).
(14) 19 C. B. N. S. 713 (1865).
(15) 36 Ch. Div. 411 (1887).
(16) 13 App. Cas. 263 (1888).
(17) 3 B. and C. 254; 27 R. R. 350 (1824).
(18) 4 M. & G. 137; 61 R. R. 501 (1842).
(19) 2 Saund, Pt. I, 112.

person contracts the obligation of one and the same thing in favour of several others, each of these is only creditor for his own share, but he may contract with each of them for the whole; when such is the intention of the parties so that each of the persons in whose favour the obligation is contracted is creditor for the whole, but that a payment made to anyone liberates the debtor against them all, this is called solidity of obligation." The effects of this solidity among creditors are stated to be, *first*, that each creditor may demand the whole debt, *secondly*, acknowledgment made to any one of the creditors interrupts prescription of the whole debt, and, *thirdly*, payment made to any creditor extinguishes the debt. [See also Vol. II, App. XI, pages 55 to 62]. The same analysis is adopted by Savigny in his Treatise on Obligations [Translated by Jerardin and Jozon, secs. 16 to 36, Vol. I, pages 150 to 421] and by Thibaut in his System [Translated by Lindley, secs. 109 and 117A and App., page LXXIV]. The substance of this analysis is that if it is the intention of the parties, to be determined either from the expression of their will or from the nature of the obligation itself, that the obligation is to be indivisible, there is a joint right which is vested in several persons and which must be enforced by them jointly. It is also pointed out that one of the most important characteristics of a joint right, strictly so called, is that upon the death of one of the persons in whom the right is vested the whole right devolves upon the survivors to the exclusion of representatives of the deceased [Pothier, Vol. II, page 60, and Thibaut, p. LXXV]. If these principles are kept in mind, the inference is irresistible that each of the heirs is entitled to sue in respect of his share of the dower-debt. In reality, each has a distinct right enforceable by himself though all may jointly sue, because each obtains a share of the whole debt. The view I take is consistent with what has been recognised as the settled rule almost since the establishment of the British Courts in this country, see, for instance, *Ali Baksh* v. *Kalu Beebe* (20), decided by the Bengal Sudder Court so far back as 1804, where upon the death of a Mahomedan woman, one of her heirs was allowed to maintain an action for the recovery of her share only of the dower-debt.

The question next arises whether in a suit so framed the other heirs ought to be joined as parties. In my opinion they ought to be on the record as Defendants for two reasons. In the first place, if any question arises as to the total amount of the dower-debt, it ought to be determined in the presence of all the parties who claim interest in that debt. In the second place, if there is any dispute as to the share to which the Plaintiff is entitled, the question ought to be settled in the presence of all the other heirs; as otherwise the debtor may be placed in a position of difficulty if, after he has submitted to a decree in favour of one of the heirs, it is established, as against him by another that the decree has been obtained in respect of a share to which the first Plaintiff was not entitled. It follows, consequently, that in a suit so framed the Plaintiff claims relief primarily and substantially against the husband who is liable for the dower-

(20) Macnaghten Sel. Rep. 110 (1804).

MAHAMED ISHAQ *v.* SHEIKH AKRAMUL HUQ.

debt and the other Defendants are brought on the record, not because any relief is claimed against them, but because the question in the determination of which they have an interest ought to be settled in their presence. In this view of the matter it is impossible to hold that the suit is barred by limitation. It is true that one of the heirs was not originally made a party Defendant but the suit was instituted in time so far as the husband is concerned and it is as against him only that the Plaintiff claims relief. Sec. 22 of the Limitation Act has, to my mind, no application to a case of this description. Sec. 22 provides that when after the institution of a suit a new Plaintiff or Defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. It may be taken therefore, that so far as Mahmudan is concerned, the suit as against her was not commenced until the 3rd May 1904, but the suit was instituted as against first Defendant, the husband, on the 4th September 1903, *i.e.*, within three years from the dissolution of marriage by death, as required by Art. 104 of the Second Schedule of the Limitation Act. No relief is claimed as against Mahmudan, and, indeed, when joined as a party Defendant, she disavowed all interest in the dower-debt. Under these circumstances I feel no doubt that the suit as against the first Defendant is not barred by limitation.

The attention of the Court was invited to several cases, which it was suggested, were inconsistent with the view. Reliance was placed very strongly upon the decision of the Madras High Court in *Ahinsa Bibi* v. *Abdul Kader* (1). That case, however, is clearly distinguishable, as there the original cause of action was joint and it was held that when on the death of the person in whom the original cause of action resided it had devolved upon his heirs, they constituted substantially one heir and must, therefore, join in a suit to enforce that claim. It cannot be suggested that in the present case, the wife had any cause of action which upon her death devolved upon her heirs. No doubt the contract for payment of the dower-debt was made with her, but under the contract as the dower was deferred, she could not take anything. It was only upon her death that a cause of action would, for the first time, come into existence in her heirs, who would then become entitled to recover from the husband their share of the dower-debt Reference was also made to the cases of *Ram Sebuk* v. *Ram Lal Koondoo* (3) and *Ramdoyal* v. *Junmenjoy Coondoo* (4) which were cases of partnership accounts, and the parties, who were added, had interest of such a description in the subject-matter of the litigation that without them, in the one case, the remaining Plaintiffs could not maintain an action, and in the other case no relief could be had against the remaining Defendants. In such cases as those, sec. 22 of the Limitation Act is obviously applicable. Reliance was also placed upon *Durga Charan Sarkar* v. *Jotindra Mohan Tagore* (5) in which a question was raised as to who were necessary parties in a suit under sec. 283 of

(1) I. L. R. 25 Mad. 26 at p. 35 (1901).
(3) I. L. R. 6 Cal. 815 (1881).
(4) I. L. R. 14 Cal. 791 (1887).
(5) I. L. R. 27 Cal. 493 (1899).

MAHAMED ISHAQ *v.* SHEIKH AKRAMUL HUQ.

the Code of Civil Procedure, but no question arose as to the applicability of sec. 22 of the Limitation Act. Reference was further made to the case of *Kandhiya Lal* v. *Chander* (2) in which it was ruled by a majority of a Full Bench of the Allahabad High Court that, when upon the death of the obligee of a money bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond. It is not necessary for our present purposes to consider how far this position is well-founded and how far the contrary view expounded by Mr. Justice Mahmood in his dissentient judgment is successfully controverted by the reasoning in the judgment of the majority of the learned Judges. It is sufficient to say that this decision is, as appears from the cases of *Ahinsa Bibi* v. *Abdul Kader* (1) and *Sitaram* v. *Sridhar* (21), based upon the principle that the several heirs of the original promisee cannot be regarded as joint promisees; they constitute one heir and are connected together by unity of interest and unity of title and must enforce their right by one action properly framed. In the present case, the right of action of the heirs of the wife of the first Defendant has not been transmitted to them by inheritance from her, and as one of the heirs happens to be and must necessarily be, under the Mahomedan law, the debtor as well as a creditor, the right of action, even if it was joint has been split up. It follows, consequently, that each heir has a separate right, which he is entitled to enforce separately in respect of his share of the dower-debt, although for the protection of the debtor and for the convenience of the creditors, the right of each must be enforced in the presence of the others. In my opinion, the view taken by the District Judge cannot be supported and his judgment must be reversed. No question has been raised as to the shares of the parties, or the amount to which the Plaintiffs are entitled. The appeal must, therefore, be allowed, the decree of the District Judge discharged and that of the Subordinate Judge restored with costs in all the Courts.

Appeal allowed.

(1) I. L. R. 25 Mad. 26 at p. 35 (1901).
(2) I. L R. 7 All. 313 (1884).
(21) I. L. R. 27 Bom. 292 (1903).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 350 OF 1905.

MITRA, J.
CASPERSZ, J.
1907.
9, May.

JOGO MOHAN DEB LASKAR, Appellant,
v.
DAUDOONG BURMAN and ors., Respondents.

Transfer of Property Act (IV of 1882), sec. 85—Parties—Parties claiming adversely to mortgagor, if necessary parties—Contract Act (I of 1872), sec. 23—Illegal contract.

Sec. 85 of the Transfer of Property Act does not require persons who claim adversely to the mortgagor to be made parties.

MON MOHINI GHOSE *v.* PARBATI NATH GHOSE (1) *followed.*

A mortgage contract is not illegal within the meaning of sec. 23 of the Contract Act merely because the mortgagors were

(1) I. L. R. 32 Cal. 746 (1905).

JOGO MOHAN DEB LASKAR v. DAUDOONG BURMAN.

entitled only to a half share and not the whole of the property mortgaged.

The Plaintiff-Appellant instituted this suit against Defendants Nos. 1 and 2, Daudoong Burman and Gunamoni Burman, to recover the balance of Rs. 200 (with interest Rs. 900), lent to them on a mortgage-bond, dated 5th May 1895, after deducting Rs. 98 which the said Defendants had paid and a further sum of Rs. 91 odd which the Plaintiff had remitted from his claim. The Plaintiff further asked for a declaration of his lien on the mortgaged property and in this connection added Defendants Nos. 3 and 4, the representatives in interest of one Kali Charan as parties to the suit. These latter alleged that the lands sought to be sold did not belong to the Defendants Nos. 1 and 2, but had been purchased by Kali Charan and that they were in possession as the successors in interest of Kali Charan. The Defendants Nos. 1 and 2 did not appear.

The District Judge found on evidence that the first and the second Defendants had no interest in the land mortgaged and that it belonged to the heirs of the deceased Kali Charan at the time the mortgage deed was executed. He further held that the mortgage contract was in view of the above fact unlawful and could not be enforced.

The Plaintiff appealed.

Babu Bepin Chandra Mullick for the Appellant.

Babu Brajendra Nath Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

On the 5th May 1905, Defendants Nos. 1 and 2, Daudoong and Gunamoni, executed a mortgage in favour of the Plaintiff. The mortgage covered property which, it is alleged in the present case, by the Defendants other than the Defendants Nos. 1 and 2, was the property of one Kali Charan who died 12 or 13 years ago leaving two sons Kamini Kumar and Krishna Charan.

As regards the execution of the mortgage and the passing of consideration, the evidence is quite satisfactory, though the learned Judge has not come to any express decision on the points. On the question of the *bonâ fides* of the document and the passing of consideration, the evidence is such that we cannot disregard it. We must hold that Daudoong and Gunamoni executed the mortgage on the 5th May 1895 and received consideration for it. The property mortgaged is, therefore, liable to be sold and no question would have arisen as regards the right of the Plaintiff to ask for a sale of the property if Kali Charan's sons and heirs had not been made parties. They were unnecessarily made parties because they did not claim the property through the mortgagors. Their claim is adverse to the mortgagors. Sec. 85 of the Transfer of Property Act does not make it necessary for persons who claim adversely to the mortgagor to be made parties. As authority for the proposition, we may refer to the case of *Mon Mohini Ghose* v. *Parbati Nath Ghose* (1). In the view we take, Defendants Nos. 3 and 4, the heirs of Kali Charan, are not necessary parties and we direct that their names be expunged from the record. Any question arising between the mort-

(1) I. L. R. 32 Cal. 746 (1905).

gagors and the mortgagee on one side, and the heirs of Kali Charan, on the other, relating to the title to the mortgaged property must be decided in a future suit properly framed. The issue, therefore, as to whether the mortgaged property belonged to the mortgagors or to Kali Charan does not exist and that issue with the finding on it must also be expunged.

The Plaintiff has, however, admitted before us through his counsel-vakil, that the mortgagors were entitled to a half share of the property and not the whole. He should be entitled to get a decree under the provisions of sec. 58 of the Transfer of Property Act, for the sale of a half share of the property covered by the mortgage.

The learned District Judge has referred to sec. 23, sub-sec. (4) of the Indian Contract Act as invalidating the contract. The contract is certainly invalid so far as Kali Charan's heirs are concerned. But so far as the mortgagors and the mortgagee are concerned, it is perfectly valid. Sec. 23, sub-sec. (4) of the Contract Act has no application to the present case, neither does sec. 33 of the Assam Land and Revenue Regulations affect the right of the Plaintiff to ask for the sale of a half share of the property in question.

On the facts stated in the judgment, it appears that in 1881-82 Kali Charan and Daudoong were recorded as joint proprietor's of the property. *Primâ facie*, therefore, Daudoong had a half share in the property. Whether he lost that right, or had not that right at all, the question must be decided in a future

We therefore direct that a decree be drawn up under the Transfer of Property Act for sale of a half share of the property covered by the mortgage. Each party will bear his own costs in all the Courts. So far as the Defendant No. 1 is concerned, he must pay the costs of the Plaintiff in the first Court and that sum must be added to the mortgage money.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1084 OF 1907.

CASPERSZ, J.
CHITTY, J.
1907.
27, September.

ADDAITA BHUIA and ors., Petitioners,
v.
KALI DAS DE, Opposite Party.

Penal Code (Act XLV of 1860), secs. 21, cl. (10), 141, cl. (5), 186—Unlawful assembly—Use of criminal force—Public servant—District Board Sircar.

The mere use of criminal force or show of criminal force by any person to take possession of any property is not sufficient to bring a case within cl. (5) of sec. 141 I. P. C., unless some criminal intent is proved against the persons so using force or show of force.

Where a District Board decided to replace a bridge across a khal *which was out of repair by means of a road with pipes passing underneath for the flow of water, and the owners of the bed of the* khal *objected to the laying of the pipes on the ground that it would obstruct the flow of water and removed the pipes placed there by the District Board Sircar,*

Held—*That the conviction of the owners under secs. 143 and 186, I. P. C., was* d.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, DECEMBER 9, 1907. [No 5

Contents.

NOTES

MR. JUSTICE GEIDT HAVING BEEN PLACED ON deputation to inspect Civil Courts under the Appellate Jurisdiction of the High Court, Mr. H. R H. Coxe, I. C. S., has been appointed to act as a Judge of the High Court during his absence. Mr. Justice Coxe took his seat on the Bench with Mr. Justice Brett on the 3rd instant.

ALTHOUGH MR. JUSTICE SALE IS TO BE CONGRATUlated on his appointment as the Legal Adviser to the Secretary of State yet his retirement from the Bench is a great loss to the Calcutta High Court. He was popular at the Bar and his elevation to the Bench made no difference in the cordiality and courtesy with which he treated everyone who came in contact with him professionally or otherwise. The good practice that he enjoyed at the Calcutta Bar made him feel quite at home in the Court where the faces, laws and customs were all familiar to him. A consciousness of being able to deal out justice with ease made him a most patient, self-possessed and dignified judge on the Bench. It is not too much to say that one can hardly remember an occasion when Mr. Justice Sale has been known to lose his temper. With almost Christian resignation he would allow all who appeared before him to have their say to their hearts' content but immediately after he would sit up in his chair and deliver his judgment with a readiness and no less thoroughness that gained for him the reputation of being a quick and expeditious judge. It is because of his ability and amiable qualities that the members of the profession as also the public interested in the Original Side never agreed to his being transferred to the Appellate Side. His career as a Judge being thus confined to the Original Side, his contributions to the case law has not been very large but all the same he has always been a sound judge.

RULE 13, ORDER IX, OF THE NEW CIVIL PROCEDURE Code Bill, provides that in case a party applies to have an *ex parte* decree set aside and a proper case is made out, the decree will be set aside as against him alone. We think this will create anomalies in many cases. Suppose A sues B, C and D upon a bond and obtains an *ex parte* decree; B comes in and proves that no summons was served on him. According to the rule the decree will be set aside as against B alone. Now if the suit is retried and the Court finds that the bond is not genuine but is a forged one, the suit will be dismissed and A will probably be prosecuted for forgery and convicted. But the decree against B and C upon the forged bond subsists and A notwithstanding his conviction may recover the decretal amount from them.

UNDER SEC. 108 OF THE PRESENT CIVIL PROCEDURE Code the entire decree under the above circumstances is set aside. Under sec. 544 of the Civil Procedure Code one of several Plaintiffs or Defendents may, in appeal, obtain reversal of the whole decree on a ground common to all. We think that on the same principle an *ex parte* decree should be reversed as regards all the Defendants if a ground is made out common to all, irrespective of the fact that the application to set aside was by one or more of the Defendants or that the decree set aside was passed against some of them after contest (see the cases of *Mahomed Hamedulla*, 1 C. W. N. 652: s. c. 25 Cal. 155; *Gopal Chetti*, 25 Mad. 604).

MAHOMEDAN LAW OF INHERITANCE AND ITS EVOLUTION.

"Mahomedan Law" remarks Sir H. S. Maine in his "Village Communities in the East and West" theoretically founded on the Koran, has really more interest for the jurist than has sometimes been supposed;

for it has absorbed a number of foreign elements, which have been amalgamated by a very curious process with a mass of semi-religious rules." (Village Communities, p. 49). The following is an attempt at an approach of the Mahomedan Law of inheritance as formulated by the Prophet in the light of the historical investigations of that eminent jurist and to co-ordinate the isolated facts hitherto presented as the dry bones of a skeleton-system in orderly sequence, as forming connected links in the chain of a living and growing system of law.

Most ancient systems of law whether Aryan or non-Aryan are dominated by the all-pervading principle that property is the property of the family and not of individuals: "The unit of an ancient society is the family, of the modern society the individual" (Maine's Ancient Law, p. 126): This is true not only of old Roman and Hindu Law but also of the Pre-Islamaic laws of the pagan Arabs before their codification by the Prophet. Like the ancient Hindu and Roman law, the pre-Islamaic customs rigidly excluded women from inheritance; nay they even went further. Men incapable of bearing arms and minors were passed over in favour of the strong and the hardy who figured foremost in the incessant tribal wars and effectually safeguarded the interest of the families against the pillaging and marauding instincts of neighbouring and rival families. Mr. Justice Ameer Ali very aptly observes that "the ancient Arab customs had one principal object in view in the succession of a deceased person's property, *viz.*, the maintenance of the goods in the family." With this view, the succession was exclusively confined to males and even among them to those capable of bearing arms. The daughters, the widows and the mothers, as well as the minors were directly or indirectly excluded from succession, the daughters because their birth was regarded as a misfortune (Koran, Chap. LXXXI, Vol. 8), and they ceased upon their marriage to be members of the natural family; the widows because they were placed in the same category as slaves and passed ordinarily into the hands of their husband's heirs as a portion of his patrimony (Koran, Chap. XLIII, Vol. 16); the minors because they were unable to defend by their arms the tribal rights and privileges and their goods therefore belonged to their tutors: (Koran Chap. IV, Vols. 2, 4, 5, 6, 7 and 11: Chap. VI, Vol. 153 and Chap. XVII, Vol. 36). (Ameer Ali, Vol. II, Succession and Status, second edition, p. 48). We learn from the same learned author that the pre-Islamaic Arabs looked upon women with so much aversion and regarded them as so great a misfortune as to bury alive many of their female children and to sacrifice others to their gods. (See Koran, Chaps. VI, XVI, XVII and LXXXI).

The above short account will enable the reader to gauge the importance of the reforms introduced by Mahomed: but it will also appear that he was in no sense a bold reformer; he proceeded only by cautious and conciliatory steps; and hence the system of law as settled by him is a curious compromise, in the words of Prof. Wilson, "between the arrangements appropriate to a patriarchal society and those suitable to a well-polished empire in which the law is strong enough to penetrate within the family and to take account of the separate personality of every man, woman and child" (Wilson Anglo-Mahomedan Law, 2nd edition, p. 91). Even such an ardent advocate of the excellence of the Mussulman system as Mr. Ameer Ali is forced to admit that several institutions which the Mussulmans borrowed from the "pre-Islamaic period have had the tendency of retarding the advancement of Mahomedan nations." (M. L., Vol. II, p. 22); but there is no denying the fact that according to his lights and the ideas of his time, Mohamed pruned away many of the excrescences that checked the progress of the Moslem commonwealth and freed property from one of its most grevious trammels, *viz.*, from being tied down by the all-absorbing needs and requirements of the corporate family and so rendered inalienable, and substituted the individual instead of the family as the unit of all transactions in the Moslem world. This bold step at once clothed individuals with full proprietorship and made it unnecessary to resort to those devices which highly matured systems of law adopted to free property from the fetters which encumbered its free alienation. Hence such distinctions as the ancestral and self-acquired property in Hindu law, *Res Mancipi* and *Res nec Mancipi*, under the Roman law, find no place in the Moslem jurisprudence. A Mahomedan father is complete master of his possessions and can freely give it or sell it away; but this free power of gift and sale does not extend to his willing away the whole of his property. A Mahomedan must die intestate as regards the major portion of his property. To speak more accurately, he must leave ⅔ to his heirs. This is at once a certain indication that Mahomed did not go far enough to hold that testamentary power was co-existent with the power of gift but lagged behind in the march of ideas swayed by a regard to the prevailing sentiments of his age. As a natural corollary from the recognition of the unfettered ownership of the father, it at once followed that his sons could not have any manner of right in the property of his father. This is in accord with the English and the Roman law, as expressed in the Latin maxim '*nemo est hæres viventis*'—a living person has no heir. This is in marked contrast with the widely prevalent school of Hindu law, the Mitakshara, which recognises the joint ownership of the son in the ancestral property.

Another great canon of inheritance in all matured systems of law is that division *per stirpes* regulates the devolution of property within the members of the agnatic groups. According to Roman law

"grandsons, if their father were livng" and "has not ceased to be under the power of the grandfather either by death or some other means," "could not be *sui heredes* and grandsons could only take the place of their deceased father." This is also an accepted principle in the Hindu law and is sytematically applied in deciding questions of partition and inheritance. Ancient systems of jurisprudence reverse this principle of division; no attention is paid to the stock or root and all the grandsons equally divide the estate. This is known as division *per capita*, or division by head or per head of the members of the agnatic group. In this connection the learned remarks of that distinguished jurist, the late Sir H. Maine, are very instructive. "The tendency of matured and developed law is to give a decided preference to distribution *per stirpes*. It is only with remote classes of relations that it abandons the distributions between the stocks and distributes the property *per capita*. But in this, as in other particulars, very ancient and undeveloped law reverses the idea of the modern jurist and uniformly prefers the distribution *per capita*, exactly equal division between all the surviving members of the family and this is apparently on the principle that all having been impartially subject to a despotism which knew no degrees, all ought to share equally on the dissolution of the community by the death of its chief. A preference for division *per stirpes*, a minute care for the preservation of the stocks is in fact very strong evidence of the growth of a respect for individual interests inside the family distinct from the interests of the family group as a whole. This is why the place given to distribution *per stirpes* shows that a given system of law has undergone development and it so happens that this place is very large in Hindu law which is extremely careful for the distinction between stocks and maintains them through long lines of succession." (Sir H. Maine, Early History of Institutions, pp. 328-29). Now turning to any text-book on Mahomedan law we find that as a general rule it does not recognise the principle of representation. Uncles exclude brother's sons. If a grandfather dies leaving him surviving two sons of one son and seven of another, the nine grandsons will take the property *per capita* and not *per stirpes*.

How comes it, then, that Mahomedan law advancing almost up to the very goal of individual ownership was caught into the meshes of the primitive law and nailed fast to the division *per capita* which is an undoubted vestige of the semi-developed and immature condition of law? The question remains yet to be answered and the only answer we can suggest with a near approach to truth is that at the time of the appearance of Mahomed and the promulgation of his laws, an institution corresponding in its main features to the *patria potestas* of the Romans prevailed in its full vigour; and Mahomed had not either the courage or, perhaps, the inclination to promulgate any change which would give a rude shock to the parental despotism characteristic of his age.

(*To be continued.*)

Notes of Cases.

PRIVY COUNCIL.

Earl of Halsbury, Lord Davey. Sir Arthur Wilson. Sir Alfred Wills. 1906. 19, June.	Scotts Patent.

Patent—Prolongation, ground for—Public interest —Usefulness.

Prolongation petition. Patent was for maturing spirits according to a process invented by Mr. Richard Clarkson Scott of Liverpool. The invention reduced the time necessary for maturing spirits bonded in wood, in order to make them drinkable. From the Attorney General's statement in opposition to the claim for prolongation it appeared that there were other inventions for the same object, the removal of deleterious matter from spirits. Mr. Scott's method was different to all those. His petition disclosed that owing to the very conservative trade up to the present his method for removing impurities in a few hours had not been adopted and he had not made a fair reimbursement commensurate with the great importance of the invention. The result of using the invention on raw spirit was that in a few hours precisely the same chemical effects were produced on the spirit as would be produced if it had been bonded in wood for two years. The Petitioners believed that now there were signs of the trade recognizing its merit and importance and the patent consequently becoming productive.

Lord Halsbury said their Lordships regretted that they did not see their way to acceding to Petitioners' prayer. He had failed to show that if the enlargement was granted it would lead to a very different result to what had been going on for 14 years There was nothing to lead their Lordships to suppose that that there would be any difference. The statute contemplated prolongation of a patent upon considerations such as had not been established to their Lordships' satisfaction. The mere fact of sympathy with the patentee was not enough; it must be something more than the mere fact of its being a good patent, and there must be some character of public interest established in the patent and its usefulness. It was manifest that no one had as yet taken up the patent. On one occasion it was tried but those who tried it did not adopt it. It was impossible to suggest that if the patent were renewed there would be a different experience from that which had been established for the last 14 years.

The Petitioner and Dr. Thomas Drinkwater we examined for Petitioners.

Mr. Russell Clarke for the Petitioner.

C. W. A. *Prolongation refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before CASPERSZ and CHITTY, JJ. CRIMINAL REVISION No. 1141 OF 1907. RAJ KUMAR SINGH, Petitioner *v.* TINCOWRY MONDAL Opposite party. 28th October 1907.

Criminal Procedure Code, secs. 195 (6), 421 and 440—Summary rejection of an application for revocation of a sanction for prosecution.

The facts are briefly these:—

The Petitioner lodged a complaint against the opposite party. After a trial the opposite party was acquitted who thereupon applied for sanction to prosecute the Petitioner under sec. 211, I. P. C. The trying Magistrate granted the sanction. The Petitioner then applied to the District Magistrate praying that the sanction should be revoked. According to a standing order of the District Magistrate this application was filed before the Joint Magistrate. Subsequently the District Magistrate without hearing the Petitioner's pleader rejected this application summarily. This rule was issued against the order of the District Magistrate summarily rejecting the Petitioner's application.

Their Lordships observed:—

"We think the learned District Magistrate was in error in not hearing the pleader in the matter of the application by way of appeal preferred by the Petitioner under sec. 195 (6) of the Code of Criminal Procedure. The principal laid down in the second paragraph of sec. 421 of the Code appears to be a salutary principle in cases like this and we don't think that sec. 440 of the Code is one on which reliance can be placed. It is obvious that an order of rejection should not have been passed without hearing the pleader who might have placed matters before the learned District Magistrate and explained them to him in a way which he may not have considered before the order of rejection was passed and we think the Petitioner was entitled, as of right to be heard through his pleader."

The rule was made absolute and the District Magistrate was directed to dispose of the case in accordance with law.

Mr. Chippendale for *Babu Hemendra Nath Sen* for the Petitioner.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before GEIDT, J. APPEAL FROM APPELLATE DECREE No. 1739 OF 1906. NILMADHUB RAI AND ANOTHER, Defendants, Appellants, *v.* NABA DAS AND ANOTHER, Plaintiffs, Respondents. 20th November 1907.

Decree, setting aside—Fraud—Perjury—Res judicata.

The predecessor of the Appellants obtained two decrees for rent against the present Plaintiffs, one in respect of a *jumma* of Rs. 12-15-4 gundas and the other in respect of a *jumma* of Rs. 5-10-11 gundas. The present suit was brought for the purpose of setting aside the decree for rent in respect of the *jumma* of Rs. 5-10-11 gundas, and both the Court of first instance and the lower Appellate Court decreed his suit holding that there was no separate *jumma* of 5-10-11 gundas, that the land in respect of which the decree for that rent had been obtained was included within the larger *jumma* of Rs. 12 5-4 gundas and that the rent decree in respect of the smaller *jumma* had been obtained by fraud.

The Defendants appealed to the High Court and contended *inter alia* that the suit was not maintainable on the ground of *res judicata.*

The fraud which the Courts found to be committed in the former suit was that the Court had been misled falsely into thinking that there was a separate smaller *jumma* apart from the larger *jumma* of Rs. 12 and odd.

Held—A person cannot set aside a decree passed against him merely on the allegation that it was wrong and that it was obtained by perjury committed by or at the instance of the other party. The fraud which entitles a party to set aside a previous judgment is a fraud by which the person defrauded was prevented from placing his case before the tribunal which was called upon to adjudicate upon it. The case which the Plaintiff set up here was the very case which they had set up before the former tribunal, namely, that they had no separate *jumma* of Rs. 5 and odd. There was no fraud on the other side by which they were prevented from establishing that case in the former suit.

Mahomed Golab v. *Mahomed Suliman* (I. L. R. 21 Cal. 612) applied.

Vadala v. *Lawes* (25 Q. B. D. 310) and *Abonloff* v. *Oppenheimer* (10 Q. B. D. 295) distinguished.

Babu Pramatha Nath Sen for the Appellants.

Babu Atul Chandra Dutt or the Respondents.

A. T. M. *Appeal allowed.*

ADDAITA BHUIA *v.* KALI DAS DE.

A Local Board Sircar is not a public servant within the meaning of sec. 21, cl. 10, I. P. C.

This was a rule granted on the 5th of September 1907, against an order of R. De, Sub-divisional Magistrate of Tamluk, dated the 30th of July 1907, convicting the Petitioners under secs. 143 and 186, I. P. C., and sentencing them to pay a fine of Rs. 25.

The facts of the case appear from the judgment.

Babu Hari Bhusan Mukherjee for the Petitioners.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The questions for our determination in the matter of this rule are, *first*, whether the Petitioners constituted an unlawful assembly within the meaning of sec. 141, I. P. C., and, *secondly*, whether the complainant, being a District Board Road Sircar, is a public servant in respect of whom the offence under sec. 186, I. P. C., has been committed.

The facts shortly are these:—There was a wooden bridge across a *khal* which, being in a state of disrepair, it was decided to replace by means of a road with pipes passing underneath for the flow of water. The bed of the *khal* belongs to the Petitioners and others, and they objected to the laying of the pipes on the ground that it would obstruct the flow of water in the *khal*. They accordingly removed the pipes placed there.

On these facts, the Petitioners have been convicted under secs. 143 and 186, I. P. C. In his explanation the Magistrate urges that the assemblage was illegal under sec. 141, cl. (5), I. P. C. But the Petitioners were simply asserting their right *bonâ fide* and preventing any unlawful interference with the *khal*. They cannot be regarded as members of an unlawful assembly. The mere use of criminal force or show of criminal force by any person to take possession of any property is not sufficient to bring the case within the clause unless some criminal intent is proved against the persons so using force or show of force. In the present case it does not appear that any unnecessary force was used to remove the pipes, which the Petitioners were entitled to do, as the District Board had only the right to bridge the *khal* by means of a superstructure.

Then on the second question, we entertain no doubt, in the absence of any express authority on the point, that a Local Board Road Sircar is not a public servant within the meaning of sec. 21, I. P. C. The Magistrate has cited cl. 10 of that section; but it cannot be said that a *sircar*, who merely supervises road work, and, in this case, the construction of a culvert, is a public servant, and that his duty is to take, receive, keep or expend any property, &c., &c., according to the definition given in the 10th clause of the section. In analogous decisions it has been held that such officers are not public servants; but the only case to which our attention has been called is that of *Regina* v. *Ramajirav* (1). That case is not on all fours with the present one, and we have to decide, on the language of the section, whether a road *sircar* is a public servant. In our opinion, he is not.

(1) 12 Bom. H. C. R. 1 (1875).

ADDAITA BHUIA v. KALI DAS DE.

The rule must, therefore, be made absolute. The fines if levied will be refunded to the Petitioners.

S. C. S. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 103 OF 1905.

RAMPINI, C. J. SHARFUDDIN, J. 1907. Heard, 31, July and 1, August. Judgment, 8, August.

GOBINDA KUMAR ROY CHOWDHURY and ors., Appellants, v. DEBENDRA KUMAR ROY CHOWDHURY and ors., Respondents.

Land Acquisition Act (1 of 1894), secs. 18, 20, 21—Reference to Special Judge—Scope of enquiry—Parties addition of, after reference—Contesting award on matters outside the reference—Hindu Law—Debutter, *private—Conversion into secular property—Consensus of family—Real or nominal* debutter—*Test—Dealings with property—Release by Government, effect of*—Shebaiti *right, alienation of, to* co-shebait—*Validity—Idol, breakage of—Effect.*

In a reference under sec. 18 of the Land Acquisition Act, it is not open to the Special Judge to go into questions raised by parties who did not object to the award and apply for a reference.

Where the reference under sec. 18 related to a dispute regarding apportionment between parties A and B,

Held—*That the Special Judge was wrong in allowing parties C and D to be added on their own application and contest the award on a ground not raised in the reference.*

ABU BAKAR v. PEARY MOHUN MOOKHERJEE (1) *followed.*

Properties dedicated to a family idol may be converted into secular property by the consensus of the family.

Held—*That in this case the properties if originally* debutter *have been so converted with common consent.*

In dealing with a question as to whether properties alleged to be debutter *are really* debutter *or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for consideration.*

Release by Government is not conclusive evidence of property being debutter.

NEMAYE CHURN POOTEETUNDEE v. JOGENDRA NATH BANNERJEE (10) *followed.*

Shebaiti *right cannot be transferred even to a* co-shebait *or to one who is next in succession.*

RAJA VURMA VALIA v. RAVI VURMA MUTHA (5), GNANA SAMBANDA PUNDARA SANNADHI v. VELU PANDARAM (6), SRI RAMAN LALJI MAHARAJ v. SRI GOPAL (7), PRASANNA KUMAR ADHICARY v. SARODA PROSANNO (9) *referred to.*

MANCHARAM v. PRANSANKAR (8) *not followed.*

Quære—*Whether an idol which has been broken is capable of holding property.*

This was an appeal preferred on the 9th of March 1905, against the decree of C. P. Beachcroft, Esq., Special Land Acquisition Judge of Zillah 24-Pergunnahs, dated the 26th of November 1904.

(1) I. L. R. 34 Cal. 451 (1907).

(5) 4 L. R. I. A. 76 (1876).
(6) 27 L. R. I. A. 69 (1899).
(7) I. L. R. 19 All. 428 (1897).
(8) I. L. R. 6 Bom. 298 (1882).
(9) I. L. R. 22 Cal. 989 (1895).
(10) 21 W. R. 365 (1874).

GOBINDA KUMAR ROY CHOWDHURY v. DEBENDRA KUMAR ROY CHOWDHURY.

This appeal arose out of a reference to the Special Judge under sec. 18 of the Land Acquisition Act.

The parties to this appeal were all before the Land Acquisition Deputy Collector. The amount awarded by the Deputy Collector was not questioned on the reference. But the Respondents (who were the first amongst four groups or "parties" of claimants before the Special Judge) in their petition of reference objected that the learned Deputy Collector was wrong in awarding a certain portion of the compensation money which they themselves were entitled to to one Sudhir Lal Roy Chowdhury, the second party. The third and the fourth parties did not ask for a reference, but they applied to the Special Judge to be made parties and their applications were acceded to. Their objection was that the lands for which compensation had been awarded were *debutter* properties dedicated to the worship of Anandamoyee Thakurani and Thakurs Radhakanta and Govindji. The first party in reply denied that the properties were *debutter*, and that even if they were *debutter*, they have according to the consensus of the family been converted into secular property.

The Special Judge held that Sudhir Lal's claim to the share awarded to him was barred by limitation. He dismissed the third and the fourth parties' objections and gave the first party the decree against which the present appeal was preferred.

Babus Umakali Mukherjee, Golap Chandra Sarkar, Narendra Chandra Bose and *Surendra Chandra Bose* for the Appellants.

Babus Nilmadhub Bose, Lal Mohun Das, Jogesh Chandra Dey and *Sailendra Nath Palit* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The present appeal arises out of certain proceedings under Act I of 1894. Certain lands situated in two villages, namely, Betbaria and Belagachi, were acquired for a public purpose. The persons interested were the members of the first, second, third and fourth prarties; and they all appeared personally or by agents before the Land Acquisition Deputy Collector who made the apportionment of the compensation money among the parties. This was objected to only by party No. 1, who are the Respondents in the present appeal.

From the reference to the District Judge made on the 28th March 1903, it appears that it was made on a petition by party No. 1 and that the dispute then was that the claimants, first party, denied the claim of Sudhir Lal Roy Chowdhuri, party No. 2, who alleged that he had a share of 17 gundas and odd in the acquired land in village Betbaria. When the case came before the District Judge, Govinda Kumar Roy Chowdhury and others, the present Appellants (*viz.*, the third party) and Kedar Nath Roy Chowdhuri (the fourth party) applied to the District Court on the 24th June 1903, and 8th July 1903, respectively, to be made parties, and the District Judge acceded to their request. But it is clear that the real matter that was referred to the District Judge was the dispute between the parties Nos. 1 and 2, that is, with regard to the compensation allowed to party No. 2 by the Deputy Collector.

GOBINDA KUMAR ROY CHOWDHURY v. DEBENDRA KUMAR ROY CHOWDHURY.

The objection to the apportionment was made under sec. 18 of Act I of 1894; and under sec. 21 of the Act the scope of the inquiry has to be restricted to the consideration of the interests of persons affected by the objection.

It will appear from the land acquisition proceeding under sec. 11 of Act I of 1904 that Sudhir Lal Roy Chowdhuri was made a member of the first party to which Debendra Kumar Roy Chowdhury and others, the Respondents, belonged, which party according to the Collectors' order was awarded a certain portion of the compensation money.

Disputes appear to have arisen amongst the members of the party which was headed by Debendra Kumar and they seem to have been to the effect that Debendra Kumar and others disputed the claim set up by Sudhir Lal on the ground mentioned in the written statements.

From the above it is clear that the dispute as to the apportionment was exclusively among the members of Debendra's party, with which the members of the other parties had nothing to do. We have already observed that the reference was made on the objection of Debendra and others against the apportionment in favour of Sudhir Lal.

We think that under the above circumstances the learned Judge ought not to have allowed the third and fourth parties to be made parties in the case and that his action has led to nothing but complications and confusion. On the authority of the case of *Abu Bakar* v. *Peary Mohun Mookherjee* (1), it is clear that according to the terms of the sections of Part III of the Act, it was not open to the learned Judge to go into the question raised by parties who had never made objection or applied for the reference.

The present case related entirely to the dispute between Debendra and others and Sudhir Lal. The latter's claim to compensation, however, according to the finding of the learned Judge is barred by limitation. He has not appealed against the judgment of the lower Court and in these circumstances, this appeal ought to fail on this ground alone. But we think that even on the merits of the case this appeal ought to be dismissed.

The Respondents claim compensation as proprietors of their respective shares, while the other parties allege that the lands for which compensation has been awarded are *debutter* properties dedicated to the worship of Anandamoyee Thakurani and Thakurs Radhakanta and Govindji. There is no dispute as to the amount of the compensation money awarded. The dispute is only as to whether the properties are *debutter* or secular.

The first party allege that these properties are not *debutter* and that they were granted in the name of the idols as a benami transaction to one of the ancestors of the family of the claimants; in the alternative the Respondents contend that if the properties were originally *debutter*, yet by consensus of the family they have ceased to be so. Lastly, they allege that the idol Anandamoyee, having been broken many years ago, has ceased to be a juridical person capable of holding property.

(1) I. L. R. 34 Cal. 451 (1907).

GOBINDA KUMAR ROY CHOWDHURY *v.* DEBENDRA KUMAR ROY CHOWDHURY.

The second and third parties deny the breakage but the fourth party admits it.

The learned Judge has by the order appealed against apportioned the disputed portion of the compensation money among the members of the first party with the exception of that portion which represents the share of Girish Chandra, a member of the first party, as he alleges the property to be *debutter*. The learned Judge in consequence has ordered the portion representing Girish Chandra's share to be invested. He has further held that the claim of Sudhir Lal is barred.

The present appeal is on behalf of the third party who have taken 41 grounds in their memorandum of appeal. The arguments before us, however, have been confined to the following points, namely:—

1. Whether the idol Anandamoyee is a juridical person.

2. Whether the disputed properties are *debutter* or secular.

3. Whether the properties, if they were originally *debutter*, have ceased to be so.

The lower Court has found that these properties were at one time *debutter* and remained so till 1832. It has further held that the lease and release of these properties by Rajballav, a common ancestor, in 1835, gave another character to these properties: and that after Rajballav's death there was a reconveyance and an English mortgage in 1867 regarding these properties, and that all the descendants of Rajballav living at the time were parties to these transactions. These descendants appear to have split up the ancestral debts and divided them according to their respective shares; and hence on the above grounds the lower Court has held that by the consensus of all the members of this family, the properties have been converted into secular properties. In Babu Golap Chandra Shastri's Treatise on Hindu Law (p. 440) it is said that "the endowments may either be public or private. In the former the public is interested and in the latter certain definite persons only are interested. When the property is dedicated to charitable, educational or religious uses for the benefit of an indeterminate body of persons the endowment is a public one; and when property is set apart for the worship of a deity of a particular family in which no outsider is interested, the endowment is a private one. The distinction between private and public endowment is an important one for 'in the case of a family idol the consensus of the whole family might give the estate another direction [*Konwar Doorga Nath* v. *Ram Chandra* (2)].' Mr. Mayne is of the same opinion (*vide* secs. 437, 438, Hindu Law and Usage, 7th edition).

In accordance with the law laid down in the abovenamed works on Hindu law, these properties can become secular by consensus of the whole family, if the dedication was to the worship of the family idol. From Sudhir Lal's written statements it is an admitted fact that the goddess Anandamoyee is an ancestral family goddess. The third party also in their written statements admit that Anandamoyee Thakurani, Radhakanta Jew and Govinda Dev Thakurs are their ancestral family deities and they were established by their ancestors. From the evidence it appears that the idol's

(2) I. L. R. 2 Cal. 351 (1876).

shrine is situated within the heart of the Roy Chowdhuris' family dwelling-house. From the above statements and facts it is clear that these idols cannot be public idols, and hence in accordance with the authorities cited, the properties, even if at one time *debutter*, could be converted into secular properties.

From the various exhibits on the record it is evident that the members of this family have been treating these properties as secular properties which could be sold, mortgaged, leased or bequeathed. The Appellants' reply is that though it is a fact that the members of the family have in many instances sold, mortgaged and leased these properties or disposed of them by Will, yet these alienations had never been in favour of any stranger and that it is legal for one *shebait* to convey his share in the *shebaiti* right to another *shebait*.

We find from Babu Golap Chandra Shastri's Treatise on Hindu Law (p. 446) that "the office of *shebaiti* right is not saleable, *Narasimu* v. *Anantha* (3), *Rangasami* v. *Ranga* (4)." It has been held by their Lordships of the Judicial Committee in the case of *Raja Vurmah Valia* v. *Ravi Vurmah Mutha* (5), that an assignment of the right of management is beyond the legal competence of a trustee under the common law of India and the usage of the foundation, and that the assignment of a trusteeship for the pecuniary advantage of the trustee could not be validated by any proof of custom. In the case of *Gnana Sambanda Pundara Sannadhi* v. *Velu Pandaram* (6), it was held that the sale of the right of management and of the endowed property was null and void in the absence of a custom allowing it. In the case of *Sri Raman Lalji Maharaj* v. *Sri Gopal* (7), it was held that the right of management is not divisible where there are more trustees than one inasmuch as they hold as joint tenants.

Babu Golap Chandra Shastri has in his abovementioned work (p. 447) laid down a rule of law on the authority of *Mancharam* v. *Pransankar* (8) that the *shebaiti* right may be transferred to a co-*shebait* or to one who is next in succession. But we prefer to follow the authority of this Court in the case of *Prasanna Kumar Adhicary* v. *Saroda Prosanno Adhicary* (9) where it was held that even a *shebait* could not grant a mourasi mokurari lease of any portion of a *debutter* property to a co-*shebait* and the same is null and void.

We find that on the 11th May 1888 (Ex. F) Govinda Kumar Roy Chowdhury executed a registered *kobala* in favour of Muktakeshi Dasi. It appears from this document that this so-called *debutter* property was sold by one member of the family to another to pay off the vendor's ancestral debt and to meet the expenses of his daughter's marriage. Ex. F (1) is also a registered *kobala* from one member of the family to another, dated 14th January 1884. From this document we find that the amount of money to be spent for the worship of the deities has been left entirely to the

(3) I. L. R. 4 Mad. 391 (1881).
(4) I. L. R. 16 Mad. 146 (1892).
(5) L. R. 4 I. A. 76 (1876).
(6) L. R. 27 I. A. 69 (1899).
(7) I. L. R. 19 All. 428 (1897).
(8) I. L. R. 6 Bom. 298 (1882).
(9) I. L. R. 22 Cal. 989 (1895).

discretion of the vendee. The above two documents show conduct on the part of some of the members of this family, which is inconsistent with the property being *debutter*.

There are on the record many other documents showing transactions of a nature indicating the properties to be anything but *debutter*. The conduct of the members of this family clearly proves that, even if the properties were at one time *debutter*, they have by common consent been converted them into secular properties.

It is contended on behalf of the Appellants that the fact of the release of the lands by the Government on the ground of their being *debutter* is proof positive of the nature of the properties being *debutter*. But it has been distinctly held in the case of *Nemaye Churn Pooteetundee* v. *Jogendra Nath Bannerjee* (10) that the mere fact of the land having been released by Government on the grounds of its having been appropriated to the services of an idol does not impose on it the character of a religious endowment, so as to exempt it permanently from being attached and sold in satisfaction of decrees against a person who may hold it. We therefore find, following the authority quoted above, that the release by Government is not conclusive evidence of the property being *debutter*.

On a review of the whole case, we think that in dealing with the question as to whether the properties in dispute were really *debutter* or only nominally so, the manner in which the dedicated properties have been held and enjoyed is the most important point for our consideration and a consideration of this leads us irresistibly to the conclusion that the property is only nominally *debutter* but not really so.

It is admitted that Debendra Kumar and others, members of the first party, are *shebaits* even now. That being so, the member of the first party who are the Respondents in this appeal are entitled to receive from Government their proportionate share of the compensation money which is in dispute. They have been in possession of those shares and it is immaterial for the purposes of the present case whether they are in possession as *shebaits* or as proprietors. If after taking out the money, they mis pend it their conduct may be the subject of another suit.

We do not think it necessary to enter into a discussion of the question as to whether the idol Anandamoyee owing to its having been broken, is capable of holding property or not.

For the above reasons we hold that the present appeal fails completely both on law and the facts. We therefore dismiss it with costs.

N. G. *Appeal dismissed.*

(10) 21 W. R. 365 (1874).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 213 OF 1906.

RAMPINI, C. J.
SHARFUDDIN, J.
1907.
12, July.

ADHAR CHANDRA CHATTERJEE, Plaintiff, Appellant,
v.
NOBIN CHANDRA CHATTERJEE, Defendant, No. 1, Respondent.

Hindu Law—Dayabhaga—Joint property

ADHAR CHANDRA CHATTERJEE v. NOBIN CHANDRA CHATTERJEE.

Self-acquisition—Money received at marriage by a member.

Money received by a member of a joint Hindu family at marriage is not joint family property.

This was an appeal preferred on the 19th of February 1906, against the decree of Babu Purno Chandra Chowdhury, Additional Subordinate Judge of Zillah Faridpur, dated the 22nd of September 1905, affirming that of Babu Bejoy Keshab Mitra, Additional Munsif of Madaripore, dated the 10th of March 1905.

The Plaintiff and the Defendants were brothers. Plaintiff alleged that they were formerly members of a joint family; that after the death of their father, the Defendant No. 1 was the *karta* of the family and the money left by the father was placed in the hands of Defendant No. 1, that the amount had by investment been increased to Rs. 11,000; that Plaintiff separated from his brothers in Magh 1308 and that the Defendant No. 1 declined to render any account of the said joint family fund and hence this suit for an account by the Plaintiff.

Defendant No. 1 in his reply stated that no money belonging to the joint family had been placed in his hands on their father's death, that he had obtained money at several marriages which he had contracted and with that he commenced money-lending business, and that it was not a joint family concern; that at his first marriage he got Rs. 1,200 out of which he kept Rs. 400 the rest having been taken by his father.

Both the Munsif and the Subordinate Judge were of opinion that the property in question was the separate self-acquired property of Defendant No. 1 and so dismissed the suit.

The Plaintiff preferred this second appeal.

Babu Lal Mohan Das for the Appellant.

Babu Bidhu Bhusan Ganguly for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for an account.

The Plaintiff seeks for an account from his brother, the Defendant No. 1, who was the *karta* of the family for some time and who has now established a prosperous money-lending business. The Plaintiff asks that the Defendant No. 1 may be directed to render an account of that business, with a view to claiming a share in the profits.

The Defendant, on the other hand, states that all his acquisitions were self-acquisitions, that he did not acquire anything by means of the joint family funds, and that, therefore, the Plaintiff is not entitled to an account.

Both the lower Courts have found in favour of the Defendant and have dismissed the suit.

The Plaintiff appeals to us and contends that the money received on the marriage of a member of a joint family is joint property, and that even if that be not so, a sum of Rs. 400 which the Defendant No. 1 got from his father at the time of his first marriage should be held to have been the nucleus of his money-lending business. He also contends that the onus has been wrongly placed upon him.

ADHAR CHANDRA CHATTERJEE v. NOBIN CHANDRA CHATTERJEE.

It appears that Defendant No. 1 inherited no money from his father and received no money from the joint funds of the family. He, however, has contracted five marriages and has received considerable sums at each of these marriages. The Defendant No. 1 is a kulin Brahmin and has married into non-kulin families, and thus acquired various sums of money as presents. At his first marriage he received Rs. 1,200 and gave Rs. 800 to his father (or his father took Rs. 800 from him) while the Defendant No. 1 himself retained Rs. 400 only. It is now asked that this sum of Rs. 400 be held to have been given to the Defendant No. 1 by his father at the time of his first marriage and that it must be presumed that it formed the nucleus of the money-lending business. It is also contended that the onus is on the Defendant No. 1 to show that he did not gain the property now in his possession by means of this Rs. 400 and that it is not on the Plaintiff to show that the Defendant's money was not self-acquired.

Now, both the Courts below find, as a matter of fact, that the money-lending business was established by the Defendant No. 1 with his own money and with the money which he received at his marriage and that this money cannot be considered as joint family property. We see no reason to dissent from this view. No authority has been shown to us to lead us to the conclusion that such property is joint property, or is property which a member of a joint family is bound to add to the joint funds. It seems to us that the general rule is that whatever a member of a joint family acquires by means of the use of the joint family funds is, joint property, but that money acquired by such a member himself in the manner in which the Defendant No. 1 gained his fortune is not joint property. We, therefore, think that this appeal must fail. There is no presumption that the Rs. 400 which the Defendant No. 1 acquired at his first marriage was joint family property; and we do not consider that the onus has been wrongly placed on the Plaintiff.

The appeal is dismissed with costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1652 OF 1905.

RAMPINI, C. J.
SHARFUDDIN, J.
1907.
Heard, 14 & 17, June.
Judgment, 19, June.

AYUB ALI CHOWDHURY and on his death Sujayet Ali Chowdhury, Defendants Nos. 1 and 2, Appellants,
v.
DAYA BIBI and others, Plaintiffs and Emdad Ali Chowdhury and ors., Defendants Nos. 4, 5, 7 to 13 and 15 to 17, Respondents.

Fishery right in tidal and navigable river when the river changes its course—Right of Government.

When a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course.

Government has the right to lease fishery rights in tidal and navigable rivers.

NARENDRA CHANDRA LAHIRI v. NRIPENDRA CHANDRA LAHIRI (1) *distinguished.*

(1) 10 C. W. N. 540: s. c. 4 C. L. J. 51 (1906).

AYUB ALI CHOWDHURY v. DAYA BIBI.

This was an appeal preferred on the 18th of August 1905, against the decree of J. A. Ezechiel, Esq., District Judge of Zillah Backergunj, dated the 16th of May 1905, modifying that of Babu Bhuban Mohun Ganguly, Subordinate Judge of Barisal, dated the 27th of September 1904.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Gunada Charan Sen* for the Appellants.

Babu Jogesh Chandra Roy for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

The suit out of which this appeal arises was brought to establish the Plaintiffs' claim to certain fishery rights in the river Tetulia or Ilsa. The Plaintiffs have undoubtedly a *jalkar* named Bhasan Tetulia and registered as No 1422 in the Backergunj Collectorate. The river Tetulia has now shifted its course and flows over the Defendants' zemindari in which they have *jalkar* rights. The question therefore is whether the Plaintiffs can follow the river, and claim their rights wherever it goes.

The Judge in the Court below has found that the river Tetulia is a tidal and navigable river. He has therefore given the Plaintiffs a decree. The Defendants 1 and 2 appeal. On their behalf it has been contended (1) that the Judge's decree is wrong : (2) that the Plaintiffs are not entitled to a 16 annas share in the *jalkar*, but only to a 12 annas 7½ gundas share, and (3) that the Judge was wrong in giving the Plaintiffs a decree for *dones* and *khals*.

In support of his first contention, the learned pleader has argued (1) that the Government has no right to lease fishery rights in tidal and navigable rivers and (2) that the Judge is wrong in holding that when a tidal and navigable river shifts its course, fishery rights continue to subsist in the river in its new course.

We do not think we need follow the learned pleader in his long argument on either of these points. It is sufficient to say that on both points the law as laid down by this Court is settled by long series of decisions, the correctness of which we see no reason to doubt. The case of *Narendra Chandra Lahiri* v. *Nripendra Chandra Lahiri* (1) on which the Appellants' pleader relies relates to non-tidal and non-navigable rivers—and has therefore no relevancy. But in any case, the Subordinate Judge has found as a fact that the river Tetulia, though it has shifted its course, has not proceeded beyond the limits of the Plaintiffs' *jalkar* mehal No. 1422 The *jalkar* claimed by the Plaintiffs is still within the boundaries of his mehal No. 1422.

The Appellants' second plea must prevail. The Plaintiffs have only a 12 annas 7½ gundas share in the *jalkar* mehal. The deed executed in their favour with regard to it was signed only by 3 out of the 8 co-shares who it was proposed should sign the deed. Hence, the deed can only convey to the Plaintiffs the interests of the signatories to it.

The third plea is of no avail. The Judge of the Court below has not given the Plaintiffs a decree for *dones* and *khals* but only for that portion of the flowing

(1) 10 C. W. N. 840 : s. c. 4 C. L. J. 51 (1906).

AYUB ALI CHOWDHURY *v.* DAYA BIBI.

river Tetulia, which flows east of the Chars Assania and Bhaduria.

We modify the decree of the lower Court restricting the Plaintiffs' rights to a 12 annas 7½ gundas share in the *jalkar*. This order carries costs in proportion. In other respects the decree of the lower Court is affirmed with costs.

S. C. S. *Decree modified.*

CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2343 OF 1905.

BRETT, J. MOOKERJEE, J. 1907. Heard, 17, July. Judgment, 1, August.	JUGDEO SINGH, Plaintiff, Appellant, *v.* HABIBULLA and others, Defendants, Respondents.

Mortgage—Purchaser of equity of redemption not made party in mortgage suit—His right against purchaser at mortgage sale—Respective rights how adjusted—Suit for possession—Limitation—Transfer of Property Act (IV of 1882), secs. 60, 85—Res judicata.

Where a mortgagee in execution of a decree against the owners of the equity of redemption, except one, brings the mortgaged property to sale and purchases it, the owner of the equity of redemption who was omitted from the mortgage suit is not affected by the decree. The proper procedure for the purchaser in such a case to follow is to sue for recovery of possession subject to the right of the person excluded to redeem him.

Where after such purchase the owner of the equity of redemption who had been excluded brought a suit for recovery of possession against the purchaser at the mortgage sale on the ground that he was not affected by the mortgage decree, and the suit was decreed,

Held—*That the owner of the equity of redemption cannot resist a suit by the purchaser at the mortgage sale for possession (subject to the right of the Defendant to redeem) on the ground that the right of the parties ought to have been adjusted in the previous litigation, when in the previous litigation he had successfully pleaded that the purchaser at the mortgage sale must enforce his rights by a separate suit.*

This was an appeal preferred on the 6th of December 1905, against the decree of C. E. Pettet, Esq., District Judge of Zillah Gaya, dated the 21st of July 1905, affirming the decree of Babu Upendra Nath Bose, Subordinate Judge, 1st Court of that district, dated the 13th of June 1994.

The facts of the case appear from the judgment.

Babus Lal Mohan Das and *Atul Chandra Dutt* for the Appellant.

Moulvi Mahomed Mustafa Khan for the Respondents.

The JUDGMENT OF THE COURT was delivered by

MOOKERJEE, J.—The subject-matter of the litigation, out of which the present appeal arises, is a five *dams* share of Mehal Bhadeji, Pergunnah Mohair, which bears Touzi No. 3033 on the revenue rolls of the Collector of Gya. The disputed property was originally owned by Defendants 2 to 5, but the Plaintiff-Appellant as well as first Defendant-Respondent claim to have the acquired title to it by different transactions and the substantial question in controversy between the parties is as to

JUGDEO SINGH v. HABIBULLA.

the manner in which their rights are to be adjusted. The Plaintiff alleges that on the 31st May 1886 one Baij Nath Singh, now represented by Defendants 2 to 5, executed a mortgage in his favour for a consideration of Rs. 1,000. The security comprised six properties and included 11 annas, 10 dams share of Mehal Bhadeji. The loan was repayable on the 23rd June 1884. Default was made in payment and in 1893 the mortgagee sued to enforce the security. He joined as parties Defendants various persons, who had meanwhile acquired an interest in different fragments of the equity of redemption, but by some misapprehension, the nature of which is not material for our present purposes, the first Defendant, who had acquired an interest in the disputed property, was left out of the litigation. On the 28th February 1895, a decree was made on the mortgage by consent of the parties to that suit. The result was that the mortgagee obtained a decree for the balance due on the security, but as he released some of the properties from his claim the decree directed a sale only of the property now in dispute and of certain other properties with which we are not now concerned. In execution of this decree, the properties were sold and purchased by the decree-holder himself on the 26th September 1896. This is the foundation of the title of the Plaintiff. Meanwhile, in the course of proceedings under the Public Demands Recovery Act, a sale was held by the Collector on the 11th of August 1894, and the first Defendant purchased the share of Mehal Bhadeji, now in dispute, for a sum of Rs. 300. His purchase was confirmed on the 14th March 1895. A dispute then arose between the Plaintiff, who had purchased at the mortgage sale, and the first Defendant who had purchased at the certificate sale, as to their respective right to have their names registered under the Land Registration Act. There was a protracted litigation in the Revenue Courts, the ultimate result of which was that the first Defendant was defeated and the name of the Plaintiff was registered as proprietor in the books of the Collector on the 12th of February 1897. On the 14th September 1897, the purchaser at the certificate sale commenced an action for recovery of possession and mesne-profits, substantially on the ground that, as he was not a party to the mortgage suit, his right of redemption and consequent possession of the property was not in any manner affected by that litigation. The Court of first instance made a decree in favour of the purchaser at the certificate sale on the 13th July 1898, which declared that the Plaintiff was entitled to have his name registered with respect to the disputed property, to recover possession thereof and to obtain mesne-profits from the date of dispossession up to the date of delivery of possession. Upon appeal by the purchaser at the mortgage sale, the District Judge reversed this decision on the 24th September 1898, and dismissed the suit. On appeal to this Court, however, *Habibulla Khan* v. *Jugdeo Singh* (1), the decree of the District Judge was set aside and that of the Court of first instance restored. The

(1) S A. No. 2614 of 1898 decided by Rampini and Brett, JJ on the 27th March 1901. Unreported.

JUGDEO SINGH *v.* HABIBULLA.

ultimate result of the litigation, therefore, was that the purchaser at the certificate sale became entitled to possession and to mesne-profits which had accrued due during the period of dispossession. It is conceded that the first Defendant has executed this decree and is now in possession. It appears to have been argued before this Court, on behalf of the present Plaintiff, who was then Respondent, that the purchaser at the certificate sale was not entitled to an unconditional decree for possession and that he was at best entitled to recover possession after he had redeemed the purchaser at the mortgage sale. This Court, however, held that, in the suit as framed, this objection could not be entertained, and an observation was thrown out that the purchaser at the mortgage sale might bring another suit for the sale of the property in the presence of the purchaser at the certificate sale. On the 21st of May 1903, the present Plaintiff, who had purchased at the mortgage sale and who had been defeated in the previous litigation, commenced this action for recovery of Rs. 2,210 by sale of the 5 dams share of Mehal Bhadeji which was covered by the mortgage of 31st May 1886 and had been subsequently purchased by the first Defendant at the certificate sale on the 11th of August 1894. The Plaintiff founded his claim upon the ground that the effect of the previous litigation had been to deprive him of the disputed property, (the price of which, fetched at the mortgage sale, had been applied in partial satisfaction of the mortgage decree) and that, as the first Defendant was not bound, in any manner, by the previous litigation on the mortgage, the Plaintiff was entitled to recover from him by sale of the mortgaged property the sum of Rs. 2,210 which he had paid at the mortgage sale as the price of the disputed property. The claim was resisted, on various grounds, amongst which it is sufficient to mention two, *namely*, *first*, that the suit as framed was not maintainable, and, *secondly*, that it was barred by limitation. The Courts below have dismissed the suit on the ground that it is barred by limitation inasmuch as it has been brought more than 12 years after the date on which the mortgage money fell due. An attempt was made, on behalf of the Plaintiff, to take the case out of the Statute of Limitation by reason of some alleged acknowledgment of the debt made by the representatives of the original mortgagor on the 28th February 1895, when the consent decree on the mortgage was made. The learned Judge, however, has held that the acknowledgment relied upon was not sufficient, and, if it were necessary for us to consider this point, a question of some nicety might have arisen. But in the view we take of the rights of the parties, it is not necessary to discuss this matter. In our opinion, the suit has been erroneously framed and, if leave be granted to the Plaintiff to amend his plaint, as we think ought to be done, no question of limitation arises and the rights of the parties may be adjusted without any difficulty.

From the circumstances we have set out, it is reasonably clear that what has happened is that the mortgagee in execution of a decree obtained against the owners of the equity of redemption, except one, has brought the mortgaged

JUGDEO SINGH v. HABIBULLA.

property to sale and purchased it. The result of this has been that the right of redemption of the first Defendant, who was omitted from the mortgage suit, has not been, in any manner, affected by the decree made in that litigation, *Mallikarjunadu* v. *Lingamurti* (2). The position of the person, who has been thus excluded, is that he has now to reckon with the purchaser at the mortgage sale in whom by virtue of the sale under the decree, the interest of the prior mortgagee and that of the holders of the equity of redemption, who were parties to the suit, have become vested as it stood at the date of the sale; but the decree, which has been obtained behind his back, obviously does not affect his rights, as he is not before the Court and had no opportunity to be heard. [*McVeigh* v. *United States* (3). Hughes on Procedure, Vol. I., p. 169]. His right in the property, which gives him the right to redeem, remains as it was before the decree was passed. *Ram Narain* v. *Bandi* (4), *Gangadas* v. *Jogendra Nath* (5), *Rungasami* v. *Felli Badi* (6), *Hassanbhai* v. *Umaji* (7), *Brij Kishore* v. *Madho* (8). The proper procedure, therefore, for the purchaser at the mortgage sale to follow is to sue for recovery of possession subject to the right of the person excluded to redeem him. It is not necessary for our present purposes to consider, whether it is open to a mortgagee, who has omitted to implead a necessary party, to maintain another suit to enforce his security against the party excluded; that he may do so under certain exceptional circumstances appears to have been affirmed by the Allahabad High Court in *Dharam Singh* v. *Angan Lal* (9) and *Lachman Das* v. *Dallu* (10); but even if it be assumed that it is open to a mortgagee to enforce his security by a fresh suit for sale against an excluded party, which, however, we must not be taken to affirm, it is well-settled that it is not obligatory upon him to do so and that his appropriate remedy is by a suit for possession subject to an exercise of the right of redemption by the party excluded. In support of this proposition reference may be made to the cases of *Banwari Jha* v. *Ramji Thakur* (11), *Ram Narain Sahoo* v. *Bandi Prosad* (4), *Harprosad* v. *Dalmardan Singh* (12) and *Gangadas* v. *Jogendra Nath* (5). Under the circumstances of the present case we think the Plaintiff is not entitled to recover from the first Defendant by sale of that portion of the mortgaged property, which is in his possession, a sum of Rs. 2,210, which, the Plaintiff alleges, he paid at the auction-sale held in execution of the mortgage decree for the purchase of the disputed property. No intelligible reason has been suggested why the Plaintiff should recover the specific sum for which he purchased the property at the mortgage sale, that sum may be greater or less than the portion of the mortgage

(2) I. L. R. 26 Mad. 332 (1902).
(3) 11 Wallace 267.
(4) I. L. R 31 Cal. 737 (1904).
(5) 11 C. W N. 403: s. c. 5 C. L. J. 315 (1907).
(6) I. L. R. 26 Mad. 484 (1902).
(7) I. L. R. 28 Bom 153 (1903).
(8) I. L. R. 28 All. 279 (1905).

(4) I L. R. 31 Cal. 737 (1904).
(5) 11 C. W. N. 403: s. c. 5 C. L. J. 315 at p. 319 (1907).
(9) I. L. R. 21 All. 301 (1899).
(10) I L. R. 22 All. 394 (1900)
(11) 7 C. W. N 11 (1902).
(12) I. L. R. 30 Cal. 891 (1903).

JUGDEO SINGH v. HABIBULLA.

debt which is fairly chargeable upon the property in the hands of the first Defendant. Besides the Plaintiff has already enforced his security, and it may very well be contended that when he brought an action upon his mortgage and obtained a decree, the effect thereof was to exhaust the original cause of action and to transform the mortgage debt into a judgment debt. No doubt, the first Defendant is not bound by that decree as he was no party to that litigation ; but it is not easy to perceive how, if the mortgage contract is one and indivisible, the cause of action as against the owner of one fragment of the equity of redemption may rightly be regarded as distinct and separate from the cause of action against the owners of other fragment of the equity of redemption. *Hemendra Kumar Mullik* v. *Rajendra Lal Munshi* (13), *King* v. *Hoar* (14), *Kendal* v. *Hamilton* (15), *Ex Jewings* (16). We must, therefore, hold that the proper remedy of the Plaintiff was to bring an action for declaration of his title as purchaser at the mortgage sale and for recovery of possession, subject to the exercise of the right of redemption of the first Defendant. It was argued, however, by the learned vakil for the Respondent that as the result of the previous litigation between the purchaser at the certificate sale as Plaintiff on the one hand, and the purchaser at the mortgage sale as Defendant on the other, the Plaintiff is precluded from recovering possession. In our opinion, there is no force in this contention. It appears from the judgment of this Court on the last occasion that the present Plaintiff, who was then Respondent, did suggest that the first Defendant, who was then Plaintiff, should not be allowed to recover possession unconditionally, that he should be put on terms and that he should be compelled to redeem the mortgagee purchaser before he was restored to possession of the property. The first Defendant then successfully resisted this suggestion on the ground that, as he was not a party to the mortgage suit and as his right of redemption had not been extinguished, he was entitled to recover and retain possession and that the mortgagee purchaser must enforce his rights by a separate suit properly framed for the purpose. This Court allowed the objection to prevail and it is not open to the Respondents now to suggest that the Plaintiff is not entitled to recover possession subject to the exercise of the right of redemption by the Defendant, and that the rights of the parties ought to have been adjusted in the previous litigation. It was, further, suggested by the learned vakil for the Respondents that leave ought not to be granted to the Plaintiff to amend his plaint at this stage of the litigation, and in support of this contention, reliance was placed upon the observations of this Court in the case of *Surjiram Marwari* v. *Berhamdeo Pershad* (17). In that case, however, there were very special circumstances, which disentitled the Plaintiff to any indulgence from the Court. In the case before us, if the suit has not been properly framed, the fact must be attributed, in some

(13) I. L. R. 3 Cal. 353 (1878).
(14) 13 M. & W. 494.
(15) 4 App. Cas. 504 (1879).
(16) 25 Ch. Div. 387 (1883).

(17) 1 C. L. J. 337 at p. 354 (1905).

JUGDEO SINGH v. HABIBULLA.

measure, to the dictum in the judgment of this Court in the previous litigation, where it was said that the Plaintiff might enforce his rights by a suit on his mortgage against the purchaser at the certificate sale. Leave is, therefore, granted to the Plaintiff-Appellant to amend his plaint and to convert the suit into one for recovery of possession of the disputed share, subject to the exercise of the right of redemption of the first Defendant.

The question next arises as to the mode in which the rights of the parties are to be adjusted. The Plaintiff mortgagee has purchased some of the mortgaged properties and the security therefore has been split up under the last paragraph of sec. 60 of the Transfer of Property Act. The Defendant is, therefore, entitled to redeem his own share in the disputed property upon payment of a proportionate part of the amount due on the mortgage [*Gangadas* v. *Jogendra Nath* (5)]. The same result follows from the circumstance that the mortgagee has released some of the properties from his claim, the effect of which is to split up the security, and allow partial redemption [*Hakim Lal* v. *Ram Lal* (18)]. To find out the proportionate amount payable by the Defendant, the value of all the properties comprised in the mortgage security at the date of the execution thereof must be first determined, as also the value of the 5 dams share of Mehal Bhadeji now in dispute. The principle amount of Rs. 1,000 must then be distributed over all the properties comprised in the mortgage and the amount fairly chargeable to the share of Bhadeji now in dispute, proportionate to its value, will have to be calculated. The amount so fixed is the principal, which, the first Defendant may legitimately be called upon to pay. Interest on this amount will run at the rate specified in the mortgage contract from the 31st May 1886 to the 28th August 1895, *i.e.*, the date which was fixed for re-payment in the decree made in the mortgage suit. This direction is based on the ground that the previous decree is not binding upon the first Defendant, for three reasons; first, because he was no party thereto; secondly, because that decree was obtained by consent, and, thirdly, because in that decree various properties were released from the claim on the mortgage and a heavier liability imposed upon the others than what could legitimately be done. As pointed out by this Court in the case of *Gangadas* v. *Jogendra Nath* (5), when a party who has been excluded from a mortgage suit and has thus not been afforded an opportunity to redeem, subsequently seeks to exercise his right of redemption, he is entitled to do so upon the same terms as if he had been made a party to the original suit; the party who has been improperly excluded from a mortgage suit, is entitled to claim that he should not be placed in a worse position than what he would have occupied if he had been made a party to the original suit; if he had been so made a party, he would have been entitled to redeem upon payment of the sum as-

(5) 11 C. W. N. 408: s. c. 5 C. L. J. 315 at p. 326 (1907).

(18) 6 C. L. J. 46 at p. 53 (1907).

(5) 11 C. W. N. 403: s. c. 5 C. L. J. 315 (1907).

JUGDEO SINGH v. HABIBULLA.

certained by the decree together with interest upon such sum at the Court rate between the date of the decree and date of actual realization; in other words, his liability to pay interest at the contract rate would have terminated on the date of the decree, when the liability would have passed from the domain of contract into the domain of judgment; from that date his liability would have been determined by the decree and interest would have run at the Court rate allowed by the decree. This principle is equally applicable whether the decree in the mortgage suit was upon contest or by consent; indeed, in the latter event, the reason for the application of the principle is paramount. This view is clearly supported by the decision of their Lordships of the Judicial Committee in *Kedar Lal Marwari* v. *Bishen Prosad* (19). [See also *Gurdeo Singh* v. *Chandrika Singh* (20)]. The amount determined as payable on the 28th August 1895, will, therefore, carry interest at 6 per cent. from the date up to the date fixed for re-payment in the decree to be made by the District Judge in the present litigation. It was suggested, and we think very properly, by the learned vakil for the Respondent, that against the sum so found due to the Plaintiff must be set off the profits, if any, which may have been realized by the Plaintiff by his possession of the disputed share after the successful termination of the proceedings before the Collector in his favour. We observe, however, from the proceedings in the previous litigation between the parties, that the decree of this Court restored the decree of the Court of first instance which entitled the first Defendant, who was then Plaintiff, to recover mesne profits from the present Plaintiff, who was then Defendant, in respect of the property, between the dates of dispossession and recovery of possession. We have not been informed whether these mesne-profits have been actually recovered by the Respondent; if they have been, the Respondent is clearly not entitled to ask for any set off of the profits which may have been received by the Plaintiff during his possession; on the other hand, if these mesne-profits have not been assessed and realized, the Defendant would legitimately be entitled to the set off which he has claimed. When the amount due to the Plaintiff from the first Defendant has been determined by the District Judge on the principles indicated above, he will make a decree, which will entitle the Defendant to pay the amount to the Plaintiff within six months from the date of the decree; if the Defendant makes the payment, the suit will stand dismissed; if the Defendant fails to make the payment, the Plaintiff will be entitled to be placed in possession of the property in execution of the decree and whatever interest the first Defendant has now in the property will stand extinguished.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge discharged, and the case remitted to him for disposal in the manner indicated in this judgment. The District Judge will be at liberty to take additional evidence for the satisfactory

(19) L. R. 31 I. A. 57: s. c. I. L. R. 31 Cal. 832 (1903).
(20) 5 C. L. J. 6 637 (1907).

JUGDEO SINGH *v.* HABIBULLA.

determination of the questions to be tried and he may do so himself, or he may direct the Subordinate Judge to act under sec. 568 of the Code of Civil Procedure. The, final decree, however, is to be made by the District Judge himself. As regards the costs of this litigation, the Plaintiff-Appellant must pay to the first Defendant the costs in all the Courts incurred up to this stage. The costs of the proceedings after the remand will be in the discretion of the District Judge.

S. C. S. *Case remanded.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 413 OF 1905.

RAMPINI, J. SHARFUDDIN, J. 1907. Heard, 12, April. Judgment, 16, April.	SURENDRA MOHAN SINGH and ors., Defendants, Appellants, *v.* BANSIDHAR MARWARI and ors., Plaintiffs, Respondents.

Bengal Tenancy Act (VIII of 1885), secs. 166, 167—Occupancy-holding—Mortgage—Incumbrance, annulment of—Fraud.

Where an occupancy-holding which had been mortgaged by the raiyat of the holding was purchased by a person in execution of a decree for money obtained by him, and the purchaser re-purchased it in execution of a rent decree against the old tenant for arrears which had accrued previous to his first purchase and annulled by a notice under sec. 167 the mortgage of which he was aware at the time of his re-purchase,

Held—***That the purchaser did not commit any fraud in re-purchasing the property and was entitled to annul the mortgage, and the mortgagor was not entitled to get a decree upon the mortgage making the holding liable for the mortgage debt.***

That the purchaser was not bound as representative of the old tenant to pay off the decree for rent obtained by the landlord.

This was an appeal preferred on the 13th of November 1905, against the decree of Babu Nunda Lal Dey, Subordinate Judge of Zillah Bhagulpore, dated the 10th of July 1905.

The facts of the case appear from the judgment.

Babus *Umakali Mukherjee*, *Provash Chandra Mitra*, *Narendra Chandra Bose* and *Sailendra Nath Palit* for the Appellants.

Babus *Krishna Prosad Sarbadhikari* and *Basanta Kumar Bose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought to enforce a mortgage bond. The Subordinate Judge has held the Plaintiff entitled to enforce his mortgage lien against *inter alia* property No. 5 which is an occupancy holding of 12 bighas in Khangarpore in the possession of the Defendants 16 to 18.

The Defendants 16 to 18 are the Appellants. They purchased the occupancy holding at a sale held in execution of a money-decree obtained by them against the former tenant Anandi Lal, the Defendant No. 1. This purchase of theirs took place on the 17th December 1902. The landlord of the holding had, how-

ever, obtained a rent decree, dated 28th February 1901, in respect of the 16as. share of the rent for the years 1304 to 1307 (1897 to 1900). He executed his decree, put up the holding to sale and the Defendants 16 to 18 again purchased it on the 9th December 1903. They obtained delivery of possession on the 2nd April 1904. They then on the 11th June 1904 applied to the Collector for the issue of a notice annulling the Plaintiffs' mortgage which constituted an incumbrance on the holding. The notice was served on the 29th June 1904. Hence, they contend, the incumbrance at the Plaintiffs' mortgage lien on the holding, was annulled.

The Subordinate Judge has, however, held that the conduct of the Defendants 16 to 18 was fraudulent, inasmuch as they well knew of the Plaintiffs' mortgage, when they purchased the holding on the 9th December 1903, and that they should have paid off the landlord's decree for rent and not allowed the holding to be sold.

The Defendants 16 to 18 urge in appeal that the learned Sub-Judge is in error on this point. The property was an occupancy holding. Hence, under sec. 166, Bengal Tenancy Act, the property was sold to the Appellants with power to annul incumbrances, and that when they took steps to annul the incumbrance through the Collector, they were guilty of no fraud but only excercised a statutory right. We consider this plea to be well-founded.

The learned pleader for the Respondents urges that as the Appellants had purchased the holding in execution of their own money decree, they were the representatives of the old tenant Anandi Lal, and were bound to pay up the decree obtained by the landlord against Anandi Lal, and so allow the Plaintiffs' mortgage lien on the holding to subsist. We are unable to see that the Defendants 16 to 18 were under any obligation to act in this way. We do not know if they had been recognised as tenants by the landlord. In any case, they were not responsible for the rent for the years 1304 to 1307 (1897 to 1900) as they only purchased the holding in 1902. The holding was liable for the back rents, and they accordingly, if they wished to keep the holding, had to satisfy the landlord's decree for rent, and they did so by buying the holding again at the sale held in execution of the landlord's decree. In subsequently annulling the Plaintiffs' mortgage under the provisions of Sec. 167, they only exercised a statutory right, which can never be an equitable wrong or fraudulent conduct on their part.

We, therefore, consider that the judgment of the Subordinate Judge is wrong on this point and we accordingly decree this appeal with costs. Hearing fee 3 gold mohurs.

S. C. S. *Appeal allowed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2360 OF 1907.

WOODROFFE, J.
COXE, J.
1907.
13, August.

SUKHAN SINGH,
Petitioner,
v.
BAIJ NATH GOENKA,
Opposite Party.

Civil Procedure Code (Act XIV of 1882), secs. 331, 332—Decree for delivery of possession of the immoveable property—Obstruction

SUKHAN SINGH *v.* BAIJ NATH GOENKA.

to delivery by third party in good faith—His remedy.

Sec. 331 of the Civil Procedure Code contemplates an application by the decree-holder; and a third party resisting the delivery of possession of property to a decree-holder cannot apply for the investigation of his claim under this section but may do so under sec. 332 of the Code after he has been dispossessed.

This was a rule granted on the 29th of July 1907, against the orders of the Subordinate Judge of Monghyr passed in a rent execution case, (1) dated 17th April 1907, rejecting the application of the Petitioner made under sec. 331, C. P. C, and directing the Petitioner to apply after the delivery of possession under sec. 332, C. P. C., and issuing process for delivery of possession on the 13th May 1907, (2) dated 1st June 1907, directing the issue of fresh process for delivery of possession on the 22nd June, (3) dated 22nd June 1907, directing the issue of process for delivery of possession on 29th June 1907, (4) dated 29th June 1907, directing issue of parwana of delivery of possession on 20th July 1907 and that the Nazir do serve the process personally by the aid of the Police.

The facts as disclosed in the petition were as follows :—

The decree-holder alleging himself to be a purchaser at a revenue sale of Pargana Bist Hazari, Touzi No. 336 of the Monghyr Collectorate, brought a suit for rent and ejectment under the provisions of sec. 66, Bengal Tenancy Act, against the judgment-debtors describing them as thikadars and on 18th July 1906 obtained a decree declaring the decree-holder entitled to the rent and directing the judgment-debtors to pay the amount decreed within 2 months, in default to be ejected from the 14 annas of Mouzah Mirzajung.

The judgment-debtors, the Petitioners alleged, held the said mouzah as thikadars under Khoji Syed Takijan and others proprietors The thika came to an end on the 11th June 1906, when the proprietors conveyed the said 14 annas 1 dam of the mouzah to the Petitioner for a sum of Rs. 8,000 by registered kobala and after that the Petitioner entered into direct possession of the property and is still in possession.

The decree-holder applied for execution of his decree whereupon the Subordinate Judge issued process for delivery of possession to the decree-holders.

The officer deputed to deliver possession reported that he was obstructed by Petitioner's men in the execution of the process.

Subsequently on an application by the decree-holder the Nazir was deputed for execution and was informed of the actual possession of the Petitioner and the Nazir thereupon submitted a report stating his inability to deliver possession and complained against Petitioner's servants of resistance.

The Petitioner applied on the 16th April 1907 under the provisions of sec. 331, C. P. C., stating that resistance if any was occasioned by the Petitioner claiming in good faith to be in possession of the property by virtue of his purchase from the proprietors before the decree obtained by decree-holders, but the Subordinate Judge ordered that the applicant (Petitioner) might apply after

SUKHAN SINGH *v.* BAIJ NATH GOENKA.

delivery of possession under sec. 332, C. P. C.

The Petitioner moved this Court for a revision of the aforesaid orders and obtained the present rule.

Babus Mahendra Nath Roy and *Joy Gopal Ghosha* for the Petitioner.

Babus Digambur Chatterjee and *Kshetra Mohun Sen* for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—It is not necessary to decide the questions that have been raised; namely, whether an appeal lies in this case or whether the Petitioner has his remedy by way of revision. The rule must be discharged upon the merits.

The petition was rejected on the ground that the Petitioner was not a person entitled to apply under sec. 331, C. P. C., which contemplates an application by the decree-holder.

I think that the contention is sound that this section is limited to an application by the decree-holder. The Appellant has not been actually dispossessed, so as to enable him to come under sec. 332, C. P. C.

It has further been stated that the execution proceedings have been struck off and that the matter is now really one relating to costs. The rule is discharged with costs, two gold mohurs.

COXE, J.—I agree.

N. G. *Rule discharged.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 942 OF 1907.

MITRA, J.
FLETCHER, J.
1907.
Heard,
27, August.
Judgment,
29, August.

RASH BEHARI LAL MANDAL and others, Petitioners,
v.
THE EMPEROR, Opposite Party.

Commitment to the Court of Sessions ordered under sec. 436 of Criminal Procedure Code (Act V of 1898)—High Court's power to revise under sec. 439—Preliminary inquiry into Sessions cases, Magistrate's power and duties in regard thereto—Criminal Procedure Code (Act V of 1898), secs. 436, 439.

It is not incompetent to a Magistrate holding a preliminary enquiry into Sessions cases to examine the credibility of evidence adduced in the course of the enquiry.

Such Magistrate should not commit the accused for trial in the Sessions Court if he be of opinion that notwithstanding direct evidence adduced against the accused, the prosecution case is improbable and the evidence is unreliable.

The High Court has full jurisdiction under sec. 439, Cr. P. C., to revise a commitment order made under sec. 436 on points of law as well as of facts.

This was a rule granted on the 12th of August 1907, against an order of H. Allanson, Esq., District Magistrate of Monghyr, dated the 29th of July 1907, setting aside the order of discharge passed on the 3rd of June 1907, by Babu Sarat Chandra Chatterjee, Deputy Magistrate of Monghyr under sec. 209, Cr. P. C., and committing the Petitioners to the Court of Sessions.

RASH BEHARI LAL MANDAL *v.* THE EMPEROR.

The facts material to the report appear from the judgment.

Mr. Jackson and *Babus Hara Prasad Chatterjee* and *Joy Gopal Ghosh* for the Petitioners.

Mr. Douglas White for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The Petitioners Rash Behari Lal Mandal, Bhai Lal Singh, Nirdhan Singh and Bahuran Kamat were charged with having committed on the night of the 14th November 1906 the offences of rape and dacoity under secs. 376 and 395, I. P. C., at a village within the jurisdiction of the Sub-divisional Magistrate of Madhepura in the district of Bhagalpur. The inquiry was proceeding in the Court of the Sub-divisional Magistrate of Madhepura when, on the application of the Petitioners to this Court, the Court directed a transfer of the case from the Court of the Sub-divisional Magistrate of Madhepura to the District Magistrate of Monghyr to be tried by himself or by some other competent Magistrate subordinate to him. The District Magistrate of Monghyr directed Babu Sarat Chandra Chatterjee, one of the Deputy Magistrates subordinate to him and exercising first class powers, to hold the preliminary enquiry. On the 3rd June 1907, the Deputy Magistrate discharged the Petitioners under sec. 209, Cr. P. C., being of opinion that he case instituted by the complainant was false, that the witnesses for the prosecution had made false statements and that the story told by them was in many respects improbable. Thereafter an application was made to the District Magistrate of Monghyr under sec. 435 of the Code for a revision of the order of the Deputy Magistrate; and, on the 29th July 1907, the Magistrate directed under sec. 436 of the Code that the Petitioners should be committed to the Court of Sessions at Bhagalpur for trial on the charges of rape and dacoity and abetment thereof.

The present application was made to us on the 12th August for an order to set aside the order of the District Magistrate directing the commitment of the Petitioners. On that date we issued a rule calling on the District Magistrate to show cause why his order of commitment should not be set aside on the ground that it was not supported by the evidence.

Notice of the rule was received by the District Magistrate of Monghyr on or about the 14th August. The record was on that date in the Court of the Sessions Judge and the Sessions Judge despatched the record to this Court on the 15th. On the 21st August the Crown entered appearance in the case.

The rule was fixed for hearing on the 26th August and there was ample time for Counsel on behalf of the Crown to prepare himself to show cause on that date. On the 21st August, however, the District Magistrate of Monghyr wrote to the Registrar of this Court for the return of the record to his office so that he might show cause against the rule issued by us. The Petitioners, however, had filed printed copies of the record and on the 23rd August the necessary number of copies was after comparison supplied to the Remembrancer of Legal Affairs. We did not, therefore, direct

RASH BEHARI LAL MANDAL *v.* THE EMPEROR.

that the record should be sent to the office of the District Magistrate but directed that a copy of the paper-book should be sent. It was also unnecessary to send back the record as the Crown had already entered appearance and intended to show cause by Counsel and in fact Counsel had been supplied with a printed copy of the record.

On the 26th August an application was made to us by the Deputy Legal Remembrancer who appeared to show cause for the postponement of the case for a fortnight, but the application was opposed by the Counsel for the Petitioners and, as ample time had already been given to show cause, we declined to postpone the case except for one day. The case came on for hearing before us on the 27th instant.

The Deputy Legal Remembrancer practically declined to show cause; but, on questions put by us, he stated that this Court has full jurisdiction to deal with the case on facts and to consider the propriety of the order of commitment made by the District Magistrate. The authorities to which he referred in support of his view are *Harbans Singh* v. *Fakir Das* (1), *Pirthi Chand Lal* v. *Sampatia* (2), *Queen-Empress* v. *Namdev Satvaji* (3) and *Re Kalyan Singh* (4). The law on the subject seems to us to be quite clear. Sec. 215, Cr. P. C., bars our reviewing a commitment made under secs. 213, 214, 477 and 478 except on a point of law; but it does not bar our revising under sec. 439 a commitment order made under sec. 436, Cr. P. C. Under sec. 439 of the Code, we have all the powers of an Appellate Court.

The only matter to which the Deputy Legal Remembrancer drew our attention is that there is nothing to show that the evidence of Bharosi Dusadh was admitted by the Deputy Magistrate; we shall presently deal with this piece of evidence. The Deputy Legal Remembrancer declined to enter into the facts of the case and left the case in our hands. We accordingly reserved our judgment in order to go through the evidence and to decide without the help of the Counsel for the Crown the question of the propriety of the order made by the District Magistrate of Monghyr.

We have gone through the evidence and after a careful consideration of the reasons given respectively by the Deputy Magistrate and the District Magistrate the conclusion we have arrived at is that a *primâ facie* case for commitment has not been made out. The Deputy Magistrate entered fully into the evidence and, apart from the discrepancies in the statements of the witnesses, he came to the conclusion that a *primâ facie* case of rape and dacoity was not established inasmuch as the story told by the witnesses for the prosecution was absurd on the face of it. He was also of opinion that the witnesses had deliberately made false statements on various points. The learned District Magistrate has not sufficiently considered the question of probabilities.

The only point, as we have said, relied on by the Deputy Legal Remembrancer is that the deposition of Bharosi Dusadh, at whose house the family of the com-

(1) 7 C. W. N. 77 (1902).
(2) 7 C. W. N. 327 (1903).
(3) I. L. R. 11 Bom. 372 (1887).
(4) I. L. R. 21 All. 265 (1899).

RASH BEHARI LAL MANDAL v. THE EMPEROR.

plainant took refuge after they were driven from their house, was not accepted in evidence. Bharosi Dusadh was examined at Madhepura before the case was transferred to Monghyr and he died before he was cross-examined. The Public Prosecutor tendered his evidence before the enquiring Magistrate at Monghyr. It does not appear from the record whether the evidence was admitted or not; but there is nothing to show that the evidence was rejected and even if it was, the evidence was not that of an eye witness but of one who could corroborate the women who, it is alleged, were raped. The witness, however, was not cross-examined and it was no fault of the accused that he was not cross-examined. We have read that evidence and treated it as part of the record and we are of opinion that it is not of any value and is not sufficient to outweigh the imperfections and improbabilities in the evidence for the prosecution.

The very revolting nature of the offence or more accurately the offences of rape alleged to have been committed by six men on three women, by two men successively on each woman, near to and in the presence of each other and in the presence of the landlord of the women and the master of the men at a comparatively early part of the night carries with it the *insignia* of unnaturalness, and highly cogent evidence is, therefore, necessary to support the charges under sec. 376, I. P. C. Some of the persons accused of the commission of the alleged offences belong to high castes and this fact adds to the character of improbability of the story for the prosecution. That the accused Rash Behary Mandal would be personally present at the scene having walked at night from his own residence to the house of a *Dusadh* situated at some distance at night is also extremely improbable. There was no necessity for his presence and his stay at the place for a sufficiently long time to witness the robbery which, the prosecution alleges, followed the offences of rape. Sundry things, not of much value, were taken away and were most unaccountably returned notwithstanding that most of the things were not identifiable. The circumstantial evidence which might support the statements of the women, who are alleged to have been raped and of the eye-witnesses is wanting. The place where the offences are said to have been committed did not show signs of violence and the persons of the women were not medically examined for the discovery of marks of violence in the commission of the offences of rape. The women declined to be medically examined. The backs of two of the women did not show even a scratch. The first information gave the story of rape on an old woman but it was too absurd to be supported by evidence and was abandoned in Court. The inconsistency between the first information and evidence might be explained and an explanation has been attempted to be given but a considerable amount of discredit attaches to the entire story on account of such serious discrepancy.

The case for the prosecution rests almost entirely on oral evidence which was disbelieved by the Court which was in the most advantageous position of testing the credibility of oral evidence. If Rash Behary Lal had been actuated by a

THE Calcutta Weekly Notes.

Vol. XII.] MONDAY, DECEMBER 16, 1907. [No. 6

Contents.

NOTES

WE INVITE ATTENTION TO THE CASE OF *Lal Mohan Pal* v. *Surya Kumar Das*, reported at p. 1152 of Vol. XI of this Journal. In this case their Lordships Rampini, C. J., and Sharfuddin, J., held that an award made by arbitrators appointed on a reference in which all the parties to the suit did not concur, is not invalid. Their Lordships observed—"There can be no doubt that, under the provisions of sec. 506 of the Code of Civil Procedure, a reference to arbitration should have the concurrence of all the parties to the suit. But we do not find that, when a reference to arbitration is preferred to a Court and an award made upon it, there is any provision for the setting aside of an award on the ground of the irregularity of the reference under sec. 506. Irregularity in the reference to arbitration and omission of the concurrence of all the parties in the application do not seem to be any of the grounds on which an award, once made, can be set aside."

THE ABOVE OBSERVATION OF THEIR LORDSHIPS SEEMS to go beyond what has been previously laid down on the same point. The decision of their Lordships, however, appears to be justified by the facts of the case, namely, that the parties who did not join in the application for a reference were not actively carrying on the suit. Of the three Defendants Nos. 1, 5, 6, the Defendants Nos. 5 and 6 did not appear at all and the Defendant No. 7 appeared in the suit and put in a written statement, but it appears that he subsequently absented himself. In the judgment there is no clear finding whether this Defendant was or was not an absent party when the application for reference was made by the other Defendants Nos. 2, 3, 4. If he was not absent, the application for reference was certainly one not contemplated by sec 506, C. P. C. The ruling in the case of *The Chairman of Purnea Municipality* v. *Siva Sankar Ram*, I. L. R. 33 Cal. 899, is to the effect that an award made on a reference in which the Defendants who had not entered appearance did not join, was not invalid, that is to say the Court interpreted the words "all the parties to a suit" in sec. 506 to be those who have entered appearance or are carrying on the litigation. To the same effect is the ruling in the case of *Pitam Mal* v. *Sadik Ali*, I. L. R. 24 All. 229.

BUT IT SEEMS TO US TO BE AT LEAST DOUBTFUL whether an award made on a reference in which all the parties who have entered appearance did not join, is not, on a proper construction of the section, wholly void and can be given effect to even as regards those who made the application for reference to arbitration. We may in this connection refer to the case of *Kadhu Singh v. Baljit Singh*, in I. L. R. 29 All. 423, in which it was held that when during the pendency of a suit a reference was made to arbitration but one Defendant through inadvertence or otherwise did not sign the vakalatnama authorising the pleader to agree to the reference, the whole award was null and void as there was no legal reference to arbitration.

SOME IMPORTANT QUESTIONS BEARING ON THE LAW OF contract and fraudulent representation inducing a contract were decided by the House of Lords in the case of *S. Pearson & Son, Ltd.* v. *Dublin Corporation*, which is reported at p. 351 of the L. R. Appeal Cases, 1907. In that case Defendants, the Dublin Corporation, being desirous of carrying out some harbour works, had to invite tenders for the necessary contracts. Certain information had to be afforded to intending tenderers. With this object engineers nominated and employed by the Corporation prepared certain plans. These plans were furnished by the engineers to the Corporation and

by the latter to the tenderers of whom the Plaintiff company was one. Upon those plans a very important wall was made to appear as being 9 feet deep but it did not in fact run to such depth, and the Defendants' engineers had no knowledge or reason to believe that it did ; it was in fact recklessly made. It was found as a fact that the Plaintiffs relying upon this representation sent in their tender at a less sum than they would otherwise have done for the execution of that contract.

IN THE CONTRACT THAT WAS ENTERED INTO BETWEEN the parties there was a stipulation that the contractor should verify the representations contained in the plans furnished by the Corporation to the contractor and the Corporation would not be responsible for their accuracy. On the completion of the work the contractors (Plaintiffs) brought an action against the Corporation claiming damages for misrepresentations as to the depth of the wall, which made them spend more for the performance of the contract. The principal defence was that by virtue of the stipulation in the contract, the contractor ought not to have relied upon the representations and they were entitled to no damage caused by those representations, as the Corporation declared themselves not responsible for the accuracy of the representations made by their engineers. It was held that the stipulation in the contract only covered honest mistakes or misrepresentations and that it did not afford protection against fraud whether of the Corporation or their agent.

IN THE COURT OF APPEAL, IT WAS HELD, DISTINGUISHING between what is called conscious fraud and unconscious fraud that inasmuch as the Corporation was not guilty of any conscious fraud, they were not liable to pay damages to the Plaintiffs. As to this Lord Robertson observed—that the distinction "would appear to amount to this, that the contractor should be held to have a cause of action for deceit if he was deceived by a deliberate lie, but no cause of action if he was deceived by a false and reckless statement not really believed in by those who made it, though in law equally fraudulent, and equally valid as the ground of such an action. . . I think this distinction unsound." As to the question whether the Corporation were exempted from liability by virtue of the stipulation in the contract that the contractor should verify the representations—it is pithily observed by Lord James of Heresford, "If this dictum be read as general in its terms, and so applied, it may be read as conferring considerable advantage upon the designers of fraud. At any rate by inserting such a clause those who framed it would run a fair chance of the contractor saying 'I assume that those with whom I deal are honest and honourable men, I scout the idea of their being guilty of fraud. An enquiry testing the plan will be expensive and difficult, so I will not make it.' The protecting clause might be inserted fraudulently with the purpose and hope that, notwithstanding its terms, no test would take place. When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it. Such a clause would be good protection against any mistake or miscalculation, but fraud vitiates every contract and every clause in it. As a general principle I incline to the view that an express term that fraud shall not vitiate a contract would be bad in law." It should be noted that the misrepresentation in the plans was not wilfully made, it was made by the engineers recklessly without any real belief in the existence of the fact represented ; still it was held that the misrepresentation amounted to fraud.

THE FOLLOWING WHICH WE TAKE FROM THE ENGLISH *Law Journal* will be found interesting by those of our readers who may have a literary taste.

The old connection between law and literature was strengthened by the late Sir Lewis Morris, who practised as a conveyancer in Lincoln's Inn while he was establishing his reputation as a poet. He was called to the Bar in 1861, and continued to practise as a conveyancer until 1881, and it was during this period that he wrote 'The Epic of Hades,' the best known of all his works. There have been several poets who have abandoned the steep places of the Bar for the slopes of Parnassus. The present Poet Laureate was called at the Inner Temple in 1857, and attended the York Assizes and West Riding Sessions for two or three years. But the late Sir Lewis Morris is the only poet of repute who has found the tasks of the conveyancer not incompatible with the cultivation of the muse. Not that there is anything in the work of the conveyancer that is peculiarly opposed to the spirit of romance. Mr. R. D. Blackmore, the author of 'Lorna Doone,' practised as a conveyancer for several years. Sir Walter Scott, speaking of himself and the law, said: 'There was no great love between us, and it pleased Heaven to decrease it on further acquaintance.' Most of the poets who have sprung from the legal profession appear to have entertained the same unfavourable view. Cowper, who was a fellow-pupil of Lord Thurlow's in an attorney's office, was called to the Bar at the Middle Temple, but he quickly yielded himself to the charms of literature. Denham, one of the most attractive poets of the seventeenth century, was a member of Lincoln's Inn, and Thomas Gray, the author of the famous 'Elegy Written in a Country Churchyard,' studied for the Bar, but neither of them got beyond the apprenticeship stage. 'Barry Cornwall,' who had a considerable vogue as a poet in the early part of the last century was a solicitor, and produced the greater part of his poetic work before he passed to the other branch of the profession. He is, perhaps, the only lawyer whose achievements as a poet have helped him to a legal appointment, for within a few months of joining the Bar he was appointed a Commissioner in Lunacy, an office which he held for nearly twenty years.

MAHOMEDAN LAW OF INHERITANCE AND ITS EVOLUTION.

(*Continued from p. xxv.*)

Another simplicity which Mahomedan law attained and which English law has not yet attained and perhaps will never attain, is the absence of any distinction between moveables and immoveables. The

analogous classification known to English law of Realty and Personalty and the consequent different laws of inheritance guiding the succession of Realty on the one hand and Personalty on the other, do not find any recognition in the system of the Arab legislator.

But it is in drawing up his table of succession that Mahommed stands apart from the legislators of other systems in originality of conception and a practical adaptation to the customs and manners of his time. Sir W. MacNaughten observes, "In these provisions, we find ample attention paid to the interests of all those whom Nature places in the first rank of our affections (MacNaughten's Mahomedan Law, 2nd Edn., Preliminary Remarks, p. 5). Indeed no system of jurisprudence makes at once a provision for the son, daughter, mother, father, and husband or wife of the deceased. Even the Jewish Rabbinical law does not seem to make any provision for the parents either in the first instance or even as a remote contingency; and among the Jewish tribes settled in the Arabian Peninsula, no provision was made for the mother in distributing the effects of the dead man. Neither the Roman law, the most matured and highly developed of the systems of the ancient world, nor the Hindu law provides for such a simultaneous succession of the heirs; these systems trusted to the good sense of the heir for the protection and support of his aged relations, such as his mother and his father's parents and his helpless sister. But Mahommed wanted to give them express rights of inheritance by his legislation. What then is the inference? This question seems to have addressed itself to the serious attention of none of the writers on Mahomedan law including even the most recent of them (Prof. Wilson). To find out a clue to this we must search the records of barbarous communities of ancient times. "There is absolute testimony," says the late Sir H. Maine, "that tribes long pressed hard by enemies or generally in straits for subsistence, systematically put their members to death when too old for labour or arms. The place from which a wild Slavonic race compelled their old men to leap into the sea is still shown; and the fiercer savage has often in many parts of the world made food of them. There is a story of a New Zealand chief who questioned as to the fortunes of a fellow tribesman long ago well known to the enquirer answered. 'He gave us so much good advice that we put him mercifully to death'" (Maine's Early Law and Custom, pp. 23-24). The Arabian society at the time of the advent of Mahommed must have consisted of Pagan tribes steeped in absolute barbarism. And there is positive evidence that they buried alive their female children (see Koran, Chap. VI, XVI, XVII and LXXXI and also Ameer Ali, Vol. II, Introduction, p. 17). A nation devoid of all natural affection for their tender offspring could not be expected to be more merciful towards their old and decrepit progenitor who formed a burdensome appendage on their predatory excursions and source of heavy drain on their scanty and very limited resources and the only way of getting rid of them was to make short work of them. It was, fired by a feeling of disgust and revolt against this unnatural and pernicious custom, that Mahommed declared in the most emphatic terms, you know not whether your parents or your children be of greater use unto you, and it might be reasonably supposed with very great probability of truth that in tearing away from the cruel custom of his time and effecting a wide departure from other systems of law, he felt the necessity for supporting his rule with a reason; and the reason that has unquestioned and unbounded operation on the minds of ignorant and superstitious multitudes was the one selected by him; for he says "this is an ordnance from God and God is knowing and wise. (Koran, Sura V, 8—16). This theory receives an additional support from the way Mahommed exhorts his hearers to accord a portion of their heritage to uterine brothers and sisters; for there too Mahommed feels he treads on untrodden ground and feels the necessity of supporting his mandates with a reason, for he says "And if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate. But if there be more than this number, they shall be equal sharers in a third part after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs. This is an ordnance from God and God is knowing and gracious. (Koran, Sura V, Ibid). We have here the high authority of Ameer Ali for the statement that the uterine brothers and sisters had no right of succession before Mahommed's legislation (Ameer Ali, Vol. II, page 49, citing as his authority M. Santaraya). Examining with a little more care Mahommed's Scheme of Inheritance, we find that certain relations of the deceased have an imperative claim to specific fractions of the estate, of his debts and legacies. These persons though inaccurately called sharers in Mahommed's text-books, are the *Zimi'l furait.* "Possessors' by Divine ordinance," because specific fractions of the estate are assigned to them by Koran itself. The residue goes to another group of relations, inaccurately called 'residuaries.' These are the *Asabah*, literally members of the family. This, of course, does not imply that 'Possessors by Divine ordinance are not members of the family, but simply that the right of the *Asabah* to inherit is in virtue of Pre Islamite customs and usages. This too cannot be advanced without some reservation for the concurrent right of females to share along with males, though quantitatively inferior, is based upon express texts of the Koran and not on the pre-existing usages. A failure of sharers and residuaries involved the estate of the deceased man to escheat to the Public treasury according to the Maliki and Shaffae doctrines, but the Hanafite lawyers

let in another class of relations called *Zami'l arham* (possessors by virtue of the womb). These are rendered in English text-books on Mahomedan law as 'distant kindred,' a term which indeed, as Prof. Wilson observes, is "very wide of the mark, seeing that they include persons so near in point of consanguinity as a daughter's son and a mother's father." (Anglo-Mahommedan Law, 2nd Edn, p. 94). This recognition of 'possessors by virtue of the womb' on failure of 'possessors by divine ordnance' and 'members of the family displays a considerable development of legal ideas among the Hanafite lawyers for it is tantamount to the acknowledgment of the principle of cognation so strenuously contended for by the Roman prætors and so successfully engrafted in the scheme of succession as perfected by them.

(*To be continued.*)

CURRENT INDIAN CASES.

LALMAN *v.* MAHAR SINGH, I. L. R. 29 All. 205. *Mortgage-sale subject to charge.*

An order may be passed for sale of a mortgaged property subject to a charge.

KASTURA KUNWAR *v.* GYA PRASAD, I. L. R. 29 All. 207. *Civil Procedure Code, secs. 244, 278.*

An application by an auction-purchaser under sec. 318, C. P. C, to have the name of one of the judgment-debtors substituted in the applicant's place which was opposed by a third person on the ground that it was with her money that the property had been purchased does not come under sec. 244, C. P. C.

BINDO *v.* SHAM LAL, I. L. R. 29 All. 210. *Appointment of guardian of minor—Welfare.*

Where a maternal grandmother was appointed guardian of a girl in preference to her father their Lordships Knox and Richards, JJ., observed as follows:—It is true that there is nothing against the father, but it is again an admitted fact that he has married a second time and will have to go under the control of a step-mother, of whom probably she knows nothing. We cannot think that the girl under these circumstances, will be so happy as she is in the house of the maternal grandmother. What we have to consider is what will really be for the welfare of the minor.

PURAN *v.* SHEODAT, I. L. R. 29 All. 213. *Suit to set aside sale on the ground of fraud—Service of summons.*

A suit to set aside a sale on the ground of fraud was held to be not maintainable when the fraud alleged was as to the service of summons and when in a previous proceeding under sec. 108, C. P. C., it was found that there was no fraud.

CHHITAR *v.* JAGANNATH, I. L. R. 29 All. 214. *Specific performance of contract of sale of minor's property.*

A contract for the sale of a minor's property to which the Judge had given his permission, was not allowed to be specifically enforced when it appeared that the guardian subsequently obtained a fresh permission to sell the property at a higher price.

SUNDAR LAL *v.* CHHITAR MAL, I. L. R 29 All. 215. *Mortgage—Redemption by Mitakshara son of his share.*

In a suit for redemption by the sons in a Mitakshara family who had mortgaged the property along with their father, *held*, they can redeem their own share alone, a former suit by the father having failed.

PADAM LAL *v.* TEK SINGH, I. L. R. 29 Cal. 217. Malik, *meaning of.*

By a bequest a property was given by a person to his wife as *malik*. *Held*, that the widow took an absolute estate.

HUSAINI *v.* MUHAMMAD RUSTUM, I. L. R. 29 All. 222. *Restitution of conjugal rights—Legal cruelty.*

The Mahomedan law on a question of what is legal cruelty between man and wife does not materially differ from the English law.

CHUNI LAL *v.* THE NIZAM'S GUARANTEED STATE RAILWAY CO, I. L R. 29 All. 228 (F. B.). *Railway Company—Liability.*

Receipt of goods by one Railway Company for carriage over its own and another Company's line makes the receiving Company solely liable for overcharge wrongfully demanded.

MULCHAND *v.* MUHAMMAD ALI, I. L. R. 29 All. 235. *Civil Procedure Code, sec. 396—Commission for partition.*

The Legislature advisedly used the plural number in the case of commissions to make partition and therefore a Court cannot legally issue a commission to one Commissioner only.

RAM SARUP *v.* RAM DEO, I. L. R. 29 All. 239. *Alienation by widow—Limitation Act, Sch. II, Art. 125.*

A collusive arbitration proceeding to which a Hindu widow was a party whereby her husband's property was divided amongst certain persons absolutely is to be considered an alienation within the meaning of Art. 125 of Sch. II of the Limitation Act.

PREONATH *v.* BISHNATH, I. L. R. 29 All. 256. *Civil Procedure Code, sec. 43.*

A suit by a doctor for fees for attendance on

Defendant's father was held to be barred by sec. 43, C. P. C., when a previous suit by the doctor upon a note of hand by the Defendant's father for a part of the fees did not include the claim made in the second suit.

PIRBHU v. BALDEO, I. L. R. 29 All. 260. *Transfer of Property Act, sec. 90.*

No decree can be passed under sec. 90 of the Transfer of Property Act even when the property under mortgage can by no possibility be brought to sale.

MUNSHI v. DAULAT, I. L. R. 29 All. 262. *Redemption.*

Each of several mortgagors can redeem to the extent of his own interest when the integrity of a mortgage is broken up upon the purchase by the mortgagee of the equity of redemption in a portion of the mortgaged property.

RAM KISHAN v. KASHI BAI, I. L. R. 29 All. 263. *Limitation Act, sec. 12.*

"We think it would be unduly restricting the language of sec. 12 of the Limitation Act, if we were to hold, as did the lower Court, that the application for a copy of the judgment must necessarily be by the Appellant or somebody proved to have been acting in the matter as her agent." (*Per* Stanley, C. J., and Burkitt, J.).

PARBATI KUNWAR v. MAHMUD FATIMA, I. L. R. 29 All. 267.

In a suit for recovery of possession by Plaintiffs on the death of their father, the Defendants set up different titles to different portions, *held* that the suit was not bad for multifariousness as the cause of action was one.

IMTIAZI v. DHUMAN, I. L. R. 29 All. 275. *Civil Procedure Code, secs 244, 310A.*

An order refusing a judgment-debtor's deposit under sec. 310A is appealable as an order under sec. 244, C. P. C.

Review.

THE BENGAL TENANCY ACT. *By R. F. Rampini, M. A., L. L. D., Indian Civil Service, of the Inner Temple, Barrister-at-Law, and Judge, High Court of Judicature, Calcutta, and J. H. Kerr, Indian Civil Service, Deputy Secretary to the Government of India, Department of Revenue and Agriculture. Third Edition, Calcutta, S. K. Lahiri & Co., 54, College Street. 1907.*

Until lately Mr. Justice Rampini's edition of the Bengal Tenancy Act had no rival in the field. Great care has been bestowed in the preparation of the present edition and we have no hesitation in commending it to all concerned in the administration of the rent law of Bengal, as a complete and most up-to-date annotated edition of the Act. The changes introduced by Act I, B. C. of 1907, have been duly embodied in the texts of the statute and for convenience of reference, placed within heavy brackets, whilst light brackets indicate the changes made by Act III, B. C. of 1898. As Act I, B. C. of 1907, does not apply to Eastern Bengal and Assam, some of the sections, which have undergone very considerable modifications have been retained as they were before amendment, whilst the sections as modified are also shown in the body of the Act. The recent rulings of which a large body have accumulated since the last edition was brought out, have been embodied in their proper places in the notes. The new rules framed by the Local Government appear in an appendix. Rules for the registration of documents under the Bengal Tenancy Act which are about to be promulgated appear in another appendix But with regard to these latter it is noted that they are still subject to revision and may be modified, but possibly not to any considerable extent. Appendix V shows the provisions of the Act which have been extended to Chota Nagpur. The most commendable feature of the present edition, however, is the introduction which traces within very short compass the gradual evolution through successive stages of the rent law of Bengal. It serves to show further, what otherwise is not very apparent, that the latest modifications introduced in the law are, in part at any rate, in furtherance of the original ideas embodied in the earliest Regulations concerning the relation of zemindars and raiyats. The second part of the introduction gives a brief analysis of the law relating to the record-of-rights The book we notice has gained considerably in bulk, as was inevitable considering the rapid accretion to the statute and case law which have taken place within recent years.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Nicholson* v. *Piper.* Before LORDS JUSTICES BUCKLEY and KENNEDY. 19th October 1907.

Extension of time for appealing—Mistake of legal adviser, as an excuse for delay.

This was an application for extension of time for appealing against an order made under the Workmen's Compensation Act, 1897. The applicant, Nicholson, was a workman and received an injury to his foot by an accident in the course of his employment in the service of the Respondent, on January 18th, 1904. An agreement between the employer and the workman providing for the payment by the former of 15*s.* per week as compensation

during the workman's incapacity or until the same should be ended, diminished, increased or redeemed in pursuance of the Act, was entered into and duly recorded in accordance with Sch. II, Para. 8 of the Act. Subsequently upon an application of the employer for the termination of the weekly payment on the ground that the workman had recovered, the Judge of the Greenwich County Court, in view of conflicting evidence adduced before him as to the state of the workman, ordered an inquiry by an independent medical referee and relying on his report made the order sought to be appealed against on the 17th November 1907, directing the agreement to be terminated and the payments to cease. The applicant thereafter without appealing from the said order instituted other proceedings and having failed therein, made the present application alleging that at the time when the order was made those who advised the applicant thought that it was impossible to appeal from it.

Lord Justice Buckley in refusing the application observed that in his opinion no special circumstances had been made out to take the case out of the general rule. The mere fact that the litigant's legal advisers thought that he could not appeal was not a special circumstance justifying a departure from the rule. No doubt the cases on this point had oscillated. But the principle which he had stated had been laid down by Lord Justice James in *International Financial Society* v. *City of Moscow Gas Company*, 7 Ch. D. 241, and by Lord Justice Collin in *In re Manchester Economic Building Society*, 24 Ch. D. 408, and had been affirmed in the latest case on the question. *In re Coles and Ravenshear*, 23 Times L R. 32.

Lord Justice Kennedy concurred.

Mr. Montague Shearman, K. C., for the Applicant.

Mr. Horridge, K. C., *Mr. W. Shakespeare* and *Mr. W. Lloyd* for the Respondent.

Application refused.

COURT OF APPEAL.—*Davis* v. *Mayor &c. of Bromley.* Before LORD JUSTICE VAUGHAN WILLIAMS, SIR GORELL BARNES, PRESIDENT OF THE PROBATE DIVISION and MR. JUSTICE BIGHAM. 17th October 1907.

Local authority—Refusing to sanction building plan—Allegation of malice—Right of action.

The Plaintiff submitted to the Defendants certain plans for draining his house and making certain additions to it which the Defendants refused to approve on the ground that they were not in accordance with their bye-laws. The Plaintiff brought this action before Mr. Justice Lawrence and a special jury alleging that the plans complied with the bye-laws and that the Defendants maliciously and in breach of their duty as the local sanitary authority, had disapproved of them. The Plaintiffs asked for a declaration of his right to construct in accordance with the said plans, for an injunction to restrain the Defendants from hindering such construction and for damages. Mr. Justice Lawrence having dismissed the claim, this was an application for judgment or new trial.

Lord Justice Vaughan Williams in dismissing the application said that the Defendant Council in this matter were not exercising judicial functions, but they were exercising a discretion vested in them by statute and the whole object of this action was to see if by bringing the action the Plaintiff could not have the decision of the Council overruled. Assuming the facts to be as alleged, he was of opinion that when a statute vested in a local authority a duty and power such as was here vested, no action would lie against that authority in respect of the decision arrived at, even if there was evidence to show that the members constituting the body were actuated by bitterness or other motive against the Plaintiff. His Lordship pointed out that the Plaintiff was not without a remedy.

Mr. Montague Shearman, K. C., and *Mr. Harry Dobb* for the Plaintiff.

Mr. Montague Lush, K. C., and *Mr. Adam Walker* for the Defendant, were not called upon.

Application refused.

KING'S BENCH.—*Crossby Brothers* v. *Lee.* Before MR. JUSTICES PHILLIMORE AND WALTON. 31st October 1907.

Fixtures, though removeable—Otto Gas engine—Distraint—Hire purchase system.

HELLAWELL *v.* EASTWOOD (20 L. J. Ex. 154) *dissented from.*

HOBSON *v.* GORRINGE (1897, 1 Ch. 182) *followed.*

The Defendant owned a shop on the Hackney Road. One Jones was their tenant. The Plaintiffs a firm of engineers had supplied an Otto Gas engine to Jones at the premises on the hire purchase system. Jones fell into arrears of rent and the landlord put in a distraint and took away the engine in question. The engine was fixed to the premises being made fast by excavating the floor and fixing nuts and screwing down. Was this engine liable to be distrained? That question arose in this action brought by the engineers against the landlord. The County Court Judge followed *Hellawell* v. *Eastwood* (see above) and held that it was distrainable as it had never become part of the freehold. The Plaintiffs, engineers, appealed. In giving judgment the Court said, *inter alia*, that over and over again the principles of law stated in *Hellawell* v. *Eastwood* had been accepted as correctly stated, but over and over again doubt was thrown as to the correctness of the application of those principles to the facts of that case, as was the case in *Hobson* v. *Gorringe*, where the fixing of the machine was much the same as in the present case. The machine here became fixed as part of the freehold, severable possibly as between landlord and tenant. If it was part of the freehold,

it was not a distrainable chattel. In *Darby* v. *Harris* (1 Q. B. at 895) it was held that although articles might be tenants' fixtures removable by the tenant they were fixtures which were part of the freehold, and were not distrainable.

Mr. Hamilton, K. C., and *Mr. Schwabe* for the Appellants.

Mr. Bevan for the Defendant.

C. W A. *Judgment for Plaintiffs, Appellants.*

KING'S BENCH.—*Stevens* v. *Stevens*. Before MR. JUSTICE COLERIDGE. 22nd October 1907.

Mother and son—Injunction to restrain son from breaking into house—Son's home rights.

Claim by the Plaintiff, Mrs. Rosamund Stevens, a widow for an injunction to restrain her son, the Defendant, Mr. Percy Stevens, from breaking into and entering her dwelling-house. Mrs. Stevens it appeared was aged 72 and the Defendant 49. From 1882 to 1902, Defendant had been in Australia. From 1902, when he returned and paid his mother a visit, till 1906, when he was forcibly ejected, he resided in his mother's house. An action brought by him in 1905 against his mother alleging fraud on her part was dismissed. He stayed in the house pending the action and abused his mother and sister. The Defendant was repeatedly requested to leave the house but he refused and in 1906, the mother whose health was seriously affected by his conduct, at the advise of her solicitor engaged two men to turn him out, whereupon he left. On the present application, the case of *Waterhouse* v. *Waterhouse*, 94 L. J. 133, was relied on in defence as showing that a son had the right to be maintained by a parent irrespective of age. Mr. Justice Coleridge distinguished the said case and said that Mr. Justice Buckley had left open the question which arose in the present case. The Defendant it was quite clear, had no right in law to occupy his mother's house and therefore the grant of the injunction was a matter of discretion. The case referred to furnished a warning that an injunction ought not to be granted except in very grave circumstances. In his opinion the circumstances of the present case were very grave and accordingly he granted an injunction in the terms asked for.

Mr. Gregory for the Plaintiff.

Mr. Turrell for the Defendant.

Injunction granted.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 10337 OF 1907. LEAKAT HOSSAIN, Petitioner *v.* THE EMPEROR, Opposite Party. 3rd December 1907.

Criminal Procedure Code (Act V of 1898), sec. 487—Disobedience of Magistrate's order—Trial by same Magistrate—Presidency Magistrate—Retrial—High Courts' duty to order—Indian Penal Code, sec. 188.

On the 5th October 1907, the Deputy Commissioner of Police, Calcutta, applied for an order under sec. 144, Cr. P. C., prohibiting the Petitioner, Leakat Hossain, from addressing public meetings or forming or leading processions in the town of Calcutta. Mr. Kingsford, the Chief Presidency Magistrate, issued a notice under sec. 144 directing the Petitioner to refrain from leading or taking any part in processions or from holding or addressing meetings in Calcutta.

On the 26th October a Daroga of the Calcutta Police applied to the Chief Presidency Magistrate for sanction to prosecute the Petitioner under sec. 188, I. P. C., for the disobedience of the notice issued under sec. 144, Cr. P. C., by his having led a procession in Bechu Chatterjee's Street, Calcutta, on the day previous, and the Chief Presidency Magistrate sanctioned the prosecution of the Petitioner. The Petitioner was then put on his trial before the same Presidency Magistrate who convicted him under sec. 188, I. P. C., and sentenced him to six months' rigorous imprisonment. A rule was issued by the High Court for setting aside the conviction and sentence.

Their Lordships observed :—

"It seems impossible to resist the conclusion that the Chief Presidency Magistrate had under sec. 487, Cr. P C, no authority to try a case of disobedience of his own order, because sec. 487 expressly lays down that no Magistrate can try a case of disobedience of his own order. It appears to us that the terms of sec. 487, Cr. P. C., as contained in the Code of 1898 are wide enough to include Presidency Magistrates . . . . . No doubt in the Code of 1882 the provisions of sec. 487 were different; as sec. 487 of that Code gave express powers to Presidency Magistrates to try cases of disobedience of their own order. That section was modified in the Code of 1898, and no such power is given in sec. 487 of the Code now in force For these reasons we think that Mr. Kingsford's order is without jurisdiction. Mr. Sinha asks us to order the retrial of the accused. We do not, however, think it is ordinarily our duty to order the retrial of any person. But we will observe that the order we now pass

setting aside the conviction and sentence is no obstacle, in our opinion, to the accused being retried if the prosecution thinks it advisable to retry him."

Babu Narendra Kumar Bose for the Petitioner.

Mr. S. P. Sinha for the Crown.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before BRETT and WOODROFFE, JJ. APPEAL FROM APPELLATE DECREE No. 169 OF 1906. MAHABIR TEWARI AND ORS., Plaintiffs, Appellants *v.* BABU PURBHU NATH CHOBEY AND ANR., Defendants, Respondents. Heard, 11, 12, 13th November 1907. Judgment, 20th November 1907.

Civil Procedure Code (XIV of 1882), sec. 13, Expl. (2)—"Ought"—Several independent grounds of action.

The Plaintiffs-Appellants all formed members of one family descended from one Mussummat Bihansa Koer and her husband Hanker Singh Tewari. The Defendants on the other hand were members of a family of Singhs descended from Mussummat Lachminia Koer and her husband Babu Bhagwan Singh.

On the 1st March 1888 a suit was brought by Sheobaran Tewari, the father of the Plaintiffs Nos 5, 6 and 7 and the brother of the other Plaintiffs, in the Small Cause Court against Mohabir Singh and Budhan Singh, the father of Defendants Nos. 2, 3 and 4 on bond for Rs. 100 said to have been executed by those two persons in favour of Sheobaran Tewari, on the 8th July 1884. An *ex parte* decree was obtained on the 21st March 1888 and in execution of the same the decree-holder Sheobaran Singh sold the whole village Sujihal on the 7th May 1890 and purchased it himself.

On the 2nd May 1884 a mortgage bond for Rs. 1,000 was said to have been executed in favour of Bihansa Koer by the predecessor of Defendants Nos. 2 to 4 by which 49½ bighas of Mouzah Sujihal were hypothecated as security for the debt. A suit was instituted in 1989 by Bihansa Koer against the present Defendants Nos. 2, 3 and 4 and a decree was obtained on the 27th February 1890. The Defendants appealed but their appeal was dismissed on the 7th October 1890. On the 3rd January 1897 the mortgaged property was sold and purchased by the decree-holder Bihansa Koer.

On the 30th September 1899 a suit was brought by the present Defendants Nos. 2, 3 and 4 to have set aside the *ex parte* Small Cause Court decree of the 21st March 1888 and the sale under that decree held on the 7th May 1890 on the ground that the bond and the proceedings based on that bond were fraudulent.

On the 13th January 1900 the same Defendants brought another suit to have the mortgage decree of the 27th February 1890 and the sale under that decree of the 3rd January 1897 set aside on the ground that the mortgage bond and the proceedings based on that bond were fraudulent. This latter suit was dismissed for default on the 7th May 1901. Bihansa Koer died in January or February 1901.

The suit to set aside the Small Cause Court decree and the sale thereunder was decreed in favour of the then Plaintiffs, the present Defendants Nos. 2, 3 and 4 on the 20th December 1900, and that decision was affirmed on appeal on the 12th June 1903.

The present suit was instituted on the 27th September 1904 for a declaration of the Plaintiffs' right to 49½ bighas, of land in village Sujihal and for the registration of their names in the Collectorate as proprietors of 49½ bighas. The Plaintiffs applied in the Land Registration Department in July, 1903 to have their names registered as proprietors of that property, claiming title as purchasers in execution of a mortgage decree at a sale held on the 3rd January 1897. The Deputy Collector allowed the application but on appeal the order of the Deputy Collector was set aside by the Collector and the decision of the Collector was confirmed by the Commissioner of the Division on the 18th June 1904.

The main ground of defence taken by the Defendants was that the Plaintiffs were not entitled to succeed in the suit because they had failed in their defence in the suit instituted on the 30th September 1899 to set aside the Small Cause Court decree to set up the title under which in the present suit the Plaintiffs sought to have their right declared in the 49½ bighas of land in Mouzah Sujihal.

The Subordinate Judge decreed the Plaintiffs' suit but on appeal the District Judge set aside the judgment and decree of the Court of first instance and dismissed the Plaintiffs' claim on the ground that it was barred by the provisions of sec. 13, Explanation (2) of the Code of Civil Procedure. On appeal to the High Court,

Held—When several independent grounds of action are available a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. It applies to the converse case of a Defendant when pleading in his defence.

The title which the Plaintiffs set up in the present suit was not one which they ought to have made a ground of defence in the former suit and therefore they were not precluded under the provisions of sec. 13, Explanation (2) of the Code of Civil Procedure from obtaining relief in the present suit. The subject-matters of the suit which was brought to set aside the mortgage decree and the suit which was brought to set aside Small Cause Court decree were dissimilar and distinct.

Babus Umakali Mukherjee and *Makhun Lal* for the Appellants.

Mr. O'Kinealy (Advocate General) and *Babus Raghu Nath Singh* and *Chandra Sekhar Prosad Singh* for the Respondents.

A. T. M. *Appeal decreed.*

Rash Behari Lal Mandal *v.* The Emperor.

desire of satisfying his lust, his presence at the scene could be accounted for. But a mere desire of revenge at the elopement of a woman of his own class with Laturan and at the persistency of Kunji, one of Laturan's relatives, to stand as his surety when Laturan was charged with the commission of theft are not in themselves sufficient to move a man of position and wealth to do personally what the prosecution alleges he did. These matters have been carefully dealt with by the Deputy Magistrate and the District Magistrate has not given the weight which they deserve in testing the credibility of oral evidence.

The oral evidence, apart from the improbabilities of the prosecution story, is highly unsatisfactory. The District Magistrate has based his conclusion on the assumption of the truthfulness of the witnesses for the purposes of the preliminary enquiry before commitment, but in dealing with the evidence he had to consider whether a *primâ facie* case had been made out and to perform in the position of an Appellate Court as nearly the same duties as the Magistrate who had held the preliminary enquiry. It has been repeatedly held by the Superior Courts in India that a Magistrate holding a preliminary enquiry would not exceed his jurisdiction if he examines the credibility of testimony and should not commit a person for trial in the Sessions Court if he be of opinion that notwithstanding direct evidence the case is improbable and the evidence unreliable.

Kunji, the complainant, and Gopal did not enquire who raped each of the women though they had ample time to do so and the matter was left to the women themselves for development at a later stage. In other points of their evidence they show evident signs of fabrication. Gopal Dusadh is as unsatisfactory as Kunji. He heard the order given by Rash Behary Lal and heard cries of the outraged women but it is curious that none of the neighbours came to help or heard the cries. Rash Behary Lal might be influential but that would be no reason for people not coming there. None of the neighbours was examined before the Deputy Magistrate. Gopal also contradicts the women on material points. The Dusadhins, Rania, Bhagia and Bhikuli the women alleged to have been raped, stand uncorroborated. The story told by Lakhia is absurd on the face of it. The other witnesses are not of much importance.

The credibility of the testimony of the prosecution witnesses must also be considerably shaken by the fact of Police control over them throughout the investigation and enquiry. • • •

On the whole, we are of opinion that the reasons given by the District Magistrate for setting aside the order of the Deputy Magistrate are insufficient, that he has not sufficiently met the reasons given by the latter for discharging the accused and that this is not a case in which a commitment to the Court of Sessions should have been directed.

We accordingly set aside the order of the District Magistrate and upholding the order of the Deputy Magistrate, we direct that the Petitioners to be discharged.

B. C. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 1033 AND 1081 OF 1905.

MACLEAN, C. J.
GEIDT, J.
1907.
Heard, 11 and 12, November.
Judgment, 25, November.

SHAMBHU CHANDRA HAZRA, Plaintiff, Appellant,
v.
PURNA CHANDRA PAL and ors., Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885) before amendment by Act I, B. C. of 1907, secs. 105, 106, 108—Record-of-rights—Entries as to character of holding and status of tenant—Correction of entries—Proper procedure.

Before the passing of Act I, B. C. of 1907, an entry in a finally published record-of-rights that lands held by tenants were mal *lands or that the status of the tenants was that of settled raiyats could not be corrected by the Settlement Officer except in a suit instituted under sec. 106, Bengal Tenancy Act. He had no authority to revise such an entry under sec. 108 of the Act.*

These appeals were preferred on the 2nd and 9th of June 1905, respectively, against the decree of G. K. Deb, Esq., District Judge of Zillah Hughly, dated the 30th of January 1905, confirming that of Babu Promotha Nath Dutt, Settlement Officer of Uluberiah, dated the 22nd of December 1903.

The appeals arose out of certain settlement proceedings. The landlord, Shambhu Chandra Hazra, applied on 27th July 1901 to the revenue authorities under sec. 103 of the Bengal Tenancy Act for the preparation of a record-of-rights in respect of Mouzah Nazarpur held by him in *dur-putni*. The records were duly prepared and on the 31st March 1903 the draft record of-rights was published. A month's time was allowed for objections to be preferred against the draft, but none having been preferred the records were finally published on the 9th June 1903. Meanwhile, on the 5th September 1902, the landlord had applied for settlement of rent under sec. 105 of the Bengal Tenancy Act. After the record-of-rights were finally published, the Settlement Officer proceeded to settle fair rents. Notices were issued on the tenants. On the 31st July 1903 the tenants appeared and, on the 19th August 1903, they filed several petitions of objection alleging with regard to some of the lands that they were *lakhiraj* and not *mal* lands, and that therefore no rent could be assessed upon such lands; with regard to certain other lands they alleged that they were *mokurari kaimi* and *mourasi kaimi jotes* and therefore subject to fixed rents which were not liable to enhancement.

The Settlement Officer held upon evidence adduced before him that the lands objected to as *lakhiraj* were in fact *lakhiraj* and had been erroneously recorded in the record of-rights as *mal*; and accordingly he refused to assess rents on these lands. With regard to the other lands, he found that the tenants had paid the same rents for over 20 years He held, however, that sec. 115 of the Bengal Tenancy Act precluded him from applying the presumption raised by sec 50 of the Act in their favour. He was also of opinion that the tenants having been recorded as "settled raiyats," their remedy was to institute a suit under sec. 106. He accordingly held that the tenants were merely settled raiyats and their rents were liable to enhancement. He also found that the area of the *jotes*

SHAMBHU CHANDRA HAZRA *v.* PURNA CHANDRA PAL.

had increased. But he refused to grant any increment exceeding 1½ times the existing rent on the ground of hardship.

Both parties appealed to the Special Judge who affirmed the judgment of the Settlement Officer on all points.

The landlord thereupon preferred S. A. No. 1033 and the tenants S. A. No. 1081 to the High Court.

S. A. No. 1033 of 1905.

Babu Sarat Chandra Roy Chowdhury (with him *Babu Charu Chandra Bhattacharya*) for the Appellant.—The two questions for decision are (1) whether, as held by the Special Judge, a Settlement Officer can under sec. 108 of the Bengal Tenancy Act revise an entry in a finally published record-of rights, (2) whether having found that the area of lands held by the tenants have increased, the Settlement Officer can set an arbitrary limit to the increase of rent as he has done in this case to one-half of the existing rent.

As regards the 1st question, reads sec. 108. Under that section the revenue-officer can only revise an order made either in a proceeding for settlement of fair rent under sec. 105 or in a suit under sec. 106. He cannot revise the record-of-rights itself as finally published. Reads secs. 102, 103, 103A, 105, 106. Here the entry in the record-of-rights was that certain lands were *mal* and not *lakhiraj*. The revenue-officer proceeded to alter this entry upon certain applications by the tenants challenging the accuracy of the entries and entered them as *lakhiraj* lands. The tenants' remedy was by a suit under sec. 106. But they did not institute any suit.

[GEIDT, J.—The petitions of the tenants may be treated as plaints under sec. 106, Bengal Tenancy Act.]

The petitions are not even stamped. They are not plaints as the Special Judge also finds.

The tenants raised no objections when the record-of-rights were being prepared. Even after the draft publication they raised no objection although 1 month's time was allowed to them, nor have they instituted a suit under sec. 106.

Then with regard to some other lands the Settlement Officer had fixed the limit of increased rent to one-half of the existing rent. The Settlement Officer seems to have had sec. 36 of the Act in mind. But this section does not apply to cases in which rent is increased on account of increase in the area. Sec 52 says, the tenant "shall be liable to pay additional rent."

Babu Nagendra Nath Ghose for the Respondents submitted on the first point that it was not quite accurate to say that the Settlement Officer in this case proceeded to revise a finally published record-of-rights under sec. 108 upon the tenants' application. Sec. 108, he conceded, had no application. The tenants raised the questions they did by way of objection to the landlord's petition under sec. 105 for settlement of rent. Under sec. 107 a proceeding under sec. 105 is a judicial proceeding. In such a proceeding it was open to the tenants who were in the position of Defendants to raise any question or issue which they might legitimately raise in a suit instituted by the landlord for the same purpose. The fact that the proceedings commenced with an application and not a plaint did not make any difference.

SHAMBHU CHANDRA HAZRA v. PURNA CHANDRA PAL.

Under the Act before its amendment by the Amending Act of 1898, it was repeatedly laid down that it was not only within the power of the revenue-officer but it was his duty to decide all questions relating to the status of the tenant or the character of the land, if raised in a proceeding for settlement of rent. *Durga Churn Law* v. *Basir Mandal* (1), *Dharani Kant Lahiri Chaudhuri* v. *Gobar Ali Khan* (2) and cases therein cited.

[*Babu Sarat Chandra Roy Chowdhury.*—The Amended Act is entirely different.]

[The CHIEF JUSTICE.—Draws attention to sec. 105, cl. (2). Does not that imply that you cannot go behind the entry of the land as *mal*, except in a suit to set aside the entry under sec. 106]

Draws attention to sec. 103B Under that section an entry is only to be presumed correct until the contrary is proved. Sec. 105 (2) does not control or override sec. 103B. The effect of sec. 103B is that the entry has a certain value as evidence. The presumption under sec. 103B can be rebutted by evidence whenever the entry is relied upon in any judicial proceeding. It was open to the tenant to do so in the present proceeding

[The CHIEF JUSTICE.—You did not at all contest the matter before the Settlement Officer during the preparation of the records. You might institute a suit under sec. 106 after final publication but you did not.]

Submits that notwithstanding all this, the entry cannot have greater operation than is given to it by sec. 103B. The non institution of a suit under sec. 106 leaves the entry just where it was after the final publication of the records. It is optional to a party either to institute a suit under sec. 106 before the revenue-officer within three months, or to institute a suit in a Civil Court at a subsequent date or to contest the correctness of the entry in any subsequent proceeding by adducing rebutting evidence.

As a matter of practice revenue-officers have always allowed questions regarding the nature of the land or the status of the tenant to be raised in proceedings for settlement of rent.

A regards the second point taken, the decision of the Settlement Officer has been affirmed by the Special Judge, and it being a decision settling rent within sec. 109A, cl (3), no second appeal lies.

Babu Sarat Chandra Roy Chowdhury in reply.

In sec. A 1081.

Babu Nagendra Nath Ghose for the Appellant.—The question in this appeal relates to the status of the tenants. The tenants were recorded in the record-of-rights as settled raiyats. But they proved in these proceedings that they had been paying the same rent for over 20 years *before* the settlement proceedings were commenced. The tenants should have been presumed under sec. 50 of the Act to be tenants holding on fixed rents until the landlord proved the contrary. He has not proved the contrary. The Courts below have thrown the onus on the tenants, being led to do so by a misreading of sec. 115. That section only lays down that holding land at the

(1) 6 C. W. N 238 (1901).
(2) 7 C. W. N 33 at p. 52 (1902).

SHAMBHU CHANDRA HAZRA v. PURNA CHANDRA PAL.

same rent for 20 years or more commencing from a date subsequent to the date of the final publication of the record-of rights will not raise such a presumption. See *The Secretary of State* v. *Kajimuddi* (3).

[The CHIEF JUSTICE points out that the same difficulty as in the case of the *lakhiraj* lands arises. Could the entry in the record-of-rights relating to the status of the tenants be altered except in a suit under sec. 106 ?]

I answer the question in the same way. Further, points out that sec. 105 (2) does not apply to the present question. There is nothing in the Act to support the position that the entries in the record-of-rights become final if a suit is not instituted to correct the entries under sec. 106.

Babu Sarat Chandra Roy Chowdhury for the Respondent was not called upon.

The JUDGMENT OF THE COURT was delivered by

MACLEAN, C. J —These appeals arise out of settlement proceedings initiated by the landlord who applied for the preparation of a record of-rights. An enquiry was held by the Settlement Officer and a draft record-of-rights published on the 31st March 1903, the parties being informed that the record would be open for inspection, and that objections would be received within one month. No objections were preferred, and on 9th June 1903 the record-of-rights was finally published. The Settlement Officer then proceeded in accordance with the landlord's application to settle fair and equitable rents, and on

(3) I L. R. 26 Cal. 617 (1899)

14th August 1903 the tenants, who had been recorded as settled raiyats holding *mal* lands, put in a petition objecting that some of their lands recorded as *mal* were *lakhiraj*, and that their status was that of raiyats holding at a fixed rent The Settlement Officer on enquiry gave effect to the first of these objections, and altered the entry in the record-of-rights, recording as *lakhiraj* lands which had been put down as *mal*. As regards the second objection the Settlement Officer held that the raiyats had not proved that they had held lands at a uniform rate of rent since the permanent settlement. The Settlement Officer's orders on these points were upheld by the Special Judge on appeal

In Appeal No. 1033 which is by the landlord it is objected that the Settlement Officer was not competent to revise the entries relating to *mal* lands The Special Judge has held that sec. 108 of the Bengal Tenancy Act gives the Settlement Officer power to alter these entries. That section provides that a revenue-officer . . . . "may on application or of his own motion within twelve months from the making of any order or decision under sec. 105, sec. 106, or sec. 107 revise the same." It seems clear to us that the entry as to *mal* lands was not made under any of the sections mentioned. Sec 105 refers to the settlement of fair and equitable rents. Sec. 106 relates to the decision of disputes regarding entries in the record-of-rights. These disputes can only be decided by the presentation of a plaint on stamped paper. No such plaint had been presented, nor had the Settlement Officer professed to settle any such dispute under

sec. 106. Sec. 107 merely refers to the procedure to be adopted under the two preceding sections and directs the revenue-officer to make in the record-of-rights a note of all rents settled under sec. 105 and of all decisions of disputes passed under sec. 106. It appears to us, therefore, that sec 108 did not warrant the Settlement Officer in revising the entries as to *mal* lands in the record-of-rights. The Act gives to tenants ample opportunity for the correction of mistakes in that record. The draft record is prepared in the presence of landlord and tenant. The draft is then published, and objections to any entries therein are invited and considered before it is finally published. A still further opportunity is afforded even after final publication by sec. 106, which allows the parties to institute before the revenue-officer a suit for the decision of any dispute regarding the entries. In the present case the tenants made no objection to the draft record, nor did they after final publication institute any suit regarding the *mal* lands. The Settlement Officer had no authority to revise the entries regarding *mal* lands in the record-of-rights, and his orders on this point must be set aside.

Another objection taken in the landlord's appeal is in regard to the limitation of enhancement of rent imposed by the Settlement Officer who has directed that the rent shall not be enhanced so as to be in excess of one and a half times the existing rent. It is urged that such a limitation is inequitable in cases where the tenant is holding an area in excess of that on which his existing rent was fixed. We are, however, unable to entertain this objection, as the order complained of is a decision settling a rent, and on such a point no second appeal lies. See sec. 109A (sub sec. 3) of the Bengal Tenancy Act.

In Appeal No. 1081 preferred by the tenants the sole ground urged is that the Settlement Officer was wrong in deciding that their status was not that of tenants holding at fixed rents. For the reasons already given in a former part of this judgment regarding *mal* land, we are of opinion that the Settlement Officer had no power to entertain their objection as to their status. Their status had been recorded in the draft record as that of settled raiyats. No objection to this entry was made before final publication, nor was any plaint presented to the Settlement Officer for a decision of a dispute on this point.

The result is that the landlord's appeal No. 1033 succeeds in part. The entries in regard to *lakhiraj* lands must be expunged, and the lands entered as *mal*. In this appeal we direct that each party bear its own costs.

Appeal No. 1081 fails and is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1982 OF 1905.

MOOKERJEE, J. CASPERSZ, J. 1907. Heard, 8, August Judgment, 16, August.

JOGENDRA NATH ROY and others, Plaintiffs, Appellants,

v.

BALADEB DAS MARWARI and others, Defendants, Respondents.

Partition of joint property—Portion omitted by mistake—Fresh suit for partition or joint possession, if maintainable—Co-owner, adverse possession by.

Where, in a suit for the partition of joint property, by reason of a mistake of the parties which was shared by the Commissioner who was appointed to make the partition, a certain portion of the property was omitted from the report and the final decree did not deal with the lands comprised in that portion,

Held—*That the effect of the decree was to leave unaffected the joint title and possession of the parties in the lands omitted in the decree.*

That such lands may be partitioned in a subsequent suit at the instance of one of the parties.

A mere determination of the shares by the preliminary decree is not tantamount to partition.

The entry into and possession of land under the common title by one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all.

A co-tenant will not be permitted to claim the protection of the statute of limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him. It must further be established that the fact of the adverse holding was brought home to the co-owner.

The possession of a wrong doer cannot be constructively extended over lands not actually in his possession.

This was an appeal preferred on the 13th of November 1905, against the decree of H. Holmwood, Esq., District Judge of Zillah 24-Pergunnahs, dated the 31st of July 1905, reversing that of Babu Saroda Prosad Sen, Munsif, 1st Court at Sealdah, dated the 2nd of February 1905.

The facts of the case appear from the judgment.

Babus Nilmadhub Bose and *Surendra Chandra Sen* for the Appellants.

Mr. C. C. Ghose and *Babu Provash Chandra Mitra* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The subject-matter of the litigation, which has given rise to this appeal, is a parcel of land comprised in holding No. 129 in the *khas* mehal of the Government in Cossipur in the Northern Suburbs of Calcutta.

The Plaintiffs and the second and third Defendants were admittedly the owners of the holding No. 129 in which the Plaintiffs had a five-sixth share and the two Defendants had an one-sixth share. In 1884 an action for partition was brought in the Court of the Subordinate Judge of the 24-Pergunnahs in respect of this holding. The preliminary decree by which the shares of the parties were determined was made in due course, and a Commissioner was appointed to effect a division by metes and bounds of all the lands comprised in the hold-

ing. By a mistake of the parties to the litigation, which was shared by the Commissioner, the portion now in dispute was omitted from the Report. As a matter of fact, this portion was, at the time, covered with jungle and was separated from the rest of the land by a ditch The aspect of the locality indicated that the land now in dispute was not included in holding No. 129 which had been directed by the preliminary decree to be mapped out and partitioned. The result was that the final decree in the partition suit dealt with the lands of the holding other than what is the subject-matter of controversy in the present litigation.

The Plaintiffs allege that in 1901 the second and third Defendants took exclusive possession of the disputed lands, ousted the Plaintiffs and settled the property with the first Defendant. Under these circumstances, they commenced this action on the 11th of June 1903 for declaration of their title, for recovery of possession and for partition At a subsequent stage of the proceedings the Plaintiffs abandoned their claim for partition and the plaint, as it now stands, is appropriate to a suit for recovery of joint possession. The claim also originally included a sum of Rs. 30 as compensation for damage done to trees. This part of the claim, however, was also subsequently withdrawn The suit was contested by the first Defendant as also by their landlords The former set up the title of the second and third Defendants and the latter claimed title by adverse possession for the statutory period; they also contended that inasmuch as holding No. 129 had formed the subject-matter of the previous suit for partition, the Plaintiffs were not entitled to maintain the present action.

The Court of first instance held that the suit was maintainable, and that the title of the Plaintiffs had not been extinguished by adverse possession on the part of their co-sharers. In this view of the matter, a decree was made in favour of the Plaintiffs. Upon appeal the learned District Judge has reversed this decision. He has found, upon the evidence, that the disputed land was waste at the time of the previous partition suit, and was omitted by mistake from the proceedings of the Commissioner, and consequently, from the final decree; but he has held that the Plaintiffs never had joint title to the land in dispute after the partition of 1884 and, as they had failed to establish possession within 12 years of the suit, their claim must be dismissed.

The Plaintiffs have now appealed to this Court and on their behalf the decision of the District Judge has been challenged, substantially, on two grounds, namely, *first*, that inspite of what had happened in the suit for partition, the Plaintiffs were entitled to have their joint title to the disputed property declared and to be placed in joint possession thereof; *secondly*, that inasmuch as the Plaintiffs and the second and third Defendants were co-owners, their title was not extinguished by adverse possession as the Defendants had failed to prove that there was a disclaimer by the assertion of a hostile title and notice thereof to the Plaintiffs.

In support of the first point taken on behalf of the Appellants, it has been argued by their learned vakil that, as the

JOGENDRA NATH ROY v. BALADEB DAS MARWARI.

final decree in the partition suit admittedly did not deal with the disputed lands, the joint title of the co-owners was not in any manner affected thereby, and, as the exclusion from the partition decree was due to the mistake of the parties, the Plaintiffs are not precluded from asserting their title to the property. It has been argued, on the other hand, by the learned Counsel for the Respondents that, as the preliminary decree directed the partition of all the lands comprised in holding No. 129 and consequently of the lands now in dispute, the proper and sole remedy of the Plaintiffs-Appellants is to re-open the decree in the partition suit when they might obtain the appropriate relief.

After careful consideration of the arguments, which have been addressed to us on both sides, we are of opinion that the contention of the Appellants ought to prevail. In our opinion, the effect of the decree in the partition suit was to leave unaffected the joint title and possession of the parties in the disputed land. It is obvious that there was no partition in fact, so far as these lands are concerned, for partition is the division made between several persons of joint lands, which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him. The mere definition of the shares of the joint proprietors does not amount to partition of the property, although such determination may, as pointed out by their Lordships of the Judicial Committee in *Joynarain* v. *Girish Chunder* (1) and *Chidambaran* v. *Gauri* (2), effect a severance of the joint interest. To effect a partition, however, the property if susceptible of division must be transformed into estates in severalty and one of such estates assigned to each of the former occupants for his sole use and as his sole property. If this view were not adopted, the very object of the partition might be completely defeated. Co-owners may desire to terminate their property relations with one another and thus avoid a continuance of that discord and irritation which must necessarily attend an association compelled by joint interest but reprobated by every other consideration. If it were held that the mere determination of the shares by the preliminary decree was tantamount to partition, co-owners would have to enjoy their property jointly which is precisely what they intend to avoid. If, therefore, we hold that the effect of the preliminary decree in the suit for partition was not to effect a partition of the disputed lands, it is clear that the effect of the final decree was unquestionably not to effect a partition, it is the common case of both parties that by a mistake the lands, now in dispute, were excluded from the report of the Commissioner and were not dealt with by the final decree.

How then, can it be contended that the disputed lands were partitioned in the former litigation? One test seems to be conclusive. If the lands were partitioned to the share of which co-sharer were they awarded? The learned Counsel for the Respondents found himself unable to furnish an answer to this question. He argued, however, that as the lands formed the subject-matter of the previous litigation, the present action is not

(1) 5 I. A. 228: S. C. I. L. R. 4 Cal. 434 (1878).
(2) I. L. R. 2 Mad. 83; L. R. 6 I A. 177 (1879).

JOGENDRA NATH ROY v. BALADEB DAS MARWARI.

maintainable either for the recovery of joint possession or for partition. In our opinion, this contention is not well-founded on principle, and is not supported by any authorities. A very similar question arose in the case of *Barnes* v. *Boardman* (3), which related to a partition of joint property. It transpired in the course of the suit that an action had been previously brought for partition of an estate of which the disputed lands formed part, but that, by a mistake of the parties as to their legal rights, these lands had been excluded from the previous suit in which the decree for partition was made in respect only of the land comprised in that action. It was argued on behalf of the Defendants that, as the lands had not been included in the previous suit, they could not form the subject-matter of another litigation. This contention was overruled. Mr. Justice Knowlton, who delivered the judgment of the Supreme Judicial Court of Massachussetts, observed as follows:—"It is contended that the Court will not make an order for a partition of a part only of an estate held by tenants in common and that, therefore, when a partition has been made which does not include all the lands that should have been included, the Court will not, in a new proceeding, do that which should have been done in the original suit. It is true that a petition for a partition of a part of an estate held by tenants in common will not be entertained against the objection of any person interested. Ordinarily, a petition of this kind should include the entire estate held in common, but it does not follow, if by mistake or by the consent of all the tenants, a partition has been made of a portion of their estate, whether by order of the Court or otherwise, that the Court is powerless to divide the remainder on a petition of one or more tenants in common. It would be a harsh rule that, after a division of a part of an estate, partition of the remainder could never be ordered by the Court. When parties have acted innocently and fairly in making or obtaining a division, which does not cover all their estate, there is no reason why the law should not aid them when they ask for a division of the remainder. The parties seem to have proceeded under a mistake in regard to their legal rights and nothing appears on either side to affect the right which Petitioners would have in any such case, if they had, by common consent, obtained the partition of a part of an estate held in common and subsequently found that a partition of the remainder of it was desirable."

This view appears to us to be consistent with principles of justice, equity and good conscience and is supported by the decision in the case of *Cartwell* v. *Chambers* (4) and by the observations of their Lordships of the Judicial Committee in *Jagajit Singh* v. *Sarabjit Singh* (5). We must consequently affirm without hesitation, the doctrine that, although a co owner cannot enforce a partition of a part only of the common lands leaving the rest undivided, and although the entire property must be included in the partition, yet if by mistake or by consent of the co owners, acting innocently and fairly, a partition of a portion only of

(3) 157 Mass 179 32 N. E. 670.

(4) 54 S. W 362.

(5) I. L. R. 19 Cal. 159 at p. 172 (1892).

JOGENDRA NATH ROY *v.* BALADEB DAS MARWARI.

their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not grant a division of the remainder at the instance of one or more of the co-owners. The conclusion, is therefore, irresistible that the effect of the decree in the partition suit was to leave untouched the joint title and possession of the parties and that the present suit for recovery of joint possession may well be maintained.

The second ground taken on behalf of the Appellants raises the question whether their title has been extinguished by adverse possession on the part of their co-sharers, the second and third Defendants In our opinion, this question must be answered in the negative. The principles which are applicable to cases of this description, in which the question arises as to whether the possession of one co-owner has been adverse to that of another, must now be taken to be well settled. The fundamental rule is that the entry and possession of land, under the common title of one co owner, will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is in itself rightful and does not imply hostility as would the possession of a mere stranger. To use the language of Mr. Justice Story in *Ricard* v. *Williams* (6) "the law will never construe a possession tortious unless from necessity; on the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful, and thus upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears." In other words, as the same learned Judge put it in *Prescott* v. *Nevers* (7), "the only difference between the possession of a co-owner and other cases is that acts which if done by a stranger would *per se* be a *disseisin*, are in the case of tenancies in common, susceptible of explanation consistently with the real title; acts of ownership are not, in tenancies in common acts of *disseisin*, it depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant in common intends to oust another; the fact must be notorious and the intent must be established in proof." It follows consequently, that one co owner may hold adversely to his co-parcener, and if his possession is continued uninterruptedly for the statutory period, he will acquire an indefeasible title, *Doe* v. *Prosser* (8), *Doe* v. *Taylor* (9). This is true whether the original entry was with intent to hold adversely or whether the entry was that of a tenant in common. Much stronger evidence however is required to show an adverse possession held by a tenant in common than by a stranger, and a co-tenant will not be permitted to claim the protection of the statute of limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him it must further be established that the fact of adverse holding was brought

(6) 7 Wheaton 107.

(7) (1827), 4 Mason 326; 19 Federal Case 1286.

(8) 1 Cowper 217 (1774).

(9) 5 B. and Ad. 575 (1833)

JOGENDRA NATH ROY v. BALADEB DAS MARWARI.

home to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted, in other words in the language of Chief Justice Marshall in *Mcclung* v. *Ross* (10) "a silent possession accompanied with no act, which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession." Mere possession, however, exclusive or long continued, if silent, cannot give one co-tenant in possession, title as against the other co-tenant. [See *Clymer* v. *Dawkins* (11), in which it was ruled that the entry and possession of one tenant in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others; when this occurs, the possession is from that period, treated as adverse to the other tenants.]

This view is identical with what has been adopted by this Court in the cases of *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (12), *Baroda Sundari* v. *Annoda Sundari* (13) and *Ujalbi Bibi* v. *Umakanta Karmokar* (14) The same conclusion is supported by the case of *Ittappan* v. *Manavikrama* (15) and by the principles, which regulate the relation between joint owners, as explained in the cases of *Mohes Narayan* v. *Nawbat Pattak* (16), *Jagarnath* v. *Jainath* (17) and *Phani Singh* v. *Nawab Singh* (18).

If, therefore, it is for the Defendants to show not merely that they have been in sole occupation of the disputed lands but also that there has been a disclaimer by the assertion of a hostile title and notice thereof to the Appellants, either direct or to be inferred from notorious acts and circumstances, what is there position? The learned District Judge found that the circumstances which put the Plaintiffs to the knowledge of the infringement of their rights, was the execution of a lease by the tenants in favour of the Respondents on the 22nd of September 1892. If so, the title of the Plaintiffs was clearly in existence and was enforceable on the 11th of June 1903, when the present action was commenced. The difficulty in the way of the Defendants-Respondents, however, does not terminate here. The facts found by the learned District Judge in his judgment show conclusively that the user of the land by them or their tenants was of a description which could not possibly create in them a title by adverse possession to the whole of the lands now in controversy As was observed by their Lordships of the Judicial Committee in the case of *Radhamoni* v. *Collector of*

(10) 5 Wheaton 116 (124).
(11) 3 Howard 674.
(12) I. L. R. 9 Cal 744 (753 and 754) (1883).
(13) 3 C. W. N. 744 (1898).
(14) 9 C. W. N. 32: s. c. I. L. R. 31 Cal. 970 (1904).
(15) I. L. R. 21 Mad 153 (156) (1897).
(16) I. L. R. 32 Cal. 837: s. c. 1 C. L. J. 437 (1905).
(17) I. L. R. 27 All. 88 (1904).
(18) I. L. R. 28 All. 161 (1905).

JOGENDRA NATH ROY *v.* BALADEB DAS MARWARI.

Khulna (19) to prove title to land by adverse possession for the statutory period, it is not sufficient to show that same acts of possession have been done, the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor, in other words, the possession must be actual, visible, exclusive, hostile, and continued during the time necessary to create a bar under the statute of limitations; or as observed by Mr. Justice Clifford in *Armstrong* v. *Monill* (20) and by Mr. Justice Maclean in *Daswell* v. *Dela Langa* (21) the possession in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse. Judged by this test, the acts of possession proved on behalf of the Defendants and their tenants fall far short of what would be necessary to extinguish the title of the Appellants. The land was originally undoubtedly waste and continued to be so for many years; the neighbours and the persons employed in certain mills used the abandoned waste as a convenient place for the purposes of nature and the first substantial use made by the Defendants which may in any sense be regarded as a hostile assertion of title on their part and ouster of the Appellants, was within 12 years of this suit. There is nothing to show that beyond 12 years there were any positive acts referable only to the intention of the Defendants to acquire exclusive control of the disputed land; there were no acts which could be regarded as adverse to the existing title; indeed, they were not acts of possession at all; in other words, to use the language of Bramwell, L J., in *Leigh* v. *Jack* (22), the acts of user were not enough to take the soil out of the Plaintiff and vest it in the Defendant, because in order to defeat a title by dispossessing the owner, acts must be done which are inconsistent with his enjoyment of the soil for purposes for which he intended to use it [see also *Wali Ahmad* v. *Tota Meah* (23). Pollock and Wright on Possession, page 86, and Lightwood on Possession, page 199].

There is another difficulty, no less formidable in the way of the success of the Defendants. The facts found by the Courts below show conclusively that the possession of the Defendants did not extend over the whole tract now in dispute. Whatever acts of user they have proved, if indeed they be deemed to be acts of passession sufficient to extinguish the title of the Plaintiffs, did not extend over the entire land. Now it was ruled by this Court in the case of *Mohini Mohan Roy* v. *Promoda Nath Roy* (24), that the doctrine of constructive possession applies only in favour of a rightful owner and must not as a rule be extended in favour of a wrong-doer, whose possession must be confined to lands of which he is actually in possession. This principle is recognised in the cases of *Radha Govind Roy* v. *Inglis* (25), *Udit Narain* v. *Golab Chand* (26), *Anandahari* v. *Secretary of State* (27) and *Vithal Das* v.

(19) 4 C. W. N. 597 : s. c L. R. 27 I. A. 136 ; I L. R. 27 Cal. 943 (1900).
(20) 14 Wallace 145
(21) 20 Howard 34.

(22) 5 Exch. D. 264 at p. 273 (1879).
(23) I L R. 31 Cal. 397 (1903).
(24) I. L. R. 24 Cal. 256 (1896).
(25) 7 C. L. R. 364 (1880).
(26) I. L. R. 27 Cal. 221 (1899).
(27) 3 C. L. J. 316 (331) (1906).

Secretary of State (28). That this doctrine is well-founded on reason and principle is manifest, for as was observed by Mr. Justice Strong in *Humricut* v. *Peyton* (29) one who enters upon the land of another, though under colour of title, gives no notice to that other of any claim except to the extent of his actual occupancy; the true owner may not know the extent of the defective title asserted against him; and, if while he is in actual possession of part of the land claiming title to the whole mere constructive possession of another of which he has no notice can oust him from that part of which he is not in actual possession, a good title is no better than one which is a mere pretence. Judged by this test also the Defendants have failed to prove that adverse possession on their part has extinguished the title of the Plaintiffs. From every point of view, therefore, it follows that the Plaintiffs are entitled to recover joint possession in the manner claimed.

The learned vakil for the Appellants stated that he does not ask for a decree for ejectment as against the first Defendant, who has been let into occupation of the land by the second and third Defendants who are co-sharers of the Plaintiffs in the property. The Plaintiffs are content to have a decree for declaration of title as against the first Defendant and to be placed in joint possession as landlords along with their co sharers.

The result, therefore, is that this appeal must be allowed and the decree of the learned District Judge reversed. The Plaintiffs will have a decree which will declare their title to a five-sixths share of the lands in dispute and will entitle them to recover joint possession thereof along with the second and third Defendants. They will however not be entitled to eject the first Defendant in execution of this decree.

It appears from the proceeding of the Courts below that a portion at any rate of the lands included in the present litigation is in the occupation of other persons who are not parties to this suit and who apparently have encroached upon these lands as part of holding No. 115. It is, therefore, necessary to declare that the Plaintiffs will not be entitled in execution of this decree to disturb the possession of such persons, if any, as are not parties to the present litigation. The Plaintiffs are entitled to their costs in all the Courts.

S. C. S. *Appeal allowed.*

(28) I. L. R. 26 Bom. 410 (416) (1901).
(29) 102 U. S. 369.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1079 OF 1907.

CASPERSZ, J.
CHITTY, J.
1907.
27, September.

JAMAIT MULLIK and ors., Petitioners,
v.
THE EMPEROR, Opposite Party.

Judgment of the Appellate Court—What it should contain—Judgment of the first Court, whether may be read as supplementing judgment of the Appellate Court—Joint trial of several accused.

The judgment of an Appellate Court dealing with the case of several accused who were convicted in a joint trial, must show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as

JAMAIT MULLIK *v.* THE EMPEROR.

may be necessary to show that the Appellate Court has devoted judicial attention to the case of each accused.

An Appellate judgment must be quite independent and stand by itself. It ought not to be read in connection with or as supplementary to the judgment of the Court of first instance.

This was a rule granted on the 5th of September 1907, against an order of Babu Jogendra Nath Chuckerbutty, Deputy Magistrate of Midnapur, dated the 17th of June 1907, directing under sec. 110, Cr. P. C., to execute a bond of Rs. 100 with two sureties in the same amount each to be of good behaviour for one year, which order was, on appeal, affirmed by Mr. J. Weston, District Magistrate of Midnapur, on the 3rd of July 1907.

The Appellate judgment of the District Magistrate was as follows :—

"In this case 17 persons have been ordered to find security to be of good behaviour, 7 of them for two years and the 10 Appellants for one year. The case, as far as the former 7 is concerned, was sent up to the Sessions Judge and he has confirmed the order. Now the other 10 prefer this appeal to me.

"The main grounds taken before me are that the accused have been prejudiced by a joint trial, that the case is instituted partly because of failure to detect the Atra dacoity case, and mainly because of a petition put in against the Police Inspector who supervised the inquiry in this case, charging him with assault, oppression, &c. It is also urged that the evidence is the outcome of party feeling.

"The trying Magistrate has made a very careful record of the evidence and written a well considered judgment. There is a mass of evidence in record to show that all these accused form a gang and are supported by one Nilkamal, a wealthy man whom they consult and visit. This being the case it is clear that resorting with men of bad character, old convicts, is an integral portion of the charge and they are no more prejudiced by that than they are by being charged separately with bad livelihood.

"Admittedly the Police took up this case after their failure to detect the dacoity case, but there were indications in that case that it was the work of this gang and their action was therefore proper. That this case was the outcome of the Inspector's revenge is absurd, unless it be believed that the Inspector also managed to get over 60 other witnesses to support his animosity and these were witnesses from some 18 different villages.

"As to the party feeling, there seems to have been some feeling between Hindus and Mussalmans regarding water-supply but the accused were both Hindus and Mussalmans as also the witnesses.

"I consider the order to find security justified and reject the appeal. Appellants will be committed to jail in default of finding security."

Babu Dasarathi Sanyal for the Petitioners.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule on the District Magistrate of Midnapur to show cause why he should not be directed to re-hear the

JAMAIT MULLIK *v.* THE EMPEROR.

appeal in the matter of the security demanded from the Petitioners to be of good behaviour, and to consider the case of each Petitioner on the evidence in the record.

The Appellate judgment of the learned District Judge is not in compliance with the law and authorities on the subject. He was dealing with the cases of 17 persons and the evidence of 70 witnesses for the prosecution and 54 for the defence This mass of evidence he disposes of in a very, what we may call, stereotyped manner. The name of not one of the accused, and the name of not one single witness, appear in the judgment of the learned District Magistrate. We have not the slightest doubt, as he mentions in his explanation, that he made notes for his guidance, with reference to each of the accused, as to what the witnesses against him said and what the witnesses in favour of him said, and that before writing his judgment he considered the evidence against each man. But this cannot be considered sufficient. It must appear, on the face of the judgment, that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused. The necessity is the greater, when, as in the present instance, a very large number of persons were jointly proceeded against and directed to furnish security for good behaviour. We are unable to accept the explanation that the Appellate judgment may be read in connection with, and as supplementary to the judgment of the Court of first instance. The Appellate judgment must be quite independent and stand by itself.

The only order, therefore, that we can pass in the matter of this rule is that the District Magistrate do re-hear the appeal and consider the case of each Petitioner on the evidence in the record.

The rule is accordingly made absolute.

Pending the re-hearing of the appeal by the District Magistrate the Petitioners will be released on bail to his satisfaction.

B. C. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICITON.]

REV. No. 944 OF 1907.

CASPERSZ, J. CHITTY, J. 1907. 11, September.	KAMINI BAURINI, Petitioner, *v.* FAKIR CHAND SARKAR and KARTIK BAURI, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 346 and 532—Commitment made under sec. 346, Cr. P. C.—De novo *trial, if necessary.*

Commitment made to the Sessions by a Magistrate acting under the powers conferred by sec. 346, Cr. P. C., is not illegal simply because he has not examined de novo *the witnesses who were examined by the Magistrate who submitted the case under the provisions of that section.*

To the case of an accused thus committed to the Court of Sessions, sec. 532 of the Code of Criminal Procedure has no sort of application.

This is a rule issued on the 12th of August 1907, calling on the District Magistrate of Burdwan and also on the opposite party to show cause why the

KAMINI BAURINI *v.* FAKIR CHAND SARKAR.

order passed by Mr. W. N. Delevingue, Sessions Judge of Burdwan, on the 6th day of June 1907, quashing the commitment of the accused made by Mr. J. C. Leighton, Sub-divisional Magistrate of Asansol, dated the 18th of May 1907, should not be set aside.

The facts of the case material to the report as they appear from the judgment of the Sub-divisional Magistrate are shortly these:—

The complainant, one Kamini Baurini, a female of about 22 years of age, who was a worker at the Sodepur Colliery, was going to a place Chapka where she met the accused Kartik Bauri whom she had known before. This Kartik started a conversation with her and held out inducements to her to come with him saying that he would give her work on good pay and good cloths at a place quite close to her home. He then gave her some tobacco, betel and pan. It appears that the pan was drugged, for after taking it she became stupid. She was then taken during the night by train to a coolie depot. That coolie depot belonged to another accused, Fakir Chand. In the depot she was confined for a day or two and then her name was entered in the register. She was then taken before a Deputy Magistrate, but she was not allowed to stand for a minute before that officer. When she was being sent to Assam, Mr. Mansfield, the Embarkation Agent found her at Goalundo, crying and he took her statement. She then said that she was unwilling to go to Assam. The Deputy Magistrate of Goalundo also examined her with the result that she was sent back. A prosecution was then started against Kartik under sec. 365, I. P. C., and against Fakir under sec. 368, I. P. C. The second class Magistrate who tried the case referred the case to the Sub-divisional Magistrate under sec. 346, Cr. P. C. Before the Sub-divisional Magistrate objection was taken on behalf of the accused that he (the Sub-divisional Magistrate) had no jurisdiction to commit the accused to the Court of Sessions without a *de novo* examination of the witnesses. He however overruled the objection and committed the accused to the Court of Sessions. But the Sessions Judge quashed the commitment holding it to be illegal. This rule was issued against the order of the Sessions Judge quashing the commitment.

Babus Shyama Prosanna Mozumdar and *Upendra Gopal Mitra* for the Petitioner.

No one appeared to show cause.

The JUDGMENT OF THE COURT was as follows :—

This is a rule calling on the District Magistrate of Burdwan, and also on the accused, to show cause why the order of the Sessions Judge of Burdwan quashing the commitment of the accused for trial before the Court of Sessions should not be set aside.

No cause is shown. After hearing the learned vakil for the Petitioner, as representing the Crown, we think that the order of the Sessions Judge cannot be supported. Sec. 532 of the Code of Criminal Procedure has no sort of application to a case of this kind. The second class Magistrate, not being able to make a commitment himself, referred the case to the Sub-divisional Magistrate, to whom

KAMINI BAURINI v. FAKIR CHAND SARKAR.

he is subordinate, and that officer, acting under the powers conferred upon him by sec. 346 of the Code, committed the accused for trial.

We accordingly make the rule absolute and direct the learned Sessions Judge to proceed with the trial on the commitment already made by the Sub-divisional Magistrate of Asansol.

Let the record be sent down at once.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1025 OF 1907.

CASPERSZ, J.
CHITTY, J.
1907.
24, September.

SOBH NATH SINGH and ors., Petitioners,
v.
THE EMPEROR, Opposite Party.

*Criminal Procedure Code (Act V of 1898), sec. 350—*De novo *trial—Omission to examine afresh the prosecution witnesses—Prejudice to the accused.*

Where after the prosecution witnesses were examined and cross examined before a Magistrate, the case against the accused was made over to another Magistrate and a de novo *trial was commenced before the latter in which the prosecution witnesses were not again examined but they were only cross-examined by the defence without any objection,*

Held—*That the trial was not in due compliance with the provisions of sec. 350, Criminal Procedure Code, and ought to be set aside.*

This was a rule issued against an order of the Honorary Magistrate of Nawadah, dated the 31st of July 1907, convicting the Petitioners under sec. 147, I. P. C., and sentencing them each, to undergo six months' rigorous imprisonment. An appeal against the said order was dismissed by the District Magistrate of Gya on the 15th of August 1907.

The material facts are shortly these:—

The Petitioners were tried for offences under secs. 147, 447 and 379, I. P. C, by Moulvi Zahiruddin, a Sub-Deputy Magistrate, before whom all the witnesses for the prosecution were examined and cross-examined. The Sub-Deputy Magistrate was then transferred and the case against the Petitioners was made over to the file of Moulvi Abu Zaffer, an Honorary Magistrate. The Petitioners thereupon filed an application asking the said Honorary Magistrate to try the case *de novo* under sec. 350, Cr. P. C., and their application was granted. When the trial commenced *de novo* the Muktear appearing for the prosecution declined to examine the prosecution witnesses afresh before the Honorary Magistrate.

Thereupon the Muktear for the defence without raising any objection to the procedure cross-examined the prosecution witnesses and then examined 4 witnesses for defence.

The Petitioners were found guilty by the Honorary Magistrate under sec. 147, I. P. C., and sentenced to six months' rigorous imprisonment. On appeal to the District Magistrate the conviction and sentence were upheld. This rule was issued to set aside the conviction on the ground *inter alia* that the trial of the Petitioners before the Honorary Magistrate was not in accordance with law.

Mr. K. N. Chaudhuri and *Babu Ganesh Dutt Singh* for the Petitioners

No one appeared to show cause.

SOBH NATH SINGH *v.* THE EMPEROR.

THE JUDGMENT OF THE COURT was as follows :—

The trial of the Petitioners, on a charge of rioting, was heard before M. Syed Naziruddin, Sub-Deputy Magistrate. That officer having nearly finished the case, was transferred to another place, and so the trial was continued in the Court of M. Abu Zaffer, Honorary Magistrate, sitting singly, with second class powers. An application was made to the second Magistrate for a *de novo* trial in terms of sec. 350, C. Cr. P. Then what happened was this :—The witnesses for the prosecution were summoned, but the prosecution Muktear declined to examine them. Accordingly, the defence Muktear, without making any objection, cross-examined those witnesses.

We think that the provisions of sec. 350 were not duly complied with. It is impossible to say that the accused have not been materially prejudiced by the procedure adopted, for it is evident that the Honorary Magistrate has arrived at conclusions on the evidence the whole of which was not recorded by himself. Under the circumstances we are obliged to set aside the convictions and sentences, and we direct that the Petitioners be retried by some other competent Magistrate in the district to be nominated by the District Magistrate.

The Petitioners will be released, and their bail bonds cancelled.

B. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1100 OF 1907.

CASPERSZ, J. CHITTY, J. 1907, 27, September. | GOLAP SAHA, Petitioner, *v.* THE EMPEROR, Opposite Party.

Excise law—Bengal Excise and Licensing Act (VII, B. C. of 1878), sec. 75, interpretation of—Confiscation in the owner's absence.

The boat in which excisable articles are carried in contravention of the excise law should not be confiscated under the provisions of sec. 75 of the Bengal Excise and Licensing Act (VII, B. C. of 1878), unless it is found that the owner of the boat was is some way implicated in the offence under the excise law.

This was a rule granted on the 10th of September 1907, against an order of Babu Chandra Sekhar Kar, Deputy Magistrate of Hughly, dated the 29th of July 1907, convicting the Petitioner of an offence under sec. 61A of the Excise Act VII of 1878 (B. C) and sentencing him to pay a fine and directing confiscation of a boat which order was, in revision, affirmed by F. Roe, Esq., Sessions Judge of Hughly, on the 16th of August 1907.

The facts material to the report appear from the judgment.

Babu Biraj Mohan Mozumdar obtained this rule on behalf of the Petitioner.

No one appeared at the hearing.

The JUDGMENT OF THE COURT was as follows :—

No one appears at the hearing of this rule. A rule was issued on the District Magistrate to show cause why the order confiscating the boat in the absence of the 5th Petitioner, Golap Saha, and no

GOLAP SAHA *v.* THE EMPEROR

cause being shown by him, should not be set aside.

For the purpose of the present rule we need not say more than that the 5th Petitioner was not tried as one of the co-accused in the case, under the Excise Act, instituted by Abdul Gani against Ramjiban and others The French liquor was found in the boat of the 5th Petitioner, and under sec. 75 of Act VII (B. C.) 1878, when any articles liable to confiscation under this Act are seized, the vessels, packages and coverings in which they are contained, and the animals and conveyances used in carrying them shall also be liable to seizure and confiscating. As we read the section, it empowers the Court to confiscate the Petitioners' boat, but as a matter of sound judicial discretion such an order should not be passed, in the absence of the owner of the boat. We would go a little further and say that unless the owner was in some way implicated in the offence under the Excise law, he should not be deprived of his property; otherwise, if the principle be disregarded, the discovery of a small quantity of opium on board an ocean steamer would render that vessel liable to confiscation under the Act. This, of course, is not to be thought of, and such a remote liability is clearly beyond the scope of sec. 75.

There is nothing in the evidence, or in the judgment of the trying Court, which justifies the confiscation of the Petitioners' boat. We accordingly set aside that order.

The Petitioner will be entitled to recover the boat on due application being made.

B. C *Rule made absolute.*

[CRIMINAL APPELLATE JURISDICTION.

GOVT. APP No. 6 OF 1906.

MITRA, J.
HOLMWOOD, J.
1906
25, July.

THE DEPUTY LEGAL REMEMBRANCER on behalf of the Government of Bengal, Appellant,
v.
UPENDRA KUMAR GHOSE, Respondent.

Irregularity—Waiver by accused—Effect—Transfer of case—De novo trial—Criminal Procedure Code (Act V of 1898), sec. 350—Throwing oneself on Court's mercy, if amounts to pleading guilty—Illegal gratification, payment of, under compulsion—Accomplice's evidence.

Except where the law expressly permits waiver the rights of an accused should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise.

The prisoner on his trial can consent to nothing. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure.

Where after several witnesses were examined the case was transferred to another Magistrate the latter acted irregularly in convicting the accused on evidence partly recorded by the former Magistrate. Sec. 350 of the Criminal Procedure Code not being applicable to such a case, the irregularity could not be waived by the accused.

Where the accused did not formally plead guilty the fact that he threw himself on the mercy of the Court should not prejudice him.

THE DEPUTY LEGAL REMEMBRANCER v UPENDRA KUMAR GHOSE.

ATTORNEY GENERAL OF NEW SOUTH WALES v. BERTRAND (2), THE QUEEN v. BHOLA NATH SEN (4), THE QUEEN v. KHAN MOHAMED (8) *followed.*

PURMESSUR SINGH v SOROOP ADHIKAREE (6) *not followed.*

The testimony of persons who have been compelled to pay illegal gratification has much greater probative force than that of ordinary accomplices.

DEONANDAN PERSHAD v. EMPRESS (1) *followed.*

This was an appeal under sec. 417, Cr. P. C, against an order of acquittal passed by Mr. S. B. Chowdry, Sessions Judge of Hughly, on appeal from an order of conviction and sentence made by Moulvi Abdus Samad, Deputy Magistrate of Howrah.

The accused, Upendra Kumar Ghose of the S. P. C. A., was placed on trial before Mr. Adie, Joint Magistrate of Howrah, under sec. 161, I. P. C., for having received illegal gratification from Benod Sardar, Coachman. The money was said to have been paid by Natobar who was travelling in Benod's carriage and handed over to the accused by Benod in the presence of constable Darbari Sing.

The case was transferred to the file of Moulvi Abdus Samad, Deputy Magistrate, after the bulk of the evidence was recorded and charges framed by Mr. Adie. The Deputy Magistrate convicted the accused under sec. 161, I. P. C. The learned Sessions Judge set aside the conviction on the ground that the witnesses Natobar and Darbari were accomplices. The Government appealed.

Mr. Douglas White for the Crown.

Mr. P. L. Roy and *Babus Dasarathi Sanyal* and *Sarat Chandra Lahiri* for the Accused.

THE JUDGMENT OF THE COURT was as follows :—

The accused, Upendra Kumar Ghose, an officer of the Society for the Prevention of Cruelty to Animals at Howrah, was tried on three charges under sec. 161, I. P. C., and was on the 19th March 1906 found guilty by Moulvi Abdus Samad one of the Deputy Magistrates at Howrah and was sentenced to rigorous imprisonment for one month and a fine of Rs. 150 on each of the charges or in the aggregate to rigorous imprisonment for three months and a fine of Rs. 450. He appealed to the Sessions Judge at Hughly who on the 27th April 1906 set aside the conviction and sentence for reasons to which we shall presently refer. The Local Government has appealed from the orders of the Sessions Judge both on questions of law and fact. Of the three charges on which the accused was tried, the 2nd and the 3rd have been abandoned in this Court and we must, as regards these, accept the verdict of acquittal. This appeal is thus confined to the first count only which refers to the receipt by the accused of Rs. 2 on the 2nd September 1905 from a *chokra* Coachman (Benod Sardar) as gratification other than legal gratification for forbearing to do an official duty.

In order to understand the questions

(1) 10 C. W. N. 669 : s. c. I. L. R. 33 Cal. 649 (1906).
(2) 36 L. J. P. C. 51 ; L. R. 1 P. C. 520 (1867).
(4) I. L. R. 2 Cal. 23 (1876).
(6) 13 W. R. Cr. R. 40 (1870).
(8) 24 W. R. Cr. R. 53 (1875).

raised and discussed in the lower Appellate Court and before us, it will be necessary to state briefly the history of the litigation. The District Magistrate of Howrah directed the prosecution and the case came before Mr. Prentice then the Joint Magistrate of Howrah. The accused objected to the trial on the ground that he was not a public servant. His objection was disallowed and then he moved this Court against the order of the Joint Magistrate and also for a transfer of the case to some other district. This Court upheld the view of the Joint Magistrate as to the accused being a public servant and declined to transfer the case to another district. In the meantime Mr. Prentice was transferred to another district and the case came before Mr. Adie, his successor. On the 27th February 1906, eight prosecution witnesses were examined in-chief before Mr. Adie—charges were framed to which the accused pleaded not guilty and he was examined under sec. 364, C. Cr. P. The case was then adjourned for the examination of the other witnesses for the prosecution. Mr. Adie was however, under orders for transfer to another district and on his representation that he would not be able to finish the case before he left the district, the District Magistrate on the same day, the 27th, transferred the case to Moulvi Abdus Samad one of the Deputy Magistrates at Howrah. The accused then asked for a trial *de novo* and the case was adjourned to the 2nd March. On that day the accused waived his right to a trial *de novo*, and one witness for the prosecution was examined, but the cross-examination of all the witnesses for the prosecution was reserved. The case again came on for trial on the 15th March. The case for the prosecution was not yet closed but the accused threw himself on the mercy of the Court and said he would not cross-examine any of the prosecution witnesses and would not also examine any witnesses for the defence. Thereupon the witnesses present in Court were discharged, the trial was considered to be closed and judgment was reversed. The accused, however, did not distinctly plead guilty and Moulvi Abdus Samad also did not record the plea of guilty. On the 19th March judgment was pronounced and the accused was convicted under sec. 161, I. P. C.

The conduct of the accused in first demanding and then waiving a trial *de novo* and throwing himself later on on the mercy of the Court abandoning his right to cross-examine the witnesses for the prosecution and not entering upon his defence left the trial incomplete. On the 15th March the Deputy Magistrate should have, when the accused threw himself on the mercy of the Court asked him if he then pleaded guilty and if he did so should have recorded his plea. If the accused did not plead guilty he ought to have been formally asked to enter upon his defence The remaining witnesses, if any for the prosecution should also have been examined.

With regard to the charge with which we are at present concerned, three witnesses were examined only in chief Darbari Singh, Natobar Sen and Benod Sardar. The accused declined to cross-examine them and unless the testimony of all of them be held to be tainted as being that of accomplices they certainly

make out a *primâ facie* case against the accused. Darbâri Singh is a Police constable and he was present when Benod Sardar and Natobar Sen both took part in the transaction of bribery. The two latter may be held to be accomplices but we however fail to see why the constable should be held to be an accomplice merely because he was present, saw the transaction and kept silent. The offence is not cognizable and there was no dereliction from duty on the part of the constable in not giving any information to his superior officers. The depositions of Natobar and Benod though they are accomplices, may justify a conviction with merely a slight degree of corroboration as has been held by this Court in *Deonandan Pershad* v. *Emperor* (1). They were as they say compelled to pay Rs. 2 to the accused and we fully agree with Brett and Stephen, JJ., in holding that the testimony of such persons though they are technically accomplices, has much greater probative force than that of the ordinary accomplices to a criminal act. If no other questions had been raised in the case, we would have considered the evidence on the record sufficient for a conviction of the accused. We cannot accept the view taken by the Sessions Judge as to the value of the evidence afforded by these witnessses.

We are not disposed to place any reliance either on the waiver of the accused as to a *de novo* trial or as to his conduct on the 15th March, throwing himself on the mercy of the Court. There being no record of the plea of guilty the conduct of the accused should not prejudice him. If again the law requires that there should be a trial *de novo* on the transfer of a case from one Magistrate to another the waiver of the accused goes for nothing. In *Attorney-General of New South Wales* v. *Bertrand* (2), the Judicial Committee of the Privy Council held that a prisoner on his trial can consent to nothing and this rule as to the effect of a waiver by a prisoner has been consistently followed in India. We may refer to the *Queen* v. *Bishonath Pal* (3), *The Queen* v. *Bhola Nath Sen* (4), and *Queen-Empress* v. *Murarji Gokuldas* (5). In *Queen* v *Bhola Nath Sen* (4), Macpherson, J., said —"It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law" and he added that the consent of the accused could not be invoked against irregularity in procedure. In *Purmessur Singh* v. *Soroop Adhikaree* (6), however, the evidence of witnesses given in a previous trial was used in a subsequent trial at the express request of the prisoners instead of the witnesses being examined *de novo* and notwithstanding this irregularity the Court declined to interfere. But the case was not argued by Counsel in this Court and the decisions we have quoted above were not cited. We cannot rely on this case especially as it has not been followed in any later case. We think the safer rule to adopt in criminal trials is that except where the law expressly permits waiver as sec 350, Cr. P. C., does, the rights of an accused

(1) 10 C. W. N. 669: s. c. I. L. R. 33 Cal. 649 (1906).

(2) 36 L. J. P. C. 51; L. R. 1 P. C. 520 (1867).
(3) 12 W. R. Cr. 3 (1869).
(4) I. L. R. 2 Cal. 23 (1876).
(5) I. L. R. 13 Bom. 389 (1888).
(6) 13 W. R. Cr. R. 40 (1870).

should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise.

In this view, the only other question that arises is could the accused be convicted by Moulvi Abdus Samad on evidence partly recorded by Mr. Adie and partly recorded by himself.

The decisions of this Court as well as of the other High Courts lay down the general principle that judgment must be delivered by the Judge who has heard the evidence [*Queen* v. *Rughoonath Das* (7), *Queen* v. *Khan Mohamed* (8), *Queen-Empress* v *Radhe* (9) and *Queen-Empress* v. *Bashir Khan* (10)]. To what extent has this rule been altered or modified by the Code of Criminal Procedure (1898)?

Sec. 350 of the Code expressly refers to the case of one Magistrate succeeding another, the former Magistrate having ceased to exercise jurisdiction in the case. The proviso (*a*) however speaks of any trial and sub sec (2) refers to a matter which does not properly come in as an exception to the rule contained in the first part of the section. The section, it seems to us, is capable of the interpretation that it covers all cases of change of trying Magistrates whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chap. XLIV of the Code. But in some of the reported cases a limited construction has been put on the section. It has been held that when a case under trial is transferred under sec. 528, Cr. P. C., the whole proceedings must be commenced *de novo.* [See *Queen* v. *Khan Mohamed* (8)]. The words of sec. 350 of the present Code are slightly different from the words of the similar sections of the Codes of 1872 and 1882. The alteration might have been made with a view to include cases of transfer, but having regard to the general principle of interpretation that provisos and sub-clauses should be governed by the operative portion of the section and to the fact that the general rule laid down in the earlier rulings have been recognised and approved of on more than one occasion since the amendment was made, we hold that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Adie.

We agree with the learned Sessions Judge that the conviction of the accused should be set aside on this ground but as we do not agree with him as to the value of the evidence now on the record. We must direct a *de novo* trial of the accused.

The evidence as recorded if believed may sustain charges under secs. 161, 342 and 383 of the Indian Penal Code and not merely sec. 161. We therefore direct that the accused be tried on charges under the above sections by some other Magistrate in the district other than Moulvi Abdus Samad.

(7) 23 W. R Cr. R. 59 (1875).
(8) 24 W. R. Cr R. 53 (1875)
(9) I. L. R. 12 All. 66 (1889).
(10) I. L. R. 14 All. 346 (1892).

(8) 24 W. R Cr. R. 53 (1875).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, DECEMBER 23, 1907. [No 7

Contents.

NOTES

The constitution of the Benches and the distribution of business amongst them will be as follows from the 2nd January next.

PRESIDENCY GROUP AND PRIVY COUNCIL DEPARTMENT.—The Chief Justice and Mr. Justice Coxe.

RAJSHAHYE GROUP.—Mr. Justice Mitra and Mr. Justice Caspersz.

PATNA GROUP.—Mr. Justice Brett and Mr. Justice Chitty.

BURDWAN GROUP.—Mr. Justice Stephen, and Mr. Justice Mookerjee.

CRIMINAL BUSINESS.—Mr. Justice Rampini and Mr. Justice Sharfuddin.

REGULAR APPEALS OF ALL GROUPS.—Mr. Justice Harington and Mr. Justice Holmwood.

ORIGINAL SIDE.—Mr. Justice Woodroffe and Mr. Justice Fletcher will sit singly.

ACCORDING TO RULE 8 OF ORDER XI OF THE NEW Civil Procedure Code Bill, interrogatories are to be answered by affidavit to be filed within ten days, or within such other time as the Court may allow. The present code (sec 126, C P. C.) also requires interrogatories to be answered by affidavit But we think that instead of requiring interrogatories to be answered by affidavit, it would be more appropriate in this country to require a verification of the answers in the same way as in the case of plaints and written statements. Otherwise parties living in the interior might be greatly harassed if they are required to go to the town for swearing an affidavit. It may also cause great hardship to females.

RULE 9 OF ORDER XIII PROVIDES THAT A DOCUMENT cannot ordinarily be returned to a party before the final disposal of a suit, or, when the decree is appealable, before the disposal of the appeal. It is also provided that a party may receive a document back earlier if he delivers a certified copy to be kept on the record. It is no doubt intended that the Court will exercise its discretion in allowing or refusing applications to receive back documents made pending the decision of the suit. In cases where the genuineness of a document is in issue it may not always be safe to allow the document to be removed during the pendency of the suit. The wording of the rule, however, does not make it sufficiently clear that the Court is to have this discretion.

WHEN A COMMISSION IS ISSUED TO A PLEADER BY A Court for the examination of an absent witness, and the examination extends over a number of days, what remuneration is the Commissioner entitled to? This question, frequently arises for discussion in Mofussil Courts. The concluding portion of Rule No. 10 of the Circular Order of the High Court (Vol. I, p. 136) which bears on this question runs thus:—"For the purpose, the following rates appear to be reasonable and are recommended for adoption by Subordinate Courts. If the Court issuing the commission be that of a Munsif or a Small Cause Court, Rs. 4 for each witness to be examined; if the commission be issued by a Court superior to that of a Munsif or a Small Cause Court, Rs. 10 for each witness to be examined."

DIFFERENT COURTS IN THE MOFUSSIL INTERPRET THE above rule in different ways. Some even go so far as to hold that no matter what length of time, or what number of days, a commission may have taken, in no case is the commissioner entitled to any larger sum than Rs. 4 or Rs. 10 according as the commission was issued by the Court of a Munsif or by a superior Court. We do not, however, understand the above Circular as laying down any such hard and fast rule in this matter. The remuneration of a commissioner should certainly be commensurate with the time and trouble legitimately spent on the commission, and the High Court could hardly have intended to lay down a different rule. What the High Court purports to do in the Circular order is to fix the amount of remuneration for ordinary cases, leaving it to the discretion of the Courts to take into consideration special circumstances and determine the amount with reference to such special circumstances.

WE INVITE ATTENTION TO THE CASE OF *Muthuswmi Mudali* v. *Veni Chetti*, reported at page 382, I. L. R. 30 Mad., which was decided by a Full Bench of the Madras High Court. The Full Bench dissenting from the view of the Calcutta High Court held that where the District Judge revokes the sanction for prosecution granted by a Subordinate Court, an appeal lies to the High Court from the order of revocation. The reasons for this decision are not fully given in the judgment, but it is simply stated that revocation of a sanction is the same as a refusal of sanction, so when there is an appeal from an order refusing sanction, there ought to be an appeal from an order revoking a sanction. But the order of refusal is passed by the first Court in which application is made for the sanction, whereas the order of revocation is passed by the Appellate Court to which an appeal is preferred against an order granting sanction. Here two Courts differ from one another, the superior Court is of opinion that sanction ought not to be given, while the inferior Court is of opinion that sanction ought to be given In such a case the opinion of the superior Court ought to be regarded as final. A sanction for prosecution ought not to be granted where there exists a reasonable doubt as to the guilt of the person against whom the sanction is sought or in other words, unless there is a reasonable probability of the conviction of that person. And when the appellate Court revokes the sanction granted by the subordinate Court, it is reasonable to hold that there is considerable doubt of the sanction resulting in the conviction of the accused.

IT MIGHT BE ASKED WHY THERE SHOULD BE AN appeal from the order of an appellate Court granting sanction which has been refused by the lower Court. To this the obvious answer is that such a right of appeal is conferred upon the accused person because it is the policy of law to allow him greater privileges in regard to appeals than the complainant. For instance a complainant is not given any right of appeal against an acquittal of the accused who has a right of appeal from his conviction. Further it may be urged that when one Court refuses sanction and the appellate Court grants the sanction, there exists reasonable doubt as to the guilt of the person against whom the sanction is granted by the appellate Court, and therefore the order of the appellate Court ought not to be final in such a case. When an appellate Court revokes the sanction, an application to the higher Court for revision of the order of revocation on questions of law might be allowable, but it seems to us that a right of appeal from the order of revocation on questions of law as well as facts was not contemplated by the Legislature and appears to be inconsistent with the policy of the criminal law.

MAHOMEDAN LAW OF INHERITANCE AND ITS EVOLUTION.

(*Continued from p. xxx.*)

Another feature of Mahomedan Law, in common with the Roman and Hindu systems, is its extreme solicitude to discharge the just claims of the creditors of the deceased. The horror of a Roman at the thought of his dying in embarrassed circumstances was so great that he hastened to constitute his slave a necessary heir to satisfy his creditor's claims so that at least (if he did not do this) the creditors might sell the estate in the slave's name so as to save the memory of the deceased from disrepute (The Institutes of Justinian, Moyle's Translation, Book I, Title VI, 1). The Hindu law is replete with denunciations against an heir who remains without discharging the just debts of his ancestor. So Mahommedan law lays down as the first duty incumbent upon the Magistrate the payment of the funeral charges and other debts of the deceased. "Those learned in the law (to whom God be merciful) say: There belong to the property of a deceased person four successive duties (to be performed by the Magistrate); first his funeral ceremony and burial without superfluity of expense, yet without deficiency: next the discharge of his just debts from the whole of his remaining effects, then payment of his legacies out of a third of what remains after his debts are paid and lastly the distribution of the residue among his successors according to the Divine Book, to the traditions and to the assent of the learned (Sirajiyyah, p. 1)" The above passage seems to suggest that the payment of the funeral charges, debts and legacies is a condition precedent to the vesting of the inheritance in the legal heirs, but this view seems to have been modified by the decisions of the various High Courts. For a partition come to before the payment of debts does not render the division illegal but only makes the heirs liable for the debts in proportion to the assets received by each. In *Tajn Begum* v. *Amir Mahomed Khan* (I L R. 7 All. 822) a Full Bench of the Allahabad High Court decided that "upon the death of a Mahomedan intestate, who leaves unpaid debts (whether large or small with reference to the value of his estate), the ownership of such estate devolves immediately on his heirs and such devolution is not contingent upon, or suspended till payment of such debts." Somewhat similar is the language of the Calcutta High Court when they say, "the theory of representation is not known to the Mahomedan law; under its provisions the estate of a deceased person devolves immediately upon his heirs, charged, however, with his debts and they are the persons through whom the property should ordinarily be reached." (I. L. R. 21 Cal. 311).

The causes of diversities in several systems of inheritance are to be sought in the varieties and pecularities of race, climate, soil, character, circum-

stance, mental and physical development, which have operated in unequal combination and with unequal force. To investigate these causes would often be a difficult, if not a hopeless task; but in the case of the peculiarities of the Mahomedan system of inheritance, some of these causes lie on the surface. A careful reader is tempted to ask whether Mahommed's mind was not struck with the inconvenience of excessive sub-division which his scheme entailed. The answer to this is to be found in the fact that in Mahommed's time, people of Arabia lived a wandering and pastoral life depending for their subsistence more upon their flocks and herds and camel than upon the tillage of the soil. Indeed very few Moslems were agriculturists. The nature of the country was not capable of creating an agricultural instinct in its people. Savage, inaccessible rock-mountains, vast expanse of deserts alternating with small strips of verdure here and there with shallow pools of water—these filled up the Arabian landscape. The wealth of the people was chiefly derived from common trade and immense flocks of sheep and goats. So the infinitesimal fraction which was secured by the inheritance rules of the Mahommedan prophet to some of the claimants of the dead man's effects, procured for them a camel or two and a dozen or score of sheep with which a start in life was fairly possible. This of course proved a great inconvenience when people increased in numbers and, pressed hard for subsistence, began to migrate into other countries more advantageously situated for large and extensive agricultural operations.

This is the reason that Mahommedan families settled in the Punjab and the Chenab Valley discarded their own system of inheritance in favour of the one prevalent among the Hindu population around them. This is also the reason why the Hindu converts to the Moslem faith did not adopt with equal zest and zeal the benefit of the Mahommedan rules of inheritance. The Khojahs and Cutchi Memons of Bombay Presidency are such steadfast followers of the Hindu Inheritance Law that though Mahommedan Law cannot in theory at least be divorced from the Mahommedan religion, a uniform current of decisions of the Bombay High Court has established that as regards simple questions of inheritance and succession they are to be governed by the principles of Hindu law. (1) *Herbai* v. *Sonabai*, Perry's oriental cases, p 110; (2) *Herbai* v. *Gorbai*, 12 Bom. H. C. R, p. 294; (3) *Rahmatbai* v. *Herbai*, 3 Bom, p. 34; (4) *Shivuji Hazman* v. *Datu Mowji Khoja*, 12 Bom., p. 281; (5) *Ashabai* v. *Tyab Haji Rahimtalla*, 9 Bom. 115; (6) *Cassumbhoy Ahmedbhoy* v. *Ahmedbhoy Hubibhoy and another*, 12 Bom., p. 280: s. c. 13 Bom., p. 534.

To conclude it may fairly be said that Mahommedan law is largely an admixture of pre-Islamite usages and of the specific rules of law enunciated by Mahommed to his companions and followers. He found the tribes of the peninsula sunk in abject barbarism, steeped in gross immorality and devoid of all sense of kindly feeling to their offspring and ranking women in the same category as chattels. But Mahommed enforced as one of the essentials of his creed 'respect for woman,' introduced amongst them a purer faith and a nobler conception of household life, devised means for making the matrimonial tie more lasting and endurable, provided women with rights of inheritance and denounced in scathing terms their fearful custom of burning their female children alive. One of the great results of the new legislation, says Ameer Ali (Mahommedan Law, Succession and Status, Vol. II, 2nd Edn., p, 49) "was to raise women in the scale of civilisation, by elevating their moral and social position and giving the widow, the mother, the daughters and sisters heritable rights."

(*Concluded.*)

CURRENT INDIAN CASES.

SHEODIHAL *v.* BHAWANI, I. L. R. 29 All. 348. *Civil Procedure Code, secs. 244, 583.*

Where after obtaining a decree for redemption the Plaintiff obtained possession without the intervention of Court and such decree was set aside on appeal, and the Defendant thereupon brought a regular suit for recovery of possession of the mortgaged property, *held*, that such a suit was not maintainable in view of secs. 244 and 583, C. P. C.

PAROSATAM *v.* JANKI BAI, I. L. R. 29 All. 354. *Hindu law—Self acquired property.*

Self-acquired property devised by a person to one of his several sons becomes the self-acquired property of the devisee.

PIRBHU NARAIN *v.* AMIR SINGH, I. L. R. 29 All. 369 *Transfer of Property Act, sec. 90*

A mortgagee may relinquish his claim against a part of the mortgaged property and yet can ask for a decree, under sec. 90 of the Transfer of Property Act.

BHOLA NATH *v.* GHASIRAM, I. L. R. 29 All. 373. *Hindu law—Partition by minor.*

In a Hindu joint family a minor has the right to have his share partitioned provided it is for the interest of the minor.

RAM SHANKAR *v.* GANESH PRASAD, I. L. R. 29 All. 385 (F. B.). *Mortgage—Sale.*

A sub-mortgagee of mortgagee rights in immoveable property is entitled to a decree for sale of the mortgagee rights of his mortgagor in enforcement of his mortgage.

UMRAO SINGH *v.* HARDEO, I. L. R. 29 Cal. 418. *Fraudulent decree, suit to set aside—Jurisdiction.*

Their Lordships in deciding this case made the following observation :—"The authorities seem to us to establish that, save under special circumstances such as those which are to be found in the cases to which we have referred, 13 B. L. R. App. 11, I. L. R. 21 Cal. 605, I. L. R. 24 Cal. 546, I. L. R. 26 Cal. 908, 25 All. 48, 4 C. L. R. 366, 5 C. W. N. 559, a suit to set aside a decree obtained by fraud, in which no other relief whatever is claimed, cannot be maintained in any district outside the district in which the fraud was committed and the fraudulent decree was obtained."

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 968 OF 1907. SOITA BISWAL AND OTHERS, Petitioners *v.* DOCHI, Opposite Party. 27th November 1907.

Trespass—Civil and not Criminal—Indian Penal Code, sec. 448—Criminal Procedure Code, sec. 522—Non-applicability of.

The facts of the case are shortly these :—

The complainant one Dochi went to Puri on a visit and in her absence certain persons took possession of her house and established there a boy alleged to be the adopted son of the father of the complainant. Dochi on her return complained to the Deputy Magistrate of house-trespass and theft against the Petitioners who were then put on their trial and convicted under sec. 448, I. P. C., and sentenced to pay a fine of Rs. 50 The Deputy Magistrate also ordered delivery of possession of the house in dispute as also of certain property recovered which the complainant alleged the accused had stolen. This rule was issued to set aside the conviction and sentence and the order of the Deputy Magistrate for delivery of possession.

Their Lordships observed :—

"It is clear that the case is one, not of Criminal but of Civil trespass. The Petitioners took possession of the house for the alleged adopted son and are now in possession. The complainant says that certain articles of her property were removed. But the accused have not been convicted of theft, on the contrary the Deputy Magistrate says the things carried off are not identifiable and he has abstained from convicting them of theft. He says the things recovered could not be satisfactorily identified. Notwithstanding this, he has ordered possession to be given to the complainant, although he records in his proceeding that the accused have all claimed the things found in their possession as their own . . . . Finally he has ordered possession of the house to be made over to the complainant. We suppose he has passed the order under sec. 522, C. Cr. P. But the provisions of that section do not warrant his doing so, because the Petitioners have not been convicted of any offence attended by criminal force. We set aside the conviction and sentences and direct that the fine, if paid, be refunded.

"The property in possession of the Petitioners must be returned to them and possession of the house restored to the persons found in possession of it."

Babus Dasarathy Sanyal and *Tara Prasanna Chatterjee* for the Petitioners.

None for the Opposite Party.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before GEIDT, J. APPEAL FROM APPELLATE DECREE No. 1675 OF 1906. TITU MIA, Defendant, Appellant *v.* HABIBULLA MIA AND OTHERS, Plaintiffs, Respondents. 20th November 1907.

Court-fees Act (VII of 1870), sec. 12—Assam Land and Revenue Regulations—Settlement—Civil Court—Jurisdiction.

The suit out of which the present appeal arose was brought to obtain possession of certain land which had been settled with the Defendant by the Cachar Revenue Authorities. The lower Courts found themselves unable by reason of sec. 39 of the Assam Land and Revenue Regulations to give the Plaintiffs a decree for possession, but gave them a decree declaring their right to obtain settlement, and they passed the decree on the finding that the disputed land was formerly included within the Plaintiff's *dag* and that therefore they were entitled to settlement.

The Defendant appealed to the High Court.

Held—No appeal lies on a question of Court-fee. The second clause of sec. 12 of the Court-fees Act gives the Appellate Court, when it finds that the fee paid is insufficient, power to order payment of the proper Court-fee, but that the appeal on that point cannot be brought by itself.

Held further—That any question as to the right of a party to obtain settlement from the Revenue Authorities is not excluded from the jurisdiction of the Civil Court.

Patan Maria v. *Bhaboram Dutt Burma* (I. L. R. 24 Cal. 239) followed.

Babu Brojendra Nath Chatterjee for the Appellant.

Moulvi Nuruddin Ahmed for the Respondents.

A. T. M. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2649 OF 1905.

MOOKERJEE, J. CASPERSZ, J. 1907. Heard, 9 and 12, August. Judgment, 21, August.

SAHADEV SUKUL and ors., Decree-holders, Appellants, *v.* SHEIKH SAKHAWAT HOSSEIN, Judgment-debtor, Respondent.

Succession Certificate Act (VII of 1889), sec. 4—Application by heir of mortgagee for supplementary decree—Succession certificate, if necessary—"Debt"—Transfer of Property Act (IV of 1882), sec. 90.

Where after a preliminary decree had been made in a mortgage suit, the mortgagee died, and his sons got themselves substituted on the record and an order absolute was made in their favour, but the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under sec. 90, Transfer of Property Act,

Held (on a review of the authorities)—*That until the applicants obtained a certificate under the Succession Certificate Act no such decree could be made in their favour.*

This was an appeal preferred on the 22nd of December 1905, against the decree of E. Panton, Esq., District Judge of Zillah Sarun, dated the 29th of June 1905, reversing that of Moulvi Ali Ahmad, Subordinate Judge, 2nd Court of that district, dated the 8th of April 1905.

The facts of the case appear from the judgment.

Babu Dwarka Nath Mitra for the Appellants.

Moulvi Mahomed Mustafa Khan for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

On the 19th September 1895, the Defendant-Respondent executed a mortgage bond in favour of one Sakhi Sukul now represented by his sons the Appellants. In 1901, the mortgagee sued to enforce the security against the mortgagor and other persons who had meanwhile acquired an interest in different portions of the equity of redemption. On the 30th April 1902, the usual mortgage decree was made in favour of the Plaintiff, mortgagee. Subsequently the Plaintiff died, and his sons, the present Appellants, made an application for order absolute. Their names were substituted in the mortgage decree which was made absolute on the 6th January 1904. The mortgaged properties were then sold at their instance, and the sale-proceeds were applied in partial satisfaction of the decree. On the 23rd December 1904, they applied to the Court for a decree against the mortgagor for the balance of the amount still due on the mortgage. Objection was taken on behalf of the mortgagor that no decree could be made in favour of the applicants until they obtained a certificate under the Succession Certificate Act. The Court of first instance overruled this objection and passed a decree in favour of the applicants under sec. 90 of the Transfer of Property Act. Upon appeal, the learned District Judge reversed this decision.

The applicants have now appealed to this Court, and on their behalf it has been contended, that the provisions of sec. 4 of the Succession Certificate Act, are inapplicable for five reasons; namely, *first*, that the amount in respect of which a personal decree is sought is not a debt,

SAHADEV SUKUL v. SHEIKH SAKHAWAT HOSSEIN.

because it was indefinite and unliquidated at the time of the death of the creditor; *secondly*, that if it is a debt, it was not due to the deceased, but accrued due to the applicants after the mortgaged properties had been exhausted and the sale-proceeds had been found insufficient; *thirdly*, that the succession opened out during the pendency of proceedings in Court; *fourthly*, that as the title of the applicants is not disputed, there is no necessity for the production of a certificate, and, *fifthly*, that as the applicants were members of a joint Hindu family with their father, governed by the Mitakshara law, the right to realise the debt has vested in them by survivor ship and not in virtue of inheritance. It has also been contended that an opportunity ought to have been afforded to them to produce a succession certificate if one is required by law.

In support of the first branch of his contention, the learned vakil for the Appellants placed reliance upon the cases of *Bisseswar Roy* v. *Durgadas Mehta* (1), *Subbauna* v. *Munckka* (2) and *Sabju Sahib* v. *Noorddin Sahib* (3). These cases are authorities for the proposition that a liability, which is not in respect of a liquidated sum, cannot be held to be a debt in the ordinary accepted legal sense of the term. In this view of the matter, it was ruled in the first and third cases, that a suit for account by a principal against an agent or by one member of a firm against another for account of partnership assets is not a suit for a debt within the meaning of sec. 4 of the Succession Certificate Act. These cases, however, are obviously distinguishable. Here the demand of the Plaintiff, mortgagee, is for a sum certain. It is in every sense of the word an ascertained debt, founded on an express contract, and not an unliquidated demand or liability. No doubt, the sum recoverable by the mortgagee from the mortgagor personally does not admit of specification till the mortgaged properties have been exhausted, and the debt satisfied in part, but that only shows, not that the claim of the mortgagee is in respect of an unliquidated sum, but that his remedies for the recovery thereof are in the first instance restricted. To recover his debt, he must first proceed to sell the mortgaged properties, and it is only when the sale-proceeds are insufficient to satisfy the demand, that he is at liberty to proceed personally against his debtor. The cases of *Hari Das* v. *Baroda* (4) and *Dambar Koeri* v. *Sham Kissen* (5) do not in any way militate against this view, because here the debt is an actually existing debt and not merely a contingent debt which might or might not become due. The distinction is between a liquidated money demand, *Rawley* v. *Rawley* (6), and unliquidated damages, for instance, damages for tort or for breach of covenant, *Wilson* v *Knubby* (7). In the case before us, the action is founded on an express contract in which, to use the language of Bacon's Abridgment, the certainty of the sum or duty appears, and "the Plaintiff is to recover the same

(1) I. L. R. 32 Cal. 418 (1905).
(2) I. L. R. 18 Mad. 457.
(3) I. L. R. 22 Mad. 139 (1898).

(4) I. L. R. 27 Cal. 38 (1899).
(5) 9 C. W. N. 703 (1905).
(6) 1 Q. B. D. 460 (1876).
(7) 7 East 128.

SAHADEV SUKUL *v.* SHEIKH SAKHAWAT HOSSEIN.

in *numero* and not to be repaired in damages as in those actions sounding in damages." [*Watson* v. *McNainy* (8), *Bamn* v. *Tonkin* (9)]. From this point of view, it appears to us to be clear that the claim is in respect of a debt within the meaning of sec. 4 of the Succession Certificate Act. The first branch of the contention of the Appellants consequently fails.

In support of the second branch of the contention of the Appellant, reliance was placed upon the case of *Nemdhari* v. *Bissessari Kumari* (10), in which it was ruled that the Succession Certificate Act refers only to debts upon which the deceased could sue, and that, consequently, a debt which had accrued due since the death of the deceased was not a debt in respect of which a certificate need be produced. This principle has obviously no application to a case like the present. Here the whole debt accrued due on the 29th March 1896 the date for repayment mentioned in the bond. It may be conceded, that the creditor was bound in the first instance to seek a particular remedy for the satisfaction of his claim, but nevertheless the debt was all the while in existence and in full vigour. There is no foundation for the assumption that the debt came into existence or accrued due for the first time, when the sale-proceeds proved insufficient to satisfy the mortgage decree. One test appears to us to be conclusive. If a question arises as to whether the personal remedy is barred by limitation, with reference to what point of time is the matter to be determined? It was ruled by this Court in *Purna Chandra Mandal* v. *Radha Nath Dass* (11) and *Rahamat Karim* v. *Abdul Karim* (12), that when an application is made under sec. 90 of the Transfer of Property Act for a supplemental decree, the Court has to consider, whether the personal remedy was barred by the rule of six years at the date of the institution of the suit. This view, which is identical with that taken in the case of *In re Barker's claim* [*McDermott* v. *Boyd* (13)], is manifestly inconsistent with the theory that the debt accrued due after the sale of the mortgaged properties. To use the language of Lord Herschell, in the case just mentioned. "The right of realization as against the debtors personally did not give a separate and independent cause of action; the truth is, that the debt is one debt only." In other words, as Lord Justice Lindley puts it. "The promise to pay the deficiency does not create a new obligation to pay, it only applies the old obligation to a reduced sum; the realisation of the security does not add to the cause of action, the cause of action accrued long before." It follows, therefore, that in the case before us, the debt, which the creditor seeks to enforce, accrued due during the lifetime of the creditor. The second part of the contention of the Appellants also fails.

In support of the third head of the contention for the Appellants, allusion was made to a *dictum* of the learned Judges who decided the case of *Baid*

(8) 1 Bibb (Ky.) 356.
(9) 110 Penn 569, 1 Atlantic 515.
(10) 2 C. W. N. 591 (1898).
(11) 4 C. L. J. 141: s. c. I. L. R. 33 Cal. 867 (1906)
(12) 11 C. W. N. 674: s. c. 6 C. L. J. 119 (1907).
(13) L. R. (1894) 3 Ch. 290

SAHADEV SUKUL *v.* SHEIKH SAKHAWAT HOSSEIN.

Nath v. *Shamanand* (14) and to the decision of this Court in *Mahomed Yusuf* v. *Abdur Rahim* (15). In the former of these cases, it was observed, that it is extremely doubtful whether the Legislature ever intended that sec. 4 of the Succession Certificate Act should apply not only to a case where a person claims to recover money under the title of succession to the original creditor, but also to a case where upon the death of that person during the pendency of the suit some other person is substituted in his place as Plaintiff in the cause. In the second case, which turned upon the construction of cl. (*b*) of sec. 4, sub-sec. (1), it was ruled, that when an application for execution had been made by the judgment creditor himself, and upon his death, his legal representative applied for leave to continue the execution proceedings, it was not necessary for the latter to produce a certificate. It is not necessary for our present purposes to examine whether these views may not be open to criticism and whether they are not too broadly formulated [see *Vasquez* v. *Pragji Harji* (16), where Farran, J., undoubtedly assumed that upon the death of the Plaintiff *pendente lite*, though the suit might be continued by his representative, a certificate in proof of his representative title must be produced, before a decree could be made]. It is sufficient to point out, that the cases cited are distinguishable. The present case turns upon the construction of cl. (*a*) of sec. 4, sub-sec. (1) which prevents a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person. The Appellants are undoubtedly persons of this description, and they seek a decree against the debtor of their deceased father in respect of debt due to him. No doubt, the claim was included in the plaint by which the action was commenced, but the claim has not yet been investigated, and the application under sec. 90 is substantially one for a supplemental decree. It was pointed out by this Court in *Purna Chandra* v. *Radha Nath* (11) that the object of sec. 90 is to obviate the necessity for a fresh suit, possibly in a Court, different from that which passed the decree for sale; the proceedings founded on an application under sec. 90 are a continuation of the original suit; the relationship of decree-holder and judgment-debtor created by the decree for sale is no longer of any benefit to the decree-holder, and the parties are, therefore, again practically relegated to the position of the Plaintiff and Defendant. In this view of the matter, it is difficult to appreciate, upon what intelligible principle a case of this description should be excluded from the operation of cl. (*a*) of sec. 4, sub-sec. (1), the terms of which are undoubtedly comprehensive enough to cover the case. In our opinion the third part of the contention for the Appellants cannot be sustained.

The fourth head of contention for the Appellants is, that, as shown by the preamble to the Act, its object is to afford protection to parties paying debts to

(14) I. L. R. 22 Cal. 143 (1894).

(15) 4 C. W. N. 558: s. c. I. L. R. 26 Cal. 839 (1899).

(16) I. L. R. 16 Bom. 519 (1892).

(11) 4 C. L. J. 141 at p. 147: s. c. I. L. R. 33 Cal. 867 (1906).

SAHADEV SUKUL *v.* SHEIKH SAKHAWAT HOSSEIN.

representatives of deceased persons, and as the Appellants were substituted in the place of their father in the decree for sale, they ought not to be called upon to produce a succession certificate. In our opinion, there is no force in this contention. No doubt, according to the decision of this Court, in the cases of *Kanchan Modi* v. *Baijnath Singh* (17) and *Baid Nath* v. *Shamanand* (14), the representatives of a mortgagee seeking relief against the mortgage property alone need not take out a certificate under the Act on the ground that such a suit is not for the recovery of the debt but for recovery of an interest in immoveable property. It was consequently possible for Appellants to obtain an order absolute for sale of the mortgaged property; but this fact does not lead to the inference that they are equally entitled to the balance of the mortgage money; it is quite conceivable that the owner of the mortgage money might have made provision for the disposition of his estate so as to leave the immoveable property to one person and the money to another. No doubt, in the view taken by this Court of the scope of sec. 4, the debtor is not entitled to any protection, so far as the sale of land itself is concerned, but so far as the personal remedy is concerned, the law gives him protection, and there is no reason why he should be deprived of it. Besides there is no admission by the Respondent that the Appellants are the persons entitled to the personal decree. But even if there were such an admission, the Court could not ignore the

(14) I. L. R. 22 Cal. 143 (1894)
(17) I. L. R. 19 Cal. 336 (1892).

mandatory provisions of sec. 4. In such a case if the matter is brought to the notice of the Court in time, it is the duty of the Court to stay its hand and to give effect to the clear legislative intent. See *Santaji* v. *Ravji* (18) where it was held by Sir Charles Sargent, C. J., that a certificate was necessary even in the case of a decree by consent. It was pointed out that the Succession Certificate Act of 1889 is meant to facilitate collection of debts by affording proof of representative title, and also for the protection of the revenue, and this is clear from the provisions of sec. 14. It is not necessary to consider, therefore, whether the principle of waiver would apply; if the object of the Act was not merely protection to the debtor, the provisions clearly could not be waived by him. [See Mis. App. 279 of 1906]. We must consequently hold that the fourth part of the contention for the Appellants cannot be maintained.

We may observe that the view we take of the applicability of sec. 4 to money decrees on mortgages, is supported by the cases of *Janaki Bullay* v. *Hafez Mahomed* (19), *Roghunath* v. *Poreshnath* (20), *Narechand* v. *Yenana* (21) and *Palaniyandi* v. *Veerammal* (22). In the first two cases, which were decided under Act XXVII of 1860, it was assumed, that the production of a certificate would not be necessary unless a personal decree was asked for on the basis of the mortgage. In the other two cases, which were decided under Act VII of 1889, it

(18) I. L. R. 15 Bom. 105 (1890).
(19) I. L. R. 13 Cal. 47 (1886).
(20) I. L. R. 15 Cal. 54 (1887).
(21) I. L. R. 28 Bom. 630 (1904)
(22) I. L. R. 29 Mad. 77 (1905).

was ruled, that when a personal decree was prayed for and granted the requisition of a certificate as a condition precedent to such a decree is right. In these two cases, however, the mortgagee had died before the suit to enforce the security which was commenced by his representatives; this circumstance, as we have explained in dealing with the third branch of the contention of the Appellant, does not affect the matter.

The fifth head of the contention of the Appellants is to the effect, that as they were members of a joint Hindu Mitakshara family with their father the right to realise the debt has vested in them by survivorship, and may be enforced without the production of a certificate. In answer to this contention, the learned vakil for the Respondent contended, that as held in *Venkataramana* v. *Venkaya* (23), to make this principle applicable, it must appear on the face of the bond, that the debt claimed was due to the joint family. It has been ruled, however, in the cases of *Bissen Chand* v. *Chatrapat* (24), *Bejraj* v. *Bhairo Prosad* (25), *Patesshuri* v. *Bhagawati* (26), *Vithal* v. *Gotya* (27) and *Pallamraju* v. *Bapanna* (28), that it is not necessary that it should appear on the face of the bond, that it is a joint family debt; it is enough, if it is admitted or proved that the family is joint, for if this much is established, the presumption is that the debt is a family debt, and when such a debt has vested by right of survivorship no succession certificate need be produced. In the case before us, however, the Courts below have not investigated whether the mortgage debt was a joint family debt. We think in all the circumstances of this case, that the Appellants ought to be allowed an opportunity to have this matter determined.

The result, therefore, is that this appeal must be allowed in part and the order of the learned District Judge discharged. The case will be remitted to him for determination of the question, whether the mortgage debt was a joint family debt. If this question is answered in the affirmative, the Appellants will not be required to produce any certificate. If it be answered in the negative, the Appellants will be afforded a reasonable time to produce the requisite certificate. We think they ought to be allowed this opportunity, because, even if their application were dismissed on the ground of their failure to produce a certificate, it would be open to them to apply again under sec. 90 of the Transfer of Property Act, for as held in the case of *Rahamat Karim* v. *Abdul Karim* (12) no period of limitation is applicable to an application under sec. 90 for a personal decree against the mortgagor. We may add, however, that the Appellants will act wisely, if when the case goes back, they obtain a succession certificate so as to render unnecessary the discussion of any question in bar of their claim. Under the circumstances the Appellants must pay the Respondent his costs of this appeal.

N. G. *Case remanded.*

(23) I. L. R. 14 Mad. 377 (1890).
(24) 1 C. W. N. 32 (1896).
(25) I. L. R. 23 Cal. 912 (1896).
(26) I. L. R. 17 All. 578 (1895).
(27) 1 Bom. L. R. 197.
(28) I. L. R. 22 Mad. 380 (1899).

(12) 11 C. W. N. 674: s. c. 6 C. L. J. 119 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 2323 OF 1905.

WOODROFFE, J. | KUNJA BEHARI SINGHA, Plaintiff, Appellant,
COXE, J. | v.
1907. | BHUPENDRA KUMAR DUTT and others, Defendants, Respondents.
Heard, 6 and 7, August. |
Judgment, 7, August. |

Contract Act (IV of 1872), sec. 72—Voluntary payment—Civil Procedure Code (Act XIV of 1882), sec. 310A—Property of third person sold in execution—His remedy—Right to recover money erroneously deposited under sec. 310A.

When property belonging to A was sold in execution of a decree against B and A had the sale set aside by making a deposit under sec. 310A of the Civil Procedure Code,

Held—*That A has no right to sue the decree-holder for recovery of the amount of the deposit money paid to him.*

DULICHAND v. RAM KISHEN SING (2), JUGDEO NARAIN SINGH v. RAJA SINGH (1) *referred to.*

A was not bound to apply under sec. 310A, Civil Procedure Code, to set aside the sale, nor had he the right to do so.

This was an appeal preferred on the 5th of December 1905, against the decree of A. C. Sen, Esq., District Judge of Zillah Bankura, dated the 11th of September 1905, reversing that of Babu Durgu Churn Sen, Subordinate Judge of that district, dated the 28th of June 1904.

The facts of the case are as follows:— The Defendants-Respondents obtained a decree against the sister of the Appellant. In execution of that decree property standing in the name of the judgment-debtor but claimed by the Appellant's mother as her own was sold.

The Appellant's mother thereupon applied under sec. 310A of the Civil Procedure Code to have the sale set aside on her depositing the purchase-money, &c. The application was allowed and the sale set aside. She then instituted the present suit to recover the amount deposited by her from the decree-holder to whom the money had in due course been made over. The Subordinate Judge gave her a decree, but on appeal his decision was reversed by the District Judge.

The Appellant preferred this second appeal.

Babus Golap Chandra Sarkar and *Digambur Chatterjee* for the Appellant.

Babus Nil Madhub Bose and *Braja Lal Chuckerbutty* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—This is not a case where money has been paid to stay a sale in execution by a person who intends to bring a suit to test the right of a decree-holder to attach and sell. Therefore we are not concerned with any cases which have these facts as the basis of their decision, we are concerned with the particular facts of this particular case. The case before us is one where the Plaintiff's property was in fact sold for the debt of his sister. The ordinary procedure in such a case would be that a suit should be brought by the person whose property has been so sold to establish his title. If he succeeded, he would get back his property and if the auction-purchaser

(1) I. L. R. 15 Cal. 656 (1888).
(2) I. L. R. 7 Cal. 648 (1881).

KUNJA BEHARI SINGHA *v.* BHUPENDRA KUMAR DUTT.

was thus deprived of the property by reason of the want of saleable interest in the judgment-debtor he would be entitled to a refund of the purchase-money. On the other hand, the decree-holder who had by reason of the establishment of the Plaintiff's title been deprived of the proceeds of sale for the satisfaction of his debt, would be entitled to proceed against other properties of the judgment debtor for the purpose of such satisfaction. In this the ordinary way the rights of all the parties would have worked out. In 1894, the Legislature introduced into the Civil Procedure Code a special provision for the benefit of the judgment-debtor and any person whose immoveable property had been sold in execution. Such a person might at any time within thirty days from the date of sale apply to have the sale set aside on making certain deposits in Court.

Now, what has happened is shortly this that the Plaintiff instead of pursuing the ordinary course, the one which I have indicated, mistook his remedy and applied under sec. 310A of the Civil Procedure Code which had no application to his case. He could not in fact apply under that section which applies only to cases of persons whose interest are affected by the sale. The Plaintiff was not a person whose interest was affected by the sale and he could not have applied under the terms of that section. He was not merely not bound but he was not entitled to have the sale set aside. The sale however was wrongly set aside at his instance and he now wants back the money which has been paid to set aside the sale and which has been made over to the decree-holder.

I do not myself think that he is entitled to get this money back. The property, as I have said, had been sold. His remedy was not that under sec. 310A, C. P. C, for he was not affected by the execution proceedings. This was not a case in which the money had been deposited for the purpose of staying the execution. The execution proceedings had, except as regards those of confirmation, practically come to an end, and would have come to an end but for sec. 310A. It is said that there are equities in favour of the Plaintiff. For my part I think that, with the exception of one circumstance, all the equities appear to be the other way. Owing to the erroneous and unwarranted action of the Plaintiff in applying under provisions which had no relation to his case, the sale was set aside and the purchase-money which would have been available to the decree holder was turned away. It is true that instead of that money which would have been available for the purpose of the decree-holder's debt was substituted the money of the present Appellant. But he now seeks to get the money back. In short having wrongfully deprived the decree-holder of the benefit of his case he in addition seeks to deprive him of the money conditional upon the payment of which alone the sale was set aside. Further the position of the decree holder appears to be likely to be a difficult ones if he is deprived of this money. It is doubtful whether under the circumstances of this case the execution proceedings could be revived.

According to the evidence adduced in the lower Court the judgment-debtor who is the Appellant's sister is a lady of

property and who is in a position to satisfy the debt. The money which was paid by the Appellant was paid directly for her benefit and by the payment her debt was satisfied.

It appears to me that the justice of the case requires that at any rate the decree-holder should not be called upon to refund the money.

Whether or not the money is properly recoverable from the judgment-debtor, we are not concerned, because the judgment-debtor has not appealed against the decision of the lower Appellate Court. I would therefore dismiss the appeal with costs, a separate set of costs is payable to the auction-purchaser who has been made a party.

COXE, J.—I agree that this appeal should be dismissed.

The decision in *Jugdeo Narain Singh* v. *Raja Singh* (1) seems to be authority for the proposition that when A's property is notified for sale as being the property of B in execution of a decree against B and A, after an unsuccessful objection, pays the decretal amount in order to prevent the sale, the payment is not a voluntary one and A is entitled to sue the decree-holder for a refund. The difficulty of reconciling this view with Chap. V of the Contract Act is evident from the observations of Markby, J., quoted in the ruling. The learned Judges, however, considered that they were bound by the decision of the Privy Council in *Dulichand* v. *Ram Kishen Sing* (2), in which it was held that such a payment was not a voluntary one but made under the compulsion of law. It may seem somewhat anomalous that when a third party deposits money in order to prevent a sale, the payment should be involuntary; but then when he pays money after the sale in order to set it aside it should be voluntary.

If in the latter case he is not a person whose immoveable property has been sold, it would seem that in the former case also he is not a person whose immoveable property is going to be sold. But I think it would be still more anomalous to hold that a payment which a prior purchaser is not authorized by law to make is a payment made, to quote the words used in *Dulichand* v. *Ram Kishen Sing* (2), under the compulsion of law. I do not think, therefore, that we are bound to decide this case on the principle which was laid down in *Dulichand* v. *Ram Kishen Sing* (2) in which case, all the circumstances, besides the fact that the sale had not taken place, were altogether different. In that case the decree-holder had no equitable right to retain the money at all; whereas in the present case the District Judge finds that the decree-holder acted perfectly *bonâ fide*, and the property that he attached was in the name of his judgment-debtor. I think therefore that the Plaintiff is not entitled under sec. 72 of the Contract Act to recover the money from the decree-holder, and as regards his claim to recover on the general equities of the case I agree entirely with the observations of my learned brother.

N. G. *Appeal dismissed.*

(1) I. L. R. 15 Cal. 656 (1888).
(2) I. L. R. 7 Cal. 648 (1881).

(2) I. L. R. 7 Cal. 648 (1881)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2426 OF 1905.

MOOKERJEE, J.
CASPERSZ, J.
1907.
Heard,
5th August.
Judgment,
14th August.

MAHANAND SAHAI and others, Plaintiffs, Appellants,
v.
MUSSMAT SAYEDUNISSA BIBI, Defendant, Respondent.

*Landlord and tenant—Construction of deed—Cess, liability to pay—Cess Act (IX, B. C. of 1880), sec. 41—*Mokurari *lease.*

A perpetual mokurari ***lease implies that the tenancy is permanent, heritable and transferable and that the rent is fixed in perpetuity.***

It is open to the zemindar and the tenure-holders to contract themselves out of the provisions of sec. 41 of the Bengal Cess Act.

Where in a perpetual mokurari ***lease the rent was fixed by a clause which runs thus :—"At varying*** jamas, ***to wit, at an annual uniform*** jama ***of Rs. 1,580 from 1284 to 1291 (Fasli) and at an annual uniform consolidated*** jama ***of Rs 1,585 of the current coin from 1292 (Fasli) together with*** abwab ***such as selami for Dusserah and Holi, Purkha, Sair, Road cess, Public works cess, &c., all of which are included in that very sum of Rs. 1,585,"***

Held—***That the contract does not provide for the contingency which happened in this case, namely, an increase in the amount of cesses levied by the State.***

That if any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute.

This was an appeal preferred on the 12th of December 1905, against the decree of A. W. Cook, Esq., District Judge of Zillah Gya, dated the 19th of September 1905, reversing the decree of Moulvi Mirza Bedar Bakht, Munsif of Aurangabad, dated the 30th of May 1905.

The facts of the case appear from the judgment.

Mr. O'Kinealy (Advocate-General), Babus Umakali Mukherjee, Raghunandan Prasad and *Raghu Nath Singh* for the Appellants.

Babus Nil Madhab Bose, Dwarka Nath Chuckerbutty, Akshay Kumar Banerjee, Moulvi Syed Shamsul Huda and *Moulvi Mustafa Khan* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The circumstances which gave rise to the litigation out of which the present appeal arises may be shortly stated as follows :—On the 26th September 1881, the Defendant-Respondent took a perpetual *mokurari* lease of the entire Mouzah Zakhim Salempore from the Plaintiffs-Appellants. A sum of Rs. 6,340 was paid as bonus and the rent payable was fixed under the lease by a clause which runs thus :—"At varying jamas, to wit, on an annual uniform jama of Rs. 1,580 from 1289 to 1291 (Fasli) and at an annual uniform consolidated jama of Rs. 1;585 of the current coin from 1292 (Fasli) together with *abwab*, such as, *selami* for Dusserah and Holi, Purkha, Sair, Road cess, Public works cess, &c., all of which are included in that very sum of Rs. 1,585." This is the covenant as embodied in the kabuliyat which was produced in the Courts below. In this Court, a certified copy of the lease was

allowed to be produced and an examination of it shows that the corresponding covenant in that document is expressed in identical language.

At the time when the lease was granted the amount of cesses levied by Government from the zemindar was Rs. 97. Since then, as the annual value of the land has gradually increased, there has been a corresponding increase in the demand of the State. In 1889, the cesses were levied from the zemindar at the rate of Rs. 108-1-1 per year and in 1902 the amount was increased to Rs. 174-4-3. The Plaintiffs-Appellants commenced the present action for declaration that they were entitled to recover from the tenure-holder Defendant the amount of cesses of Rs. 97 which they had been called upon to pay by the Government and also for recovery of the sums paid. The claim was resisted by the Defendant on the ground that the amount payable by her in respect of this tenancy had been unalterably fixed by the terms of the contract of the 26th September 1881 and that the burden of all new impositions by the State must be borne by the Plaintiffs zemindars. The Court of first instance overruled this objection and made a decree in favour of the Plaintiffs. Upon appeal the District Judge has reversed that decision.

The Plaintiffs have now appealed to this Court, and, on their behalf, it has been contended that, upon a true construction of the lease of 1881, the Defendant is liable to bear the burden of the increase in the amount of cesses payable. Whether this contention is valid or not, must depend upon the terms of the contract between the parties. But, before we consider the question of true construction of the lease of 1881, it is desirable to point out that it was open to the zemindar and the tenure-holder to contract themselves out of the provisions of sec. 41 of the Bengal Cess Act of 1880 (See *Suurnomoyee* v. *Paresh Narayan* (1), *Shumbhu Nath* v. *Hurrosundari* (2), *Ashutosh Dhur* v. *Amir Molla* (3) and *Narendra Kumar Ghose* v. *Gora Chand Joddar* (4). The question, therefore, reduces itself to this to what extent have the parties contracted themselves, out of the provisions of sec. 41 of the Cess Act, because to that extent only will their rights and liabilities be governed by the contract and, beyond that, the statute must prevail.

The lease is described as a perpetual *mokurari* lease which implies that the tenancy was permanent, heritable and transferable and that the rent was fixed in perpetuity. From this it was argued on behalf of the Defendant-Respondent, that the sum of Rs. 1,585 was the only sum payable by the tenant, to the land-lord during the whole period of the continuance of the tenancy. It was pointed out that the lease describes this sum as the uniform annual jama which includes *abwabs* of various descriptions and Road cess and Public works cess, and it was contended that this implied whatever might be the amount levied by the Government from time to time as Road cess and Public works cess, the tenant could not be called upon to pay anything

(1) I. L. R. 4 Cal. 576 (1878).
(2) 11 C. L R. 140 (1882).
(3) 3 C. L. J 337 (1900).
(4) I. L. R. 33 Cal. 683: s. c. 3 C. L. J. 391 (1906).

more than Rs. 1,585 annually; in other words, it was argued that the effect of the agreement between the parties was that the tenant should take upon herself to pay the whole of the cesses payable at the time of the contract and that, if the amount payable was subsequently increased the burden of the excess should fall upon the landlord.

After a careful examination of the terms of the contract, we are clearly of opinion that the contract did not provide that if the cesses were increased in future the additional burden should fall upon the landlord. The only reasonable interpretation of which the covenant in question is capable is that the amount annually payable by the tenant, namely, Rs. 1,585 included *abwabs*, Road cess and Public works cess. No doubt it was a consolidated amount, but the contract does not provide for the contingency which has happened, namely, an increase in the amount of cesses levied by the State. Much stress was laid on behalf of the Respondent upon the words "yeh sab shamil usi pundrah sao pachasi rupea menhai *bil mokhata*" and it was suggested that this means that Rs. 1,585 was the only amount which could, however the circumstances might alter, be legitimately demanded by the landlord from the tenant. In our opinion, there is no foundation for the interpretation suggested. The word "*bil mokhata*" is well known, it means "according to agreement, stipulated, fixed or consolidated." In Wilson's Glossary, p. 87, a "*bil mokhata jama*" is stated to mean 'stipulated assessment' and a '*bil mokhata pottah*' is stated to mean a lease for a gross aggregate rent; one in which the land taxes and other cesses or *abwabs* are consolidated. The position of the word '*bil mokhata*' in the sentence in the lease before us, might even justify a literal translation "according to agreement" (that is, the lease), instead of the derivative rendering 'consolidated' and this interpretation considerably weakens the contention for the Defendant-Respondent.

The clause in question in the lease now before us seems, therefore, to imply nothing more than this, that Rs. 1,585 was the total amount inclusive of *abwabs* and cesses. There is nothing to show that the parties contemplated a possible increase in the amount of cesses leviable by Government, and they do not appear to have provided for this particular contingency. If so, the obvious result is that the rights and liabilities of the parties must be regulated by the statute, only except in so far as the contract has made provision to the contrary. How far, then, has the contract in this case made express provision contrary to the statute. In our opinion, the effect of the contract is that the tenant undertakes to pay the whole of the cesses which were levied at that time, inclusive of the share payable by her under the statute as also the share the burden of which would otherwise have to be borne by the landlord himself. If any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute.

In support of the interpretation which we put upon the contract, reliance may be placed upon two well-established principles. In the first place, it is indisputable that when an exemption is claim-

MAHANAND SAHAI *v.* MUSSMAT SAYEDUNISSA BIBI.

ed from statutory liability, the contract under which exemption is claimed, must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability as imposed by the statute. This rule is especially applicable where exemption is claimed from taxation imposed by the State. No doubt, in this particular instance, it was open to the parties to contract themselves out of the provisions of the statute. But it must be clearly and satisfactorily established, not only that the parties did intend that their liability should be different from that created by the statute, but also, that they intended the variation to go to the extent now suggested on behalf of the Respondent. In the second place, it is well-established that the construction to be placed on a deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them [see *Attwood* v. *Emery* (5), *Rawlinson* v. *Clarke* (6)]. In other words, as stated by Phillips, J., in *McElroy* v. *Sloope* (7), a Court should always prefer that construction, consistent with the language of the deed, which will prevent one of the parties from obtaining an unconscionable advantage over the other.

Now, in the case before us, if the contention of the Respondent prevails, what is the obvious result? Under the Bengal Cess Act, the amount of cesses payable is assessed upon the annual value of the land, which means the total rent actually payable or assessed as reasonably payable during the year, by all the cultivating raiyats of the land. Consequently, as the total amount of rent payable increases, there must be a corresponding increase in the amount of cess leviable. It follows accordingly, that the greater the diligence and success of the Defendant in the enhancement of rent payable by the cultivating raiyats, the larger will be the amount of cesses demandable by the State. The contention of the Respondent, therefore, amounts to this—that the greater the profit she makes by increasing the rent payable by her tenants, the greater will be the additional burden thrown upon the landlord; and it is quite conceivable that if in course of time, the annual value of the land, that is, the annual profits of the Defendant continuously increases, the increase in cesses might reach a figure which would absorb the whole of the rent receivable by the Plaintiffs. If the contract between the parties had expressly stated that their relative position was to be of this description, a Court might feel itself compelled to enforce the terms of the agreement. But when the lease does not expressly make a provision to this effect and, when a different interpretation is possible and is consistent with the language of the deed, we must decline to accept the construction suggested on behalf of the Respondent, the result of which would be manifest injustice to one of the contracting parties. We must adhere to the just rule of interpretation that the words of a contract should be given a reasonable construction, where that is possible, rather than an unreasonable one, and we must en-

(5) 1 C. B. N. S. 110 (1856).
(6) 14 M. and W. 187 (1845).
(7) 47 Fed. Rep. 380.

deavour to give a construction, most equitable to the parties, which will not give one of them an unfair or unreasonable advantage over the other [*Clay* v. *Ballard* (8)]. We feel no doubt whatever, that the interpretation which the Respondent now put on her contract, is an after thought, and is not the interpretation put upon it by the parties when it was executed.

The learned vakil for the Respondent suggested that at the time when the lease was granted, it was executed by way of a compromise of a dispute, and that there was an agreement between the parties that future alteration in the cesses should in no way disturb the *jama* mentioned in the lease. In support of this view he cited the 8th paragraph of the written statement. It is obvious, however, that this can be of no assistance to the Respondent It cannot be disputed that under the Indian Evidence Act, no evidence of extrinsic circumstances is admissible to add to, contradict vary or alter the terms of a deed, and as was observed by Lord Denman, C. J., in *Goss* v. *Lord Nugent* (9) "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given on what passed between the parties, either before the written instrument was made or during the time that it was in state of preparation, so as to add to or substract from or in any manner to vary or qualify the written contract." If evidence of negotiations was admissible to contradict the terms of the written contract the very object which the parties had in view in reducing the terms of the agreement into writing, would be completely defeated. No doubt, as stated in *Meriam* v. *United States* (10), it is a fundamental rule that in the construction of contracts, Courts may look not only to the language employed but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made, but this may be done with a view to interpret the contract and not to contradict it [*Inglis* v. *Buttery* (11), *Macdonald* v. *Longbottom* (12)] In the case before us, if we advert to the subject-matter of the lease and the surrounding circumstances at the time of its execution, it is clear that the parties did not intend and could not very well reasonably have intended that the burden of all additional impositions should be borne by the landlord, specially if this imposition was due to an event, the entire profit of which would be enjoyed by the tenant. We must consequently hold that, so far as the additional amount of cesses is concerned, the rights of the parties must be regulated by the statute.

The question next arises as to the amount which may be legitimately claimed by the Plaintiffs from the Defendant. The effect of the contract was, as we have already stated, that the tenant undertook to pay to the landlord not only what was at the time legitimately demandable from her as tenure-holder under sec. 41 of the Bengal Cess Act, but also the amount the burden of which

(8) 9 Robinson 308 ; 41 Am. Dec. 328.
(9) (1833) 5 B. and Ad. 58 at p. 64.
(10) 107 U S. 437.
(11) 3 App. Cas. 552 (576) (1878).
(12) 1 El. & El. 977.

MAHANAND SAHAI *v.* MUSSMAT SAYEDUNISSA BIBI.

would otherwise have to be borne by the landlord as zemindar. If we examine the provisions of sec. 41 of the Bengal Cess Act, we find their ultimate effect to be this: The cess is calculated upon the annual value at a certain rate, which in the present case, is one anna in the rupee. The zemindar, in the first instance, pays to the Government the amount assessed, that is, $\frac{1}{16}$ of the annual value, subject to a deduction proportionate to the Government revenue, which turns out to be $\frac{1}{32}$ of the revenue. But the zemindar collects from the tenure-holder $\frac{1}{16}$ of the annual value subject to a deduction of $\frac{1}{32}$ of the rent paid and the tenure-holder, in his turn, collects from the cultivating raiyats $\frac{1}{32}$ of the annual value. The nett result of this operation is that if the total amount of cesses be taken to be $\frac{1}{16}$ of the annual value, the Government bears $\frac{1}{32}$ of the revenue; the zemindar bears $\frac{1}{32}$ of the difference between the rent he collects from the tenure-holder and the revenue he pays to Government, the tenure-holder bears $\frac{1}{32}$ of the difference between the rent he collects from the cultivating raiyats and the rent he himself pays to the zemindar; and the cultivating raiyat bears $\frac{1}{32}$ of the rent he pays to the tenure-holder. It is obvious, therefore, that if the rent payable by the tenure-holder to the zemindar is, as in this case, constant, the amount of cesses which the zemindar has ultimately to bear is a constant quantity and it is this amount which under the contract in this particular case, the tenant herself undertook to bear. The tenant also undertook to pay the amount then payable by her under the statute which would vary with the annual value. As the annual value has now increased it is this item alone which has increased and the whole of the increase had to be paid by the tenant. It has been found that the amount of cesses payable at the date of the contract was Rs. 97, and this was included in the consolidated sum of Rs. 1,585. The amount of cesses now payable is Rs. 174-4-3. The difference therefore, namely, Rs. 77-4-3 which has been levied by the Government from the zemindar, is payable by the Defendant tenure-holder, and this is the rate at which the claim is laid in the plaint, although the calculations by which this amount is determined are not very intelligible. The Plaintiffs further claimed damages at the rate of 25 per cent. The Court of first instance, however allowed damages at 12 per cent. only, which seems to us to be fair. It is clear, therefore, that the total amount which was decreed by the Court of first instance is legitimately recoverable by the Plaintiffs from the Defendant.

The result is that this appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored. This order will carry costs throughout.

S. C. S. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECREES
NOS. 2128 AND 2172 OF 1905.

MACLEAN, C. J.
GEIDT, J.
1907.
12, November.

SYED ABDUL RAB CHOWDHURY, Defendant, Appellant,
v.
H. C. EGGAR, and anr., Plaintiffs, Respondents.

Civil Procedure Code (Act XLV of 1882), sec. 437—Suit against mutwallis*—Suit for rent—Parties—Minor—Representation*

When a suit for rent was brought against two persons in the capacity of mutwallis, *but one of them who was a minor was not properly served and no guardian was appointed on his behalf,*

Held—*That* mutwallis *are trustees and the presence of all of them in the suit was essential, and it was properly dismissed for defect of parties.*

These were appeals preferred on the 13th and 14th of November 1905, against the decree of Babu Purna Chandra Chowdhuri, Sudordinate Judge of Faridpur, dated the 18th of July 1905, reversing that of Babu Lalit Mohan Das, Munsif of Madaripur, dated the 23rd of January 1905.

These two appeals arise out of two suits for rent described in the plaints as brought against "Syed Abdul Rab Chowdhury &c., &c., *mutwalli* for self and as guardian of Syed Mahomed Mahabubrab Chowdhury, son of the late Syed Abdul Rahim Chowdhury." After Plaintiff's title to receive the rents, the plaints set out the position of the Defendants as follows:—"The Defendants were in possession of the *putni* taluk as *mutwallis* under a *wakfnama* of Amirunissa Khatun, the predecessor in title of the Defendants."

Defendant, Syed Abdul Rab Chowdhury, objected to the suits on amongst other grounds that they were not properly laid against Defendant No. 2 who was a minor, and on this point the Munsif found as follows.

"The Defendants Nos. 1 and 2 are described in the plaint as *mutwallis*, and are alleged to be in possession of the *putni* taluk in that capacity. . . . The summons has been served on the Defendant No. 2 and no steps have been taken to have a guardian appointed for him."

The Subordinate Judge agreed with the Munsif that the Defendant No. 2 had not been properly represented in the suit and he further found that he had not been properly served.

The Munsif had dismissed the suit on the ground amongst others of defect of parties. This decision was reversed by the Subordinate Judge on appeal and the suits were decreed. The Defendant No. 1 preferred these second appeals.

Dr. Priya Nath Sen for the Appellant.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—I think this appeal must succeed upon one short point, namely, that the Plaintiffs cannot succeed because they have not brought before the Court all the parties who are liable to pay the rent. In this case the rent was created by a *putni pottah*, the date of which is not given but the effect of which is stated in the first paragraph of the plaint. The interest under that *putni pottah* subsequently became vested

SYED ABDUL RAB CHOWDHURY v. H. C. EGGAR.

in the two first Defendants as *mutwallis.* I have always regarded a *mutwalli* as a trustee. One of these *mutwallis* is a minor; he is a Defendant but no guardian *ad litem* has been appointed on his behalf, for the purposes of this suit. It is found that the summon was not properly served upon him. An objection was taken at the hearing that Defendant No. 2, the minor, was a necessary party to the suit, and that he was not properly represented before the Court. He had not been properly served and it appeared that no guardian *ad litem* had been appointed on his behalf. Even then if the Plaintiffs, in order to save the suit, had asked the Court to allow it to stand over for a short time to enable a guardian to be properly appointed and proper notice to be served on Defendant No. 2 such an application would possibly have been granted. But they did not do that. I consider it essential that both the *mutwallis* who are the persons liable to pay the rent should be before the Court, and as they were not before the Court the view taken by the Court of first instance is right and the suit fails.

Other points of some nicety were raised, but I need not go into them.

Both the appeals are allowed with costs and the suits dismissed with costs.

GEIDT, J.—I agree.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 209 OF 1906.

MITRA, J.
CASPERSZ, J.
1907.
12, November.

KRISHNA KINKAR DUTTA and anr., Defendants, Appellants,
v.
MAHANTO BHAGABAN DAS, Plaintiff and Susar Moyi Debi and anr, *pro forma* Defendants, Respondents.

Chowkidari Act (VI, B. C. of 1870), sec. 51—Resumption of chakran *land—Lessee from chowkidar, rights of.*

When chowkidari land is resumed and transferred by the Collector to the zemindar the interest of the chowkidar in the land and, along with it, all rights created by him in favour of others, cease

Sec. 51 of the Chowkidari Act does not save rights created by the chowkidar but refers to contracts made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situate

This appeal is from the decision, dated the 8th of December 1905, of Babu Umesh Chandra Sen, Subordinate Judge of Birbhum, reversing that of Babu Durga Das Chakraburty, Munsif of Rampur Hat, dated the 29th of May 1905, and arises out of a suit for ejectment.

The facts of the case are shortly these :—

The disputed plots of land were chowkidari land One plot was settled with the Defendants by the Magistrate on behalf of the chowkidar for a term of 25 years from 1293 to 1317. The other plot was settled with the Defendants by the chowkidar himself. Afterwards

KRISHNA KINKAR DUTTA v. MAHANTO BHAGABAN DAS.

the land was resumed under Act VI of 1870, B. C., and transferred to the zemindar, the Maharaja of Burdwan. The Plaintiff claimed title as *putnidar* as well as under a fresh settlement in respect of the resumed lands from the Maharaja. The Munsif had decreed the suit in regard to one plot but dismissed it as regards the other plot. There was an appeal and a cross-appeal to the Subordinate Judge resulting in a decree in favour of the Plaintiff for possession of both plots.

Babus Digambur Chatterjee and *Gobind Chandra Dey Roy* for the Appellants.

Babus Lal Mohan Das and *Surendra Krishna Dutt* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The main question argued before us refers to the construction to be put on the last words of sec. 51 of Act VI (B. C.) of 1870. Under sec. 50 of the Act, the Collector is authorized to make a transfer of resumed chowkidari land to the zemindar. Sec. 51 says that the transfer shall be subject to the amount of assessment mentioned in the deed of transfer which is to be in the form prescribed in Sch. C of the Act, and "subject to all contracts heretofore made in respect of, under, or by virtue of, which any person other than the zemindar may have any right to any land, portion of his estate or tenure, in the place in which such land may be situate."

The contention before us is that the words quoted above reserve the rights created by the chowkidar whose land is resumed in favour of a third person. We are of opinion that this contention is not sustainable. The words evidently refer to a contract made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situate. This has been the view taken in a series of cases decided by this Court and the form as given in Sch. C conforms with the view that has been taken in these cases. The last words of the form are "subject to all contracts binding the said—in respect of any lands, portion of the said—situated within the said village." The section evidently refers to contracts in the nature of *putnies* or *mokraris* created by the zemindar himself in favour of third persons. If the transfer is made to the zemindar and the zemindar has already granted a sub-lease of the entire village including the chowkidari land, the sub-lessee would be entitled to the benefit of the transfer made by the Collector under the Act. It would go against the principle of the Act itself and the well-known status of chowkidars if we are to hold that the rights created by the chowkidar would subsist notwithstanding the transfer by the Collector by virtue of the provisions contained in sec. 51 of the Act. A chowkidar is in possession of chowkidari land for the purpose of certain services and his interest is limited to the period during which he serves the estate or the zemindar. As soon as his service ceases, his right to the land ceases. The grantor ceasing to have right in the land, the grantee must necessarily cease to have right under any grant made by the grantor.

We are, therefore, of opinion that, both on principle and on the construction of sec. 51 of Act VI (B. C.) of 1870,

KRISHNA KINKAR DUTTA v. MAHANTO BHAGABAN DAS.

leases created by the chowkidar must be held to have ceased upon the transfer by the Collector of the land to the zemindar. Our judgment with respect to this point will cover both the plots A and B which are the subject of dispute in this case.

As regards plot A, a further contention has been raised, namely, that the Magistrate of the district having granted a lease for 25 years in favour of the Appellants, they are entitled to rely on that lease in any suit for ejectment by the transferee from the Government. It does not however appear that the Magistrate or the Collector had any power to grant such a lease and it would seem from the wording of the lease itself that the Magistrate or the Collector intended to act on behalf of the chowkidar. If that is so, the grant of a lease by the Magistrate or the Collector could not be of any use as against the transferee. The Magistrate or the Collector stood in the same position as the chowkidar himself. And then again if the lease be considered as one created by the chowkidar himself, the lease is void for non-registration inasmuch as it was executed after the Transfer of Property Act came into force. For these reasons, we are of opinion that this appeal must fail and it is accordingly dismissed with costs.

N. G. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]
RULE No. 2480 OF 1907.

BRETT, J.
HOLMWOOD, J.
1907.
22, November.

MUSSAMAT HAFIZAN, Petitioner,
v.
ABDUL KARIM, Opposite Party.

Civil Procedure Code (Act XIV of 1882), secs. 380, 410—Pauper Plaintiff, if can be required to furnish security for Defendant's costs.

The provisions of sec. 380 of the Civil Procedure Code cannot apply to the case of a person to whom permission has been granted under sec. 410 of the Code to sue as a pauper, as the effect of an order requiring such a person to furnish security for the Defendant's costs would be to render nugatory the order under sec. 410.

In making an order under sec. 380 of the Civil Procedure Code against a Plaintiff who had been permitted to sue as a pauper, the Court acted in the exercise of its jurisdiction illegally and with material irregularity.

NUSSEROODDEEN BISWAS v. UJJUL BISWAS (1) *relied on.*

This was a rule granted on the 5th of August 1907, against an order of Babu Ram Lal Das, Subordinate Judge, 1st Court, Patna, dated the 16th of July 1907, directing the Petitioner to furnish security of Rs. 800 within a month for the costs of the suit instituted by her against the opposite party.

The facts of the case are fully set out in the judgment.

Babus Baidya Nath Dutta and *Chandra Sekhur Prosad Singh* for the Petitioner.

Moulvi Syed Shamsul Huda for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The present rule is directed against an order passed on the 13th of July 1907 by the Subordinate Judge of Patna under the provisions of sec. 380, C. P. C., requiring the present Petitioner to fur-

(1) 17 W. R. 68 (1871).

MUSSAMAT HAFIZAN *v.* ABDUL KARIM.

nish security to the extent of Rs. 800 within a month for the payment of any costs incurred or likely to be incurred by the Defendant in the suit which has been instituted by the Petitioner. It appears that the Petitioner who is a woman instituted a suit against the opposite party claiming to be entitled as his wife to a certain amount of money as dower, and that when she instituted the suit she put in an application for permission to be allowed to bring the suit as a pauper. An enquiry was, in consequence, made into that application with the result that an order was finally passed under the provisions of sec 410, C P. C, granting the application and permitting her to prosecute the suit as a pauper. After that application had been granted, the application which led to the order which is the subject of the present rule was put in by the Defendant, the opposite party, asking the Court to require the Petitioner under the provisions of sec. 380 to furnish security for costs. That application was supported by an affidavit which contains certain allegations to the effect that the woman was a person of immoral character, that she never was the wife of the Defendant and that she was supported in the case by two touts of the Patna Bar. In reply to that affidavit the Petitioner filed a counter-affidavit denying the truth of the allegations made in the Defendant's affidavit and stating that she was 'not in a position to give security for the costs in the suit.

The Subordinate Judge on a consideration of these two affidavits has recorded the following order:—"Having carefully considered all the circumstances presented to me I think I ought to exercise discretion in favour of the Defendant. It is therefore ordered that the Plaintiff do furnish security to the extent of Rs. 800 within a month. In default the suit will be dismissed with costs." After that order had been passed the Petitioner applied to this Court and obtained a rule calling on the opposite party to show cause why that order should not be set aside.

In support of the application it has been contended, and we think fairly contended that the effect of the order passed by the Subordinate Judge under the provisions of sec. 380, C. P. C, is to render nugatory the order passed under the provisions of sec 410 of the Code.

The learned vakil who has appeared in support of the application has invited our attention to the case of *Nusseroodeen Biswas* v. *Ujjul Biswas* (1), and has pointed out that a similar view was taken by the learned Judges who tried that case, though that case was (to a certain extent) not quite on all fours with the present. In that case the order under sec. 380 had been passed with reference to an Appellant who had been allowed to appeal as a pauper. And the learned Judges say in effect that to allow an order for security to be passed on such an Appellant, would be practically to render nugatory the order passed allowing him to appeal as a pauper, and they go on to add that in their opinion the provisions of the section of the Code then in force which corresponds with sec. 380 of the present Code were so inconsistent with the provisions of the Code dealing with suits and appeals by paupers

(1) 17 W. R. 68 (1871).

MUSSAMAT HAFIZAN v. ABDUL KARIM.

as to, in their opinion, support the view that the provisions of sec. 380 were not applicable to suits or appeals brought by paupers. It has been argued on the basis of this decision that in the present case the Subordinate Judge in passing the order demanding security from the Petitioner either exercised a jurisdiction not vested in him by law or acted in the exercise of his jurisdiction illegally and with material irregularity.

In support of the order it has been argued that the Subordinate Judge was not prevented by the fact that the Petitioner had been permitted to sue as a pauper from requiring security from her under the provisions of sec. 380, and the learned vakil has gone so far as to suggest that as the order for security is one within the discretion of the Subordinate Judge we as a Court of revision ought not to interfere with it under the provisions of sec. 622, C. P. C. In our opinion this contention cannot prevail. The provisions of sec. 622 certainly give to this Court full powers to interfere if we are satisfied that the lower Court has either exercised a jurisdiction not vested in it by law or has acted in the exercise of its jurisdiction illegally and with material irregularity. In this case we think that the view which this Court took in the case on which the learned vakil for the Petitioner relies is one which we should adopt and that the provisions of sec. 380 cannot be taken to be applicable to the case of a person to whom permission has been granted under the provisions of sec. 410 to sue as a pauper. We think therefore that the Subordinate Judge, in passing the orders which he passed under sec. 380, C. P. C., and which had the effect of rendering nugatory the jurisdiction which he had exercised under the provisions of sec. 410 of the Code, acted in the exercise of his jurisdiction illegally and with material irregularity and that his order under sec. 380 of the Civil Procedure Code must be set aside.

In the present case the learned Subordinate Judge has refrained from giving his reasons for passing the order under sec. 380, but after reading the two affidavits we think that the materials before him were not sufficient to justify that order. We, therefore, direct that the rule be made absolute and that the order passed under sec. 380 requiring the Petitioner to furnish the security be set aside. The Petitioner will recover costs of this proceeding from the opposite party. We fix the hearing fee at two gold mohurs.

N. G. *Rule made absolute.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1829 OF 1907.

RAMPINI, C. J. SHARFUDDIN, J. 1907. 27, August.	TILAK CHAND LAHUTHY, Petitioner, *v.* THE EAST INDIA RY. Co. and another, Opposite Party.

Railways Act (IX of 1890), secs. 77 and 140—Goods lost in transit—Notice of claim—Sufficient notice.

Notice of claim for goods lost in transit given to Railway Company A., with whom they were originally booked is not sufficient notice within secs. 77 and 140 of the Railways Act to Railway Company B. on whose line the goods were subsequently lost.

TILAK CHAND LAHUTRY *v.* THE EAST INDIA RY. CO.

THE EAST INDIAN RAILWAY COMPANY *v.* JETHMULL RAMANAND (1) *followed.*

Application for revision of an order of the Subordinate Judge of Dinajpur, exercising the powers of a Court of Small Causes, dated the 16th of March 1907.

The facts of the case material to this report appear from the judgment.

Babu Munindra Nath Bhattacharjee for the Appellant.

Babus Lal Mohan Das and *Mahendra Coomar Mitra* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a rule, calling upon the opposite party to show cause why the decree of the Subordinate Judge of Dinajpur, passed in the exercise of his powers of a Court of Small Causes and dated the 16th March 1907, should not be set aside on the ground that the notice to the Defendant, opposite party, was in accordance with the provisions of sec. 77 of the Indian Railways Act.

The facts are as follows: It appears that certain goods were booked on the 13th February 1906, from station Jaipur on the Rajputna Malwa Railway. These goods were to be delivered to the Plaintiff at Dinajpur station on the Eastern Bengal Railway; but they never reached the Petitioner. The Petitioner therefore applied to the Rajputna Malwa Railway Company and carried on for some time correspondence with them. Ultimately the East Indian Railway Company on being referred to admitted that the goods had been received by them on the 14th February 1905, but that they had gone astray.

(1) I. L. R. 26 Bom. 669 (1902).

The Petitioner then sued the East Indian Railway Company who defended the suit on the ground that no notice of claim was ever given to them under the provisions of secs. 77 and 140 of the Indian Railways Act. The Small Cause Court Judge held that as the notice of claim must be given within six months and as no such notice was given, the suit was barred by the special law of limitation, and it accordingly dismissed the suit.

The Plaintiff has obtained this rule to show cause why the decree of the Small Cause Court should not be set aside. He contends that the notice given to the Rajputna Malwa Railway was sufficient and that the suit is accordingly not barred by limitation: and furthermore, that the East Indian Railway Company admitted that they received the goods.

We think, however, that we must hold on the authority of the case of *The East Indian Railway Company* v. *Jethmull Ramanand* (1), that the notice to the Rajputna Malwa Railway Company was not sufficient notice of claim to the East Indian Railway Company under secs. 77 and 140 of the Railways Act and that although the East Indian Railway Company admits the receipt of the goods and that they went astray on their line, the suit being barred by limitation, there can be no decree given against them.

The rule is discharged with costs, two gold mohurs.

N. G. *Rule discharged.*

(1) I. L R. 26 Bom. 669 (1902).

[CIVIL REFERENCE.]

No. 1A OF 1907.

RAMPINI, C. J.
SHARFUDDIN, J.
1907.
19, August.

MAHIMA CHANDRA SIRDAR, Plaintiff,
v.
KALI MANDOL and another, Defendants.

Provincial Small Cause Courts Act (IX of 1887), secs. 16, 32 (2)—Civil Procedure Code (Act XIV of 1882), sec. 646B—Institution of a suit before a Munsif exercising Small Cause Court powers up to a certain value—Trial by his successor invested with higher powers.

Where a suit for recovery of a sum of Rs. 70 was instituted in the Court of a Munsif exercising Small Cause Court powers up to Rs. 50 and subsequently during the pendency of the suit the Munsif was transferred and the substantive Munsif who succeeded him had powers of a Small Cause Court up to Rs. 100,

Held—*That the suit should be tried as if the powers of the Court remained the same as they were when the suit was instituted.*

This was a reference under sec. 646B of the Civil Procedure Code made on the 6th of March 1907, by Mr. A. W. Cook, District Judge of Jessore, for the consideration by this Court of the case tried by the Munsif of Bongong (Babu Amulya Churn Ghose) as the Judge doubted whether the proceeding was in accordance with the law.

The facts appear from the judgment.

No one appeared on this Reference.

The JUDGMENT OF THE COURT was as follows:—

RAMPINI, C. J.—This is a reference under sec. 646B by the District Judge of Jessore.

The facts are that a money suit in which the claim was for Rs. 70 was instituted in the Court of Babu H. L. Sinha, Officiating Munsif of Bongong, who had Small Cause Court powers up to Rs. 50. Before the trial of the suit commenced the officer for whom Babu H. L. Sinha was acting returned, and Babu H. L. Sinha was transferred. The substantive Munsif of Bongong had Small Cause Court powers up to Rs. 100. Accordingly relying on the provisions of sec. 16 of Act IX of 1887, which bars the trial of a suit cognizable by a Court of Small Causes by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable, he tried the suit as a Small Cause Court suit.

The Defendants against whom a decree was given, applied to the District Judge in revision. The District Judge has referred the case to us. He relies on the provisions of sec. 32 (2) of Act IX of 1887; and the cases of *Hari Kammaya* v. *Hari Venkaya* (1), *Kanan Nambiar* v. *Anantan Nambiar* (2) and *Shambhu Dhanaji* v. *Ramvithu* (3).

Sec. 32 (2) provides that the jurisdiction of a Court before which a suit is instituted is not affected by a change in the powers of the Court after the institution of the suit.

The substance of the rulings relied on by the Judge is, as he says, that a case started as an ordinary money suit cannot be tried subsequently as a Small Cause Court suit, although the Court in which the suit was instituted may subsequently be invested with sufficient powers to try the suit by the Small Cause Court pro-

(1) I. L. R. 26 Mad. 212 (1903).
(2) I. L. R. 29 Mad. 124 (1905).
(3) I. L. R. 28 Bom. 244 (1903).

cedure. The Judge goes on to say:—
"The present case is not exactly parallel to the cases in *Hari Kammaya* v. *Hari Venkaya* (1) and *Shambhu Dhanaji* v. *Ramavithu* (3) which contemplate the extension of the powers of the same officer during the pendency of the suit.

"The case in *Kanan Nambiar* v. *Anantan Nambiar* (2), however, refers to the transfer of an original money suit to another officer, whose powers under the Small Cause Courts Act were sufficient to enable him to deal with the case by summary procedure. It was ruled that having been instituted as a regular money suit, it must remain such and be tried under the ordinary procedure. The ruling in *Hari Kammaya* v. *Hari Venkaya* (1) is cited and followed. The principal ground for the decision in *Hari Kammaya* v. *Hari Venkaya* (1) appears to be that the parties should not be deprived of their power of appeal, which they have so long as the suit is dealt with under the ordinary procedure. The same principle will hold good, whatever the changing circumstances be, *e.g.*, the transfer from one Court to another, or the increase in the power of the same officer during the suit, or the change in the officer presiding in one and the same Court. If this be so, then in the present case, the Defendants have been deprived of their right of appeal by the procedure adopted in disposing of the case. It seems to me therefore that the Munsif, 1st Court, Bongong, was wrong in disposing of the case under Small Cause Court procedure and I accordingly submit the record under sec. 646B of the Civil Procedure Code."

(1) I. L. R. 26 Mad. 212 (1903).
(2) I. R. L. 29 Mad. 124 (1905).
(3) I. L. R. 28 Bom. 244 (1903).

We consider that the views of the District Judge are correct. The word used in sec. 32 (*2*) is "Court." As interpreted, and we think correctly interpreted, by the rulings cited by the District Judge, it lays down that when a case is instituted in a Court which has certain powers, it must be tried by that Court irrespectively of any subsequent increase in those powers. The present suit was instituted in the Court of the Munsif of Bongong, when that Court had only Small Cause Court powers up to a limit of Rs. 50. By the return of the substantive Munsif of Bongong, the powers of the Court were increased to Rs. 100. But under sec. 32 (*2*), we think the suit should have been tried, as if the powers of the Court remained the same as they were when the suit was instituted.

We must therefore set aside the decree of the Munsif of Bongong and remand the suit to him for retrial.

We return the record to the District Judge of Jessore.

SHARFUDDIN, J.—I agree. I consider the District Judge is right not only on the authority of the rulings he has quoted, but also under the provisions of 33 of Act IX of 1887. (Provincial Small Cause Courts Act). Under this section a Court invested with the jurisdiction of a Court of Small Causes is to be deemed to be different from the Court exercising ordinary jurisdiction in suits of a civil nature which are not cognizable by a Court of Small Causes. In the present case the substantive Munsif

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JANUARY 6, 1908. [No.

Contents.

NOTES

A BILL HAS BEEN INTRODUCED INTO THE VICEROY'S Council to consolidate and amend the law for the limitation of suits and for other purposes. The Bill is intended primarily to remedy hardship to some mortgagees caused by the recent decision of the Judicial Committee in the case of *Vasudev Pillai* v. *K. S. Srinivasa Pillai*, reported at p. 1005 of the last volume of our reports, to make some amendments auxiliary to the Code of Civil Procedure Bill which is now before the Council, and further, to amalgamate in one enactment the various Acts in which the law of limitation is at present scattered.

WE NOTE WITH SATISFACTION THAT THE GOVERNMENT has lost no time in extending relief to the mortgagees who, labouring under the impression that the period of limitation for instituting suits on their mortgages was 60 years instead of 12 years, have not or did not bring their suits within 12 years, *i.e.*, the period of limitation as prescribed in Art. 132 of the Limitation Act. The Bill provides that in parts of the country where the 60 years' rule prevailed the mortgagees, whose claims are barred under the 12 years' rule of limitation as laid down in the decision of the Privy Council, will be allowed two years' period of grace to institute their suits. Also that those suits which have been dismissed as being barred by limitation since the date of the Privy Council decision should be restored.

IN THIS CONNECTION WE DRAW ATTENTION TO A PARAgraph which appeared at p. cccl of the last volume of this journal, where we referred to the hardship that resulted to the mortgagee in consequence of the Full Bench decision in *Balaram* v. *Mangta*, 11 C. W. N. 969, a case from Sambalpur where formerly the 60 years' rule prevailed. Surely the mortgagee was, as we then said, "in no way responsible for the change of jurisdiction brought on by the Partition of Bengal." Although the provision in the Schedule for the extension of the Bill to the Sambalpur district will furnish relief to suitors whose suits may have been dismissed since the 22nd of July (the date of the decision of the Judicial Committee) yet it makes no provision in the case of those whose suits have been dismissed prior of that date in accordance with the views of the Calcutta High Court, since the transfer of Sambalpur to Bengal. The Full Bench decision in *Balaram* v. *Mangta* is a case in point in which the mortgagee's suit was dismissed only six days before the date fixed in the Bill. We would therefore suggest that the provision of the Bill should be made applicable to cases of the kind in the Sambalpur district from the date of Partition of Bengal.

WE INVITE ATTENTION TO THE CASE OF *Ram Narain Routh* v. *Lal Das Routh*, decided by their Lordships Mookerjee and Caspersz, JJ., a report of which appears at p. 55 of the current volume of this journal. Their Lordships held that when a person having an interest in a tenure or holding advertised for sale, makes a deposit under sec. 171, Bengal Tenancy Act, he is not in all cases entitled to get delivery of possession of the tenure or holding saved from sale by his deposit by an application to the execution Court in which the deposit is made; he can only get delivery of possession by such application as against the defaulting judgment-debtor, but not as against a stranger to the execution proceeding who happens to be in possession of the tenure or holding. The reasons assigned by their Lordships are that when such a stranger will dispute the title of the depositor to make the deposit under sec. 171, Bengal Tenancy Act, it is hardly conceivable that the execution Court should decide the dispute which is between persons neither of whom is a party to the suit and further that under sec. 62 of Act VIII, B. C. of 1869, which is replaced by sec. 17 of the Bengal Tenancy Act, the depositor was declared to be entitled to obtain immediate possession of the tenure of the defaulter on applying for the same, whereas sec. 171, Bengal Tenancy Act, simply says

that the depositor "shall be entitled to possession of the tenure or holding &c."

THE LANGUAGE OF SEC. 171, BENGAL TENANCY ACT, is no doubt ambiguous in so far as it does not say by what procedure the depositor will get possession. The words used are "he (*i.e.*, the depositor) shall be entitled to possession of the tenure or holding." But it seems to us that having regard to the fact that the object of the provisions in sec. 171, Bengal Tenancy Act, is to enable a person having an interest in the tenure or holding which will be voidable upon the sale of the tenure or holding to save his interest by preventing the sale of the tenure or holding and at the same time to avoid unnecessary delay and multiplicity of actions, the Legislature did not by these words intend that the depositor will have to bring a regular suit to get possession. According to this decision, the same words "shall be entitled to possession," will have to be interpreted in different ways according as the possession is sought against the defaulting tenant or a third person, who of course holds possession of the tenure or holding advertised for sale, by some title derived from the defaulting tenant. For if the third person claims possession adversely to the defaulting tenant, he can in no way be bound by the order of the execution Court delivering possession to the depositor.

IT IS SAID THAT BY THE CHANGE OF LANGUAGE IN sec. 171, the procedure for getting possession under Act VIII, B. C. of 1869, has been changed. But it might as well be argued that if the Legislature meant to enact that the depositor will have to bring a regular suit to get possession in certain cases, it would have used appropriate words indicating its meaning. At the time when sec. 171 was enacted the Legislature knew that the depositor gets delivery of possession by an application to the execution Court and so if the Legislature intended to change or modify that procedure is it not reasonable to suppose that the Legislature would have expressly said so?

AS TO THE INAPPROPRIATENESS OF THE EXECUTION Court investigating into the *locus standi* of the depositor to make the deposit under sec. 171, at the instance of a third party, all we can say is that such investigation becomes incumbent upon the execution Court when the judgment-debtor or the decree-holder questions the title of the depositor to make the deposit. When the third party raises the question, the investigation need not be more lengthy or complicated. All that the Court has to see is whether the depositor has an interest in the tenure or holding advertised for sale, which will be voidable upon the sale; but the Court need not pause to consider the respective claims of the depositor and the third party to make the deposit. Admittedly the third party has not made the deposit so the tenure or holding would have been sold with the result that the third party's interest in it would have been avoided but for the deposit made by the "depositor" who asks for delivery of possession. Certainly the third person cannot complain of any injury to himself by reason of the deposit. The mere fact of his having a right to make the deposit under sec. 171, will not disentitle another person having a similar right who by the exercise of due diligence makes the deposit before him, to get possession from the Court. The only question the Court will have to decide is, whether or not the person who made the deposit is entitled to do so under sec. 171, whether the *locus standi* of the depositor is questioned by a party to the suit or a third person. It is not necessary for the Court to determine whether the third person has a better title to make the deposit, for admittedly he did not take any steps to make the deposit at the proper time.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Newman* v. *A. & S. Gatti*
Before LORD JUSTICE VAUGHAN WILLIAMS, SIR GORELL BARNES, PRESIDENT, and MR. JUSTICE BIGHAM. 22nd October 1907.

Understudy, employment as—Right to play the principal's part in latter's absence.

Defendants, the Managers of the Vaudeville Theatre, London, and the Plaintiff Ethel Newman, an actress, entered into a written contract to the effect that the "Managers engage the said artiste for the run of the play to follow *The Catch of the Season*, at the said theatre to understudy Miss Edna May commencing on or about the 24th March 1906 and the said managers agree to pay weekly to the said artiste the sum of £4 inclusive and an extra salary of £1 per performance for every performance that the said artiste shall play Miss Edna May's part . . . . . And the said artiste agrees to perform to the best of her ability upon the above conditions. The rehearsals prior to and during the continuance of this engagement to be given free. And the said artiste agrees not to appear at any place of public entertainment at any time during her engagement by the said managers without the written consent of the said managers or their representatives and further agrees to read and conform to the rules and regulations governing the said Vaudeville Theatre." The Plaintiff alleged that in fulfilment of this engagement she acted at a number of matinees and on other occasions when Miss Edna May was absent. On 22nd September 1906 when Miss Edna May finally left the theatre Plaintiff played her part for a fortnight; but early in October she received notice that Miss Phyllis Dare would take Miss Edna May's part at the next performance. The Plaintiff refused to understudy Miss Dare and brought this action in which the ques-

tion arose whether upon the above agreement the Plaintiff as "understudy" had the right to play the part of Miss May when absent; or whether the Defendants warranted to the Plaintiff that Miss May would act the part contemplated during the run of the piece and as Miss May had not done so, the Defendants were liable in damages to the Plaintiff. Both questions were decided against the Plaintiff. Lord Justice Vaughan Williams said that upon the face of it the term "understudy" was used in the theatrical profession and the evidence given in explanation of it showed that it did not imply any right in the understudy to play the part of the principal actor or actress in the latter's absence, his or her obligation and right being simply to be ready to do so if called upon by the management.

Mr Montague Lush, K. C., and *Mr. Colam* for the Plaintiff.

Mr. C F. Gill, K. C., and *Mr. A. H. McCardie* for the Defendants.

PRIVY COUNCIL.

[Appeal from Bengal.]

Lord Halsbury.	
Lord Macnaghten.	Bishun Chand Bachhoat,
Lord Atkinson.	(Petitioner), Appellant,
Lord Collins.	*v.*
Sir Arthur Wilson.	Bejoy Singh Dudhuria,
1907.	Respondent.
10th December.	

Leave to appeal—Substantial question of law—Sec. 317 of the Civil Procedure Code—High Courts not unanimous in its construction.

This was an application for special leave to appeal under the following circumstances :—

On 22nd May 1901, the Petitioner purchased for the sum of Rs. 12,000 a house at Baluchar at a sale held in execution of a decree made on 1st September 1896, by the Calcutta Small Cause Court against one Chattraput Singh in favour of the firm of Tara Chand Hakin Chand. On 2nd June 1895, the father of the Respondent also obtained a decree against Chattraput Singh from the High Court at Calcutta (Original Side). The Respondent desired to execute that decree by attachment and sale of the said house. He, however, having failed to set aside the said sale to the Petitioner by summary proceedings, instituted a suit in the Court of the Subordinate Judge of Murshidabad, on 30th September 1902, against the Petitioner to obtain a declaration that the sale to him was fraudulent and that he had purchased the said house *benami* for Chattraput Singh. The Petitioner in defence denied the fraudulent and *benami* nature of the purchase and pleaded *inter alia* that the suit was barred by secs. 317 and 295 of the Code of Civil Procedure. On 26th May 1904, the Subordinate Judge delivered judgment and decided that the purchase money came from the Petitioner's firm; that nevertheless the inference to be drawn from all the circumstances was that the purchase was *benami* for Chattraput Singh and that the suit was not barred by either of the above-mentioned sections of the Code of Civil Procedure. A decree was accordingly made. Against that decree the Petitioner appealed to the High Court of Judicature at Fort William in Bengal, which, on 16th April 1907, delivered judgment and affirmed the judgment and decree of the Subordinate Judge. On 30th May 1907, the High Court rejected the Petitioner's application to appeal to His Majesty in Council against the last-mentioned decree. The following were the terms of that order: "This is an application for a certificate that the case is a fit and proper one for appeal to His Majesty in Council. The amount in dispute is well over Rs. 10,000 and the decree appealed against is one of affirmance. The Petitioner must therefore make out that the appeal involves some substantial question of law.

"The suit was one to set aside a sale in execution of a decree on the ground that it was fraudulent and both Courts have found that it was a fraudulent sale and set it aside. It is contended that a substantial question of law arises in relation to sec. 317 of the Code of Civil Procedure, and that this section is a bar to the suit. Dr. Rash Behary Ghose, who appears for the applicant, has, with his usual fairness, stated that, when the matter was before the Court he felt, having regard to the decisions of this Court, that beyond mentioning the point he could not properly occupy the time of the Court by arguing it. There certainly was no serious argument before us and this possibly accounts for the somewhat summary manner in which the point was dealt with in the judgment sought to be appealed against.

"Apart however from any such consideration it is difficult to appreciate how any substantial question of law is involved upon the facts found in the judgment so far as sec. 317 is concerned.

"The finding of fact is that the sale was a fraudulent one. The ground of the present suit is fraud and is not the ground mentioned in the section.

"The other substantial question of law which is suggested is that the Plaintiff is not entitled to maintain this suit because he would not be entitled to any share in the sale-proceeds under sec. 295 of the Code of Civil Procedure. That point was not raised until reply; it was not seriously urged in argument. If the Appellant had considered it a substantial question of law one might reasonably have expected that it would have been urged in the opening of the appeal. I do not think it is a substantial question of law within the meaning of sec. 596."

Mr. DeGruyther for the Petitioner.—Both Courts in India have concurred in finding that the purchase money was in fact paid by the Petitioner. The finding that the said sale was fraudulent and *benami* is an inference drawn from the circumstance in regard to which the High Court in their judgment state "taken separately the various incidents in connection with the sale and the subsequent dealing

with the house to which we have referred might not have been sufficient to warrant the conclusion of the lower Court, but taken collectively they disclose a reasonably clear case of fraud and dishonesty." That shows that the finding is not one of fact but an inference from facts found. The suit is barred in law by secs. 317 and 295 of the Code of Civil Procedure; and although the High Court at Calcutta has construed sec. 317 against the contention of the Petitioner, that construction is opposed to decisions of the High Courts of Madras and Allahabad: *Rama Kurup* v. *Sridevi*, (1892) I. L. R. 16 Mad. 290, and *Kishan Lal* v. *Garuruddhawaja Prasad Singh*, (1899) I. L. R. 21 All. 238.

When the High Courts differ, it is a good ground for appeal in order that their Lordships may decide which construction is the right one.

Leave to appeal granted.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1209 OF 1907. JOGENDRA NATH CHAKRAVARTY AND ANOTHER, Petitioners *v.* THE EMPEROR, Opposite Party. 3rd December 1907.

Warrant of arrest—Whether illegal when only initialled by the officer who issued it—Indian Penal Code, sec. 225B.

The material facts of the case are shortly these:—

A money decree was obtained against Jogendra Nath Chakravarty, the Petitioner No. 1, and in execution of that decree the Munsif issued a warrant for his arrest. A Civil Court peon went with the warrant to arrest Jogendra, but when the warrant was shown him, Jogendra ran away. The peon chased him and caught him near the house of one M., the Petitioner No. 2. A struggle ensued between the peon and Jogendra who shouted for help. Thereupon M. and several others numbering more than five came to the spot and forcibly rescued Jogendra from the grip of the peon who was also very roughly handled by M. and received several injuries on his person. The Petitioners were tried by the Deputy Magistrate of Patukhali who convicted Jogendra under sec. 225B and sec. 147, I. P. C. and M. under secs 147, 323 and 225B and sentenced each of them to 2 months' rigorous imprisonment under each of the sections, the sentences to run concurrently and the Petitioner No. 2 to a fine of Rs. 30 in addition. On appeal to the Sessions Judge the separate sentences under the different sections were set aside, but the Petitioner No. 1 was sentenced to 2 months' rigorous imprisonment and the Petitioner No. 2 was sentenced to 2 months' rigorous imprisonment and to a fine of Rs. 30.

The Petitioners obtained the present rule to show cause why the convictions of and sentences passed upon them should not be revised, and why the convictions under sec. 225B, I. P. C., should not be set aside. It appears that the warrant of arrest issued by the Munsif was not signed with his full name, but was only initialled.

Their Lordships observed:—

"It is contended that this mode of signing a warrant is illegal. The learned pleader for the Petitioners cannot show us any authority for this contention; nor any ruling of any Court that a warrant is illegal and can be resisted simply because it is not signed with the full name of the officer who issues it, but only with his initials. Nor has he shown us that "initials" do not come within the definition of "signature" as laid down in the Code of Civil Procedure and in the General Clauses Act. On the other hand the learned Sessions Judge says that the initialling of a criminal warrant is, under sec. 537, Cr. P. C., sufficient to make it legal. Therefore we are unable to hold that the warrant in this case which was initialled and not signed with the full name of the Munsif, was not signed within the meaning of the Code of Criminal Procedure, and we do not think we can say that the conviction under sec. 225B cannot be sustained" . . . .

Babu Baikuntha Nath Das for the Petitioners.

No one for the Opposite Party.

B. C. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. CIVIL RULE No. 2650 OF 1907. TARINI PROSONNO DAS MOJUMDAR, Defendant No. 2, Petitioner *v.* TARA CHAND MARWARI, Plaintiff, Opposite Party. 28th November 1907.

Joint family—Dayabhaga School—Son's liability for father's debt.

The Plaintiff instituted a suit for recovery of a sum of money on a *bahikhata*. The Defendant No. 2 denied liability alleging that he was not present when the advance was made, that he was never benefited by the advance, that he was not a member of the joint family with his father, Defendant No. 1, and that he could not be made liable for his father's debt. The family was governed by the Dayabhaga School of law.

The Small Cause Court Judge passed a decree against both the Defendants. The judgment rested mainly on the ground that the Defendant No. 2 was joint with Defendant No. 1. He therefore held that they were jointly liable.

Defendant No. 2 moved the High Court.

Held—If the parties were governed by the Dayabhaga School of law, the son could not be made liable for the debts contracted by the father.

Babus Dwarka Nath Mitra, Sailendra Nath Palit and *Surendra Nath Ghose* for the Petitioner.

Babu Provash Chunder Mitra for the Opposite Party.

A. T. M. *Rule made absolute.*

MAHIMA CHANDRA SIRDAR *v.* KALI MANDOL.

exercises the functions of an ordinary Civil Court as well as those of a Court of Small Causes. His Court of Small Causes being different according to sec. 33A from his Court of ordinary jurisdiction, it seems to me he has no jurisdiction to transfer suits from his file of Small Causes to that of the civil suits of his ordinary jurisdiction and *vice versa.*

S. C. S.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ROBERTSON LORD COLLINS SIR ARTHUR WILSON. 1907. 19, November.	BIBI PHUL KUMARI, Appellant, *v.* GHANSHYAM MISRA and another, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 283, suit under—Stamp on plaint—Court Fees Act (VII of 1870), Sch. II, Art. 17, cl. (i).

In a suit brought under sec. 283 of the Civil Procedure Code, the proper Court-fee payable on the plaint is Rs. 10 under the Court Fees Act, Sch. II, Art. 17, cl. (i).

DHONDO SAKHARAM KULKARNI *v.* GOVIND BABAJI KULKARNI (1) *approved.*

Appeal from a decree of the above-mentioned High Court, dated the 10th of December 1903, confirming a decree of the Court of the Subordinate Judge of Purneah, dated the 27th of August 1900.

The sole question raised on the appeal was the determination of the proper Court-fee payable on the plaint in the suit.

Chhatrapat Singh (Respondent No. 2) was the owner of Pergunnahs Katihar and Kumaripur, bearing Nos. 1175 and 1176 in the registers of the Purneah Collectorate. On 2nd September 1893 he sold the said properties to the Appellant, Bibi Phul Kumari, who obtained possession thereof and was duly registered as proprietor in the Collector's register.

In or about 1898 Ghanshyam Misra (Respondent No. 1), having obtained a decree for money against Chhatrapat Singh, attached the said properties and advertised them for sale in execution of his decree.

The Appellant objected to the said attachment and applied to the Subordinate Judge of Purneah for removal thereof, claiming the said properties as her own. On 24th April 1899 an order was made rejecting her claim.

The Appellant, thereupon, instituted the present suit in the Court of the Subordinate Judge of Purneah against the Respondents as Defendants. Paras. 6, 7 and 8 of the plaint were as follows:—

"6. That the cause of action in this case accrued to the Plaintiff from the 24th April 1899 aforesaid within the jurisdiction of this Court.

"7. That for the purpose of jurisdiction this suit is valued at Rs. 70,000, being the value of the properties advertised for sale as aforesaid.

"8. That the Plaintiff pays a Court-fee of Rs. 10 for her prayer for a declaration and another fee of Rs. 10 for her prayer for permanent injunction."

The Plaintiff prayed for judgment as follows:—

"(a)—That the Plaintiff's title to and possession of the aforesaid properties be

(1) I. L. R. 9 Bom. 20 (1884).

BIBI PHUL KUMARI *v.* GHANSHYAM MISRA.

declared and that it be declared that the Defendant 2nd party has no right or title left in the said properties after the sale to the Plaintiff as aforesaid.

"(*b*)—That it be further declared that the said properties are not liable to be sold in execution of the decree of the Defendant 1st party against the Defendant 2nd party as aforesaid.

"(*c*)—That a permanent injunction may issue on the Defendant 1st party not to execute his said decree against the said properties of the Plaintiff.

"(*d*)—That the costs of the suit and interest be awarded to the Plaintiff as against Defendant 1st party.

"(*e*)—That such further relief be granted to the Plaintiff as the Court in the circumstances of the case may consider her entitled to"

Chhatrapat Singh did not defend the suit. Ghanshyam Misra filed a written statement in defence pleading *inter alia* that the Plaintiff's suit could not proceed on the ground that the plaint in the case was insufficiently stamped. On the pleadings the Subordinate Judge fixed five issues, of which it is necessary to refer here to only one: "Whether the plaint has been sufficiently stamped."

After the completion of all the evidence on all the five issues, the Subordinate Judge on 27th August 1900 delivered a judgment on the abovementioned issue only, holding that the suit did not fall within Art. 17, Sch. II of the Court Fees Act, but was one on which Court-fees were payable, calculated on Rs. 62,022-11-0, the amount of the decree of Ghanshyam Misra; and on failure to pay a further sum of Rs. 1,230 into Court by 31st August 1900, he made a decree dismissing the suit with costs. In his judgment he observed as follows :—

"The Plaintiff's learned pleader contends that the subject of the present suit is to have an unfavourable order made in a claim case set aside and also for a declaration that Defendant No. 2 has no subsisting interest in the disputed properties which might be put up for sale for the satisfaction of Defendant No. 1's decree against him, and further that the title and possession in respect of the said properties are with her (Plaintiff), that under Art. 17, Sch. II of the Court Fees Act, the latter is bound to pay Rs. 10 stamp for each of those two prayers and as she paid Rs. 20 stamp, she has sufficiently complied with the requirements of the law, especially when she seeks a declaration of right and no consequential relief, and in support of this contention cited the following precedents.—*Chunia* v. *Ramdial* (2), *Gulzari Mal* v. *Jadaun Rai* (3), *Fatima Begam* v *Sukh Ram* (4), *Munraj Kuari* v. *Maharajah Radha Prasad Singh* (5), *Dildar Fatima* v. *Narain Das* (6), *Gobind Nath Tiwari* v *Gajraj Mati Taurayan* (7), *Kammathi* v. *Kunhamed* (8), *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1), *Vithal Krishna* v. *Bal Krishna Janardan* (9).

"A reference to these authorities reveals the fact that the three High Courts

(1) I. L. R. 9 Bom. 20 (1884).
(2) I. L. R. 1 All. 360 (1877).
(3) I. L. R. 2 All. 63 (1878).
(4) I. L. R. 6 All. 341 (1884).
(5) I. L. R. 6 All. 466 (1884).
(6) I. L. R 11 All. 365 (1889).
(7) I. L. R. 13 All. 389 (1891).
(8) I. R. L. 15 Mad. 288 (1891).
(9) I. L. R. 10 Bom. 610 F. B. (1886).

BIBI PHUL KUMARI *v.* GHANSHYAM MISRA.

uniformly held that the Court Fees Act being a fiscal enactment its provisions must be so construed as to affect the litigants less heavily and acting upon this principle they unanimously held that in a suit instituted under sec. 283, Civil Procedure Code, the duty leviable should be that provided in Art. 17, Sch. II and not *ad valorem* provided in Sch. I of the Court Fees Act. The 9 Bom. precedent went so far as to hold that the same duty would be payable even when the plaint contained a prayer for an award of possession. Against this array of authorities there are two precedents of the Calcutta High Court, the one reported in *Ahmed Mirza Saheb* v. *A. Thomas* (10) and the other in *Modhusudun Koer* v. *Rakhal Chunder Roy* (11). The former distinctly rules that in a suit of this nature, *ad valorem* duty should be leviable while the latter lays down that the duty should be charged on the amount of the decree and not on the value of the property attached, unless the two amounts happen to be identical. None of these precedents it is true is a Full Bench one, but when they are in conflict with other High Courts one of which is a Full Bench decision in *Vithal Krishna* v. *Bal Krishna Janardan* (9), I think, I am bound to follow the *dictum* of the High Court to which I am subordinate. Now it appears from the execution mohurir's note that Defendant No. 1's decree is now worth Rs. 62,022-11-0 and I must call upon the Plaintiff to pay duty on this sum amounting to Rs. 1,250, but as she has already paid Rs. 20, she would now be required to pay Rs. 1,230 on or before the 31st current."

Against that decree of the Subordinate Judge the Appellant appealed to the High Court of Judicature at Fort William in Bengal, which Court on 10th December 1903 delivered its judgment and made a decree dismissing the appeal with costs. The judgment of the High Court contained the following:—

"The Subordinate Judge has pointed out that in certain cases decided by the Allahabad, Madras and Bombay High Courts a suit of this kind has been held to be one coming under Art 17, Sch. II of the Court Fees Act, and therefore subject to a Court-fee duty of Rs. 10 only. He has, however, followed two rulings of this Court, *Ahmed Mirza Saheb* v. *A. Thomas* (10), *Modhusudun Koer* v. *Rakhal Chunder Roy* (11), according to which a suit of this nature is one in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

"The learned pleader who appears for the Appellant has invited us to come to the conclusion that the above cited rulings of this Court are erroneous and to refer the question of the Court-fee duty payable on such a suit to a Full Bench with a view to having the decisions in these two cases set aside. We do not see any necessity to adopt this course. The earlier of these two cases only followed a still older decision reported in *Muftee Jelalooddeen Mahomed* v. *Shaharoollah* (12); so that the rule

(9) I. L. R. 10 Bom. 610 F. B. (1886).
(10) I. L. R. 13 Cal. 162 (1886).
(11) I. L. R. 15 Cal. 104 (1887).

(10) I. L. R. 13 Cal. 162 (1886).
(11) I. L. R. 15 Cal. 104 (1887).
(12) 22 W. R. 422 (1874).

BIBI PHUL KUMARI v. GHANSHYAM MISRA.

of this Court on the subject is one of very many years standing. Moreover, in this case the Plaintiff seeks not only for a declaration of her right, but for the grant of a perpetual injunction restraining the sale, as the property of Defendant No 2, of the property she lays claim to. Hence, she would seem to us to seek for more than a mere declaratory decree and the suit comes within the purview of the Full Bench decision of the Allahabad High Court in *Ram Parsad* v. *Sukhdai* (13) which seems to have been overlooked in some at least of the later cases decided by the Allahabad High Court, which are cited in the Subordinate Judge's judgment."

The Appellant, thereupon, brought the present appeal to His Majesty in Council.

Mr. DeGruyther for the Appellant.—The present suit is brought under sec. 283 of that Code. The High Courts in India are not in agreement as to the proper Court-fee payable on the plaint, when a suit is brought under sec 283 of the Civil Procedure Code. The Bombay High Court has held that the plaint in such a suit is to be treated as falling under cl. (*i*), Art. 17 of Sch. II of the Court Fees Act (VII of 1870): *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1) The Allahabad High Court has held that such a suit need not be valued according to the value of the property, but could be brought on a stamp of Rs. 10 under Act VII of 1870, Sch. II, Art 17 (*iii*): *Chunia* v. *Ramdial* (2). The Calcutta High Court has held that as there is consequential relief claimed it did not fall under either cl. (*i*) or cl. (*iii*) of Art. 17, Sch. II of the Court Fees Act, but that it fell under sec. 7 (*iv*) (*c*) of that Act and accordingly *ad valorem* duty prescribed by Sch. I of that Act was payable on the plaint. *Ahmed Mirza Saheb* v. *A. Thomas* (10).

[LORD COLLINS.—You do not say in your plaint that Rs. 10 is sufficient stamp on the price of the relief, which you claim.]

Mr. DeGruyther.—I am not under sec. 7 (*iv*) (*c*) at all. The question is whether consequential relief is asked for. If the answer is in the affirmative, the Court-fee already paid on the plaint is not sufficient; but if the answer is in the negative, which it is submitted is the case here, it is sufficient. When you ask for possession of the moveable or immoveable property, you must pay *ad valorem* duty. But no possession is claimed in this case.

[LORD COLLINS.—Is not the value of the relief you claim the value of the burden or obligation you want to get rid of?]

Mr. DeGruyther.—This is a suit to set aside a summary order. Neither the case of *Muftee Jelaloodleen Mahomed* v. *Shahunoollah* (12), nor the case of *Ahmed Mirza Saheb* v. *A. Thomas* (10) decides on what the *ad valorem* duty is payable. The case of *Modhusudun Koer* v. *Rakhal Chunder Roy* (11) has no bearing on this point. The question there related to the jurisdiction of the Court. The present suit is a suit to set aside a summary order and the Court-fee already paid is

(1) I. L. R. 9 Bom. 20 (1884).
(2) I. L. R. 1 All. 360 (1877).
(13) I. L. R. 2 All. 720 F. B. (1880).
(10) I. L. R. 13 Cal. 162 (1886).
(11) I. L. R. 15 Cal. 104 (1887)
(12) 22 W. R. 422 (1874).

BIBI PHUL KUMARI *v.* GHANSHYAM MISRA.

sufficient under sec. 6 and Art. 17, Sch. II of the Court Fees Act. The decision in *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1) is right. See also *Vithal Krishna* v. *Bal Krishna Janardan* (9) and *Gobind Nath Tiwari* v. *Gajraj Mati Taurayan* (7) All that the Appellant wants to get rid of is the attachment. Reference was also made to sec. 42 of the Specific Relief Act (I of 1877) and *Kathama Natchiar* v. *Dorasinga Tever* (14).

The Respondents did not appear.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The sole question in this appeal is what is the proper Court-fee payable on the plaint in the suit. The Act governing the question is the Court Fees Act (VII of 1870). Proceeding on the theory that what was due was Rs. 20, the Appellant stamped her plaint accordingly, her suit was dismissed in the Court of first instance on the ground that her plaint was insufficiently stamped; and this judgment was affirmed by the High Court of Bengal in the judgment now appealed against. The present appeal has been heard *ex parte*.

For the right determination of the question at issue it is necessary to ascertain what are the object and the nature of the suit. Now, fortunately, this is not dubious. The Plaintiff succinctly and accurately states that the cause of action accrued on 21th April 1899, that being the date of a judgment pronounced against her in the Court of the Subordinate Judge of Purneah in certain execution proceedings. What had taken her into that Court was this: she had bought a property from the second Respondent and had taken possession and was registered as proprietor. After and notwithstanding this, the first Respondent, purporting to be a creditor of the second Respondent, under a decree for Rs. 62,022 attached the property and advertised it for sale. The Appellant lodged with the Subordinate Judge of Purneah, before whom the execution proceedings took place, a claim to the property, claiming that her right should be declared and that an injunction should issue against the execution of the decree held by the first Respondent. This claim was rejected by the Subordinate Judge on 21th April 1899, and his decree is the cause of action in the suit which gives rise to this appeal.

Now the right of the Appellant to sue for the establishment of her right, which the Subordinate Judge had negatived, rests on the 283rd section of the Civil Procedure Code (XIV of 1882).

"The party against whom an order under sec. 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

This is clear of itself, and the High Court, in the judgment appealed against, describes the suit as "of the nature referred to in sec. 283."

Having thus ascertained what is the nature of the suit, their Lordships turn to the Court Fees Act to see whether such actions of appeal are specifically dealt with; for it is only if they are not specifically dealt with that the task

(1) I. L. R. 9 Bom. 20 (1884).
(7) I. L.R. 13 All. 389 (1891).
(9) I. L. R. 10 Bom. 610 (1886).
(14) L. R. 2 I. A 169 (1875).

BIBI PHUL KUMARI *v.* GHANSHYAM MISRA.

arises of finding to which group of cases this is to be assigned. Now, the 17th Article of Sch. II is expressly made to apply to "plaint or memorandum of appeal in each of the following suits."

"1. To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any revenu Court."

Now this is an exact description of the effect of the Appellant's suit. It is true that, instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and sec. 283 of the Civil Procedure Code, under which section the action is brought, recognizes such a suit as not merely an appropriate, but the only mode of obtaining review in such cases.

Their Lordships are accordingly of opinion that the first head of Art. 17 of Sch. II applies to the case. This view is opposed not only to that of the Respondents and of the High Court, but to that of the Appellant. Misled by the form of the action directed by sec. 283, both parties have treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action. Accordingly, on the one hand, the Appellant, pointing to her prayer for a declaration, says she pays Rs. 10 on that, and, pointing to her prayer for injunction, says she pays other Rs. 10 on that. In their Lordships' judgment, this is not the proper view of the suit taken as a whole; but if it were, it would be extremely difficult for the Appellant to bring her suit, which asks consequential relief as well as a declaratory decree, within the enactment which she invokes.

On the other hand, the Respondents equally ignore the essential fact that this is a plaint for review of a summary decision; and they go on to bring the action, treated as an original action, within the class of cases where the Court-fees are *ad valorem* of the action. It is not necessary to discuss this in detail; but their Lordships are not satisfied that, even if the value of the action determined the fee, the Respondents have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must mean the value to the Plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit.

Their Lordships, however, are satisfied that there is in the statute no general or overriding reference to value. The terms of sub-sec. 1 of Art. 17 (which they hold to apply) contains no reference to value. In like manner the class of suits dealing with arbitration awards is coupled with suits such as that immediately in question; awards may be of value Rs. 10 or of value Rs. 100,000; and yet no distinction is made. In short, the statute, for good reasons or bad, has dealt with certain actions irrespective of value; and the present action is one of them.

This being a matter of practice, although to be determined by statute

BIBI PHUL KUMARI *v.* GHANSHYAM MISRA.

their Lordships would willingly have given much weight to any consentaneous practice. But while the Respondents can claim to be supported by decisions of the Calcutta and Allahabad High Courts, there is a contrary decision in the Bombay High Court, *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (1), which has the high authority of Sir Charles Sargent, whose judgment is in accordance with the conclusion at which their Lordships have arrived.

It is a singular fact that while the *ratio* of the Appellant's case is at variance with that which their Lordships adopt, there is only a difference of Rs. 10 in the practical result,—the Appellant having maintained that she was liable for Rs. 20, while she was truly liable only for Rs. 10. On the other hand, the sum held due in India was Rs. 1,320, and this was the result of the *ad valorem* theory. It is to be observed that the Appellant did not, as she should have done, stand on the first clause of the 17th Art of Sch. II, but, on the contrary, contributed to mislead the Courts by advancing a theory which was as unsound as that of the Respondents. Their Lordships think that, in these circumstances, the justice of the case is met by the first Respondent (who alone appeared in the suit) paying half of the Appellant's costs in the High Court and in England.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees of the High Court and the Court of the Subordinate Judge ought to be discharged, that the case ought to be remitted to the High Court with a view to the necessary steps being taken to dispose of the remaining issues reserved by the Subordinate Judge for future consideration, that the first Respondent ought to pay half the Appellant's costs in the High Court, and that the costs in the Court of the Subordinate Judge ought to be dealt with by the Subordinate Judge after the other issues have been disposed of.

The first Respondent will pay half the Appellant's costs of this appeal.

Solicitor: *Mr. C. G. Farr* for the Appellant.

Respondents did not appear.

Appeal allowed.

(1) I. L. R. 9 Bom. 20 (1884).

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 1060 OF 1906.

MACLEAN, C. J.	GAYRATULLA SARDAR, Defendant, Appellant,
GEIDT, J.	*v.*
1907.	GIRISH CHANDRA BHAUMIK and ors., Plaintiffs,
13, November.	Respondents.

Mokurari, meaning of—Bengal Tenancy Act (VIII of 1885), secs. 11, 18, 74, 179— Abwab—*Rent.*

The word "mokurari" means "with fixed rent" that is to say, when applied to a tenure, it means a tenure held at a fixed and permanent rate of rent.

Held, *upon a construction of the lease in this case, that it was not a mokurari lease and that the stipulation in the lease for payment of Rs. 3 instead of delivery of 2 goats was an* abwab *and that the case did not fall within the protection of sec. 179 of the Bengal Tenancy Act.*

GAYRATULLA SARDAR *v.* GIRISH CHANDRA BHAUMIK.

This was an appeal preferred on the 23rd of June 1906, against the decree of Babu S. C Ganguli, Officiating Subordinate Judge of Zillah Jessore, dated the 14th of March 1906, confirming that of Babu Netai Chura Ghose, Munsif, 2nd Court, at Narail, dated the 15th of September 1905.

The facts of the case material to the report are as follows: Plaintiff brought a suit for recovery of rent. The defence *inter alia* was that the stipulation for payment of Rs 3 instead of 2 goats is an *abwab* and not legally enforceable. The material portion of the lease is as follows:—

"This is a deed of a Kayemi Mourasi Patta. I am in possession by receipt of rents and profits of Kharija Taluk Kismut Ragharpur bearing Towji No 870 of the Jessore Collectorate and bearing an annual revenue of Rs. 6-4-2 situated in Pargana Naldi Mouzah Alakdanga, Sub-Registry Lohagara, Zillah Jessore. It being now inconvenient to collect the rents of the tenants in the Mofussil I have proposed for a *bandbust* and you have also prayed to me to take a settlement. I have granted your prayer; accordingly I grant you a patta, on receipt of a *selami* of Rs. 5, of the lands described in the boundaries below out of the aforesaid taluk and measuring (by guess) four khadas of lands including *raiyati*, *khamar*, *hasil* (culturable), *patit* (waste) at an annual rent of Rs. 66-4-2 out of which Rs 10 is to remain in suspension on account of lands under water.

1. From this day you will be entitled to collect rents from tenants and take the profits of *khamar* lands and shall pay rent to me in four *kists* mentioned below from the 4 annas *kist* of 1301, and shall enjoy the same in succession of sons and grandsons You shall not be entitled to raise any plea for abatement of the *jama* which has been fixed, if you do it shall not be granted.

2. You shall pay as per *kists* for payment of rent the road-cess and public-works cess fixed for this taluk by the Government.

3. If you do not amicably pay rent, the amount of rent stated above as suspended shall be added to the rent and I shall be entitled to realise the same by suit with damages at the aforesaid rate and with all costs. No objection of yours shall be granted. At my will I shall be entitled to demand the amount of rent under suspension and you shall be bound to pay the same.

. . . .

5 If in future any revenue, etc, is levied by Government you shall, without any objection, pay the same to me and if for the creation of any *hât* and bazar or for Railway purpose any portion of the land is acquired I shall get the whole of the compensation and you shall only be entitled to a reduction of rent.

7. At the time of the Saradiya Puja the tenants of this mehal used to deliver two goats and render *begar* service; in the same way you shall cause them annually to render the aforesaid *begar* service and to deliver two goats, price Rs 3. If you do not do so I shall be able to realise from you without any objection the expenses which I shall incur on that account. You and your succes-

GAYRATULLA SARDAR *v.* GIRISH CHANDRA BHAUMIK.

sors shall equally be bound by the terms of this patta.

. . . ."

The first Court held that it was by no means clear from the terms of the lease that he held the tenure either at a rent or rate of rent fixed in perpetuity, that the word *kaimi* used in the kabuliyat does not necessarily import fixity of rent and that sec. 179 of the Bengal Tenancy Act did not apply to the case. The first Court further held that the sum agreed to be paid as price of the goats is an *abwab* and not enforceable at law. The lower Appellate Court held that the agreement about payment of Rs. 3 for the price of goats seemed to be a lawful consideration for the use and occupation of the land and observed as follows:—

"Ex. I is the registered kabuliyat executed by Defendants and the tenure is therein mentioned as "kaimi mourasi" meaning permanent and heritable tenure. Defendants by Ex. I agreed to give 2 goats or Rs. 3 as the price thereof. Sec. 179 of the Bengal Tenancy Act is in Plaintiff's favour.

Appellant's pleader cites the Full Bench ruling *Radha Prosad Singh* v. *Bal Kowar Koeri* (1). The agreement about goats or price thereof in Ex. I seems to be a lawful consideration for the use and occupation of land and sec. 179, Bengal Tenancy Act, lays down that nothing in the Act shall be deemed to prevent any proprietors, etc., from granting a permanent *mokurari* lease on any term agreed on between him and his tenant. I don't think that ruling cited by Appellant's pleader applies and I find the 3rd point for the Plaintiffs.

I therefore dismiss the appeal with costs and decree the cross-appeal, the Munsif's decree is thus modified."

The Defendant appealed.

Babu Surendra Chandra Sen for the Appellant.

Babu Janoki Nath Pal for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—We are unable to agree with the lower Appellate Court that the lease in this case is a permanent *mokurari* lease within the meaning of sec 179 of the Bengal Tenancy Act. It described as a deed of "*kaimi mourashi* lease," *i.e.*, a permanent heritable lease. The word *mokurari*, as I understand, means "with fixed rent," that is to say, when applied to a tenure it means a tenure held at a fixed and permanent rate of rent. But that is not the case here—that is not the nature of the lease—and consequently the case does not fall within the protection of sec. 179 of the Bengal Tenancy Act. The payment of Rs. 3 instead of the delivery of 2 goats is, we consider, an *abwab*—that has scarcely been disputed—within the meaning of sec. 74; and, consequently, that is not recoverable. All that the landlord can recover is the rent; and not this additional payment of Rs. 3. The appeal succeeds on this point only. The appeal, therefore, must be allowed with costs, and the decree of the lower Appellate Court varied and there will be a decree only for the rent claimed.

GEIDT, J.—I agree.

Decree modified.

(1) I. L. R. 17 Cal. 726 (1890).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORIGINAL DECREES
Nos 191, 192, 193, 194 OF 1887
AND
Nos. 179, 180, 181, 182 & 183 OF 1888.

PIGOT, J.
BEVERLEY, J.
1889.
Heard,
28, February,
1, 4 to 8, 12
to 15 and 28,
March.
Judgments,
25, March
and 23, July.

NAM NARAIN SINGH,
Plaintiff, Appellant,
v.
TEKAIT GANJHU and
others, Defendants,
Respondents.

Service tenure—Resumption—Digwars of Ramgurh—Dismissal by Government and re-settlement with them as sikmi *talookdars—Default, proof of—Act VIII, B. C. of 1878, settlement under—Effect.*

The Digwari service in this case corresponded closely with what in other cases have been termed ghatwalli There is nothing in the use of the term Digwar to raise any presumption in favour of the contention that the holders of land by a service so named hold as personal servants of the Rajah. If anything, the presumption would seem to be the other way.

The power of Government, although generally exercised through the Rajah, was always recognised as supreme with respect to the supervision over the Digwars in regard to the discharge by them of their police duties. The Rajah of Ramgurh never possessed or exercised a right to dismiss the Digwars and to resume the Digwari grants, save in cases of default; and by the terms under which persons held Digwari grants, no such power was given or reserved to the Rajah.

The dismissal by Government of the Digwars and the substitution for them of a new system of rural police supposed to be of superior quality did not entitle the Rajah to resume the lands as for default.

The subsequent settlement of the lands by Government, purporting to act under Act VIII, B. C. of 1878, with the dismissed Digwars, treating them as sikmi *talookdars, and imposing on them assessments for road and police purposes of an amount far beyond the burden which previously rested on the holdings in the shape of supplying patrols, amounted to a continuance in the form imposed by statute of their public duties. There was no default.*

These appeals were preferred against the decrees of R. H. Renny, Esq , Second Subordinate Judge, Zillah Hazaribagh, dated the 14th of June 1887.

The facts of the case will appear from the judgment.

Mr. Woodroffe and *Babus Mohesh Chandra Chowdhury, Basanta Kumar Bose* and *Karuna Sindhu Mukerjee* for the Appellant.

Dr. Rash Behari Ghosh, Babus Lal Mohan Das and *Jogesh Chandra Dey* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

No. 191.—We do not propose this morning to deliver a final judgment in this appeal, that is to say, a final judgment in it. It may be that in hearing the other cases something may arise which might make it desirable to add to the terms of the judgment which has been written. But substantially we are now about to dispose of the questions which have arisen

NAM NARAIN SINGH v. TEKAIT GANJHU.

in the lengthy argument before us in this case.

The Plaintiff is zemindar or Rajah of the well known Ramgurh estate described in Hunter's Vol. 17, p. 120.

The names of the Rajah's predecessors so far as material are as follows :—

Tej Narain Singh A. D 1762 (S. 1829).
|
Pareshnath
|
Mani Nath with whom settlement was made in 1790.
|
Sib Nath
|
Lakshi Nath — Shambhu Nath — Ram Nath
|
Trailakha Nath dead.

Plaintiff succeeded under the decision in 1872 reported in 9 B. L. R. 274 (*Maharani Hiranath Koer* v. *Ram Narayan Sing*).

The Plaintiff zemindar of Raj Ramgurh brings this suit for the possession of lands situated within the limits of his zemindari.

The Plaintiff's case is that these lands were held in lieu of salary by Digwars or road patrols appointed to guard ghats and roads within the zemindari by the Plaintiff or his ancestors; that the Digwars were so appointed that they were the servants of and subject to the zemindar of Ramgurh estate, and the appointment and dismissal of them was in the power of the zemindars for the time being, the Magistrate and the Police only keeping an eye and having supervision over them (the Digwars) to see if they discharged their duties faithfully; that at times the authorities informed the zemindar of the dishonesty and misconduct of the Digwars and had many of them dismissed and others appointed; that when a Digwar was dismissed his jaghir was resumed and the resumed land settled afresh according to the choice of the zemindar; that afterwards the District Superintendent of Police at different times dismissed several of the appointed Digwars and appointed others and at his request the zemindar of Ramgurh used to pay the salary of the said Digwars in cash into Government Treasury; that in 1877 on account of negligence on the part of the former Digwars the authorities thought it proper to make a fresh settlement with the Digwars and all the old Digwars with whom settlement had been made by the zemindar of the Ramgurh estate were dismissed. Plaintiff sets out a *perwana* from the Deputy Commissioner of Hazaribagh, dated the 16th February 1877, by which a new settlement with the Digwars was ordered. He states that after this the Deputy Commissioner instructed Mr. Wilson, formerly Assistant Commissioner, but at the time Manager of the Ramgurh estate, on his (the Plaintiff's) behalf to resume the *baiswan* jaghir lands which were held in possession by the dismissed Digwars in lieu of their salary, and in consideration of their being in possession for a long time to execute lease *pattahs* in their favour for terms of 20 years; that such settlements were offered to the Digwars and accepted by some of them, but that he has not yet got possession.

He claims that from the 16th February the date of the *perwana*, he has been entitled to resume the Digwari lands held by the Digwars who have been dismissed and that his cause of action against them then arose.

Paragraphs 11 to 17, inclusive, of the

NAM NARAIN SINGH v. TEKAIT GANJHU.

plaint set out a case made against the Deputy Commissioner of Hazaribagh which is not involved in the appeal before us. It is however necessary to refer to it. The Plaintiff states that by the *perwana* of February 16th, 1877, he was required to pay to Government Rs. 1,004 per mensem, as Digwari assessment; that in March 1880 he was directed by another *perwana* to pay only the reduced assessment of Rs. 615-11 4 and on the 31st July 1882 by another, to pay Rs. 946-5, each of which successive orders he has obeyed.

The Plaintiff complains that under the Hazaribagh and Lohardagga Police Act, which is Act VIII of 1878 of the Bengal Council, the dismissed Digwars were settled with and assessed as *sikmi* talookdars or under tenure-holders whereas they were not *sikmi* talookdars but Digwars in the special service of Plaintiff, while no Digwari assessment was made on persons who were really *sikmidars* of the Plaintiff whose number is very great; he says the Digwars having been dismissed and the whole amount of salary charged on him under the *perwana* of February 1877 they had no right to retain possession of the service lands; but by the proceedings of the Deputy Commissioner they had been made *sikmi dars* and he feels great difficulty in resuming the lands held by them.

The suit was originally instituted against 182 Defendants included in two Schs. *ka* and *kha*, the first containing the names of the Digwars made Defendants the second, *kha*, being described as persons holding possession of the mouzahs mentioned in the said schedule under mortgages, &c., made on behalf of the Digwars named in Sch. *ka*. The plaint states in para. 18 that they are made Defendants "for when the principal Digwars have no right to hold possession of the disputed mouzahs, the persons who hold under or through them can have no right at all to hold possession. That is the cause of action as against these persons. No case is made against them as alienees without the sanction of the zemindar. The last of the original Defendants is the Deputy Commissioner of Hazaribagh. To these 182 Defendants many more were subsequently added either on their own application or on the application of the Plaintiff. By an order of the Judicial Commissioner of January 9th, 1885, the Plaintiff was allowed to proceed against nine sets of Defendants in so many separate suits, the Deputy Commissioner remaining also a Defendant. As against the others the suit was dismissed with liberty to file a fresh one.

These nine cases after being before several judicial officers were finally heard by Mr. Renny, 2nd Subordinate Judge of Hazaribagh, who dismissed the suits and it is from his decrees that the present appeals are brought. No appeal is brought against that part of the decrees which dismissed the suit as against the Deputy Commissioner of Hazaribagh.

The Sub Judge has disposed of the nine cases in one judgment, noticing the points in which the nine cases, called by him lots, differ from each other.

At the request of the parties we consented to hear the appeal relating to lot I first, and it was argued before us at very unusual length, owing in part no doubt to the imperfect manner in which the case was originally shaped and was

presented by both sides at the hearing in the Court below.

We have thought that in complying so far with the wish of the parties, we have adopted the least inconvenient mode of dealing with a case which, in consideration for the unfortunate litigants, we have felt bound to hear, although the mode in which it has been framed and managed makes it almost impossible to deal with it satisfactorily.

Substantially, the Defendants' contentions in their written statements are, that they are under tenure-holders who themselves had under them Digwars and road patrols. They deny that they rendered or held by personal service as Digwars. They set up an ancestral jaghir and they also contend that the Plaintiff is bound by the proceedings had under Act VIII of 1878 of the Bengal Council and referred to in the plaint.

In evidence they attempted to show that they held under a Mudkati Jaghir granted for services done to the Plaintiff's ancestors against the Pindaris or other marauders. This they undoubtedly failed to establish.

The Sub-Judge has found that it is shown that they hold Digwari Jaghirs which is the case set up by several of the other Defendants and he finds that the Defendants did not refuse to obey orders and did not fail to render service. He finds, therefore, that Plaintiff is not entitled to resume the lands held by the Defendants.

The Sub Judge also holds that the suit is barred by sec. 34 of Act VIII of 1878 of the Bengal Council. We think it unnecessary to determine that question: and as the Government is not represented before us, we abstain from expressing any opinion as to the regularity of the proceedings taken under the authority of that Act by the executive authorities.

Before us the Appellant's contention was that the Defendants had the lands held by them merely as wages to hired servants, and that the Rajah could dispense with the services for which the wages were in this form received at his pleasure, and could then resume the lands: it was further contended that if the performance of the services ceased without the Rajah's own act in dispensing with them, he then also had the power to resume; and further, that as a matter of fact the services had ceased by reason of the Defendants' default, and that therefore the Rajah, from any point of view, had become entitled to resume.

The Respondents contend that even on the Appellant's own case the Defendants have their lands by a permanent tenure, heritable in its nature; that the lands are held subject to certain services, namely, the payment of a small rent, and the performance of the duty of guarding certain ghats. In short that the relation between them and the zemindar was not the hiring of a servant giving him certain land by way of wages, but arose out of grants of land upon the condition of certain services [as in *Rajah Leelanund* v. *Thakur Munoorunjun* (1)]

The Defendants have not produced any grant or *sannad*. The Plaintiff tendered, during the proceedings in the Court below, documents which he put forward as copies of *sannads* granted to the Defendants' predecessors by divers of his

(1) I. A. Sup. Vol. 181 (1873).

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

ancestors. These documents we hold to be inadmissible.

But it is in the 6th paragraph of the plaint expressly alleged by the Plaintiff that the mouzahs mentioned in the schedule were granted by his ancestors to the ancestors of the different Defendants as *baiswan* Digwar Jaghir in lieu of salary for their service as Digwars and their protecting the passes. It has been throughout the Plaintiff's case that the different Defendants held under grants or *sannads*; the questions in the case have throughout been whether the grants were made upon such terms that they were resumable at the pleasure of the Rajah, or if not in what events, and whether, if resumable in any events, such events have happened as to entitle the Rajah to resume and to maintain his present suit for possession.

Before we proceed to refer to the evidence of the Plaintiff, we must observe upon the character of the services to which the term Digwari is applied, for the decisions in the Judicial Committee of the Privy Council and in this Court have been usually with reference to services, termed in the cases decided, Ghatwalli services, and this case has been argued for the Appellant upon the footing that the Digwari service of the Defendants was a service personal in its nature, and not of that public character which formed an element in the determination of the cases respecting Ghatwalli tenures.

Having regard to the nature of the service, to the length of time during which according to the Plaintiff's case, these lands have been held under it, to the extent of the aggregate of the mouzahs (over 400 bighas in this single case) and to what is before us as to the use of the term Digwar in one or two cases which have come before the Privy Council we have no doubt that the Digwari service in this case corresponds closely with what in other cases have been termed Ghatwalli. The terms for all purposes, such as arise in this case, in respect of the nature of the services, seem to be interchangeable. There is nothing in the use of the term Digwar to raise any presumption in favour of the contention that the holders of land by a service so named hold as personal servants of the Rajah. If any thing, the presumption would seem to be the other way.

The origin of these kinds of services and the nature of them and of the tenures held subject to them in this part of Bengal are fully set out in Lord Kingsdown's celebrated judgment, *Lelanund Sing* v. *The Government of Bengal* (2). The term Digwars, so far as we are aware, first appears in reported cases, in *Rajah Nilmoney Singh* v. *Bakra Nath Singh* (3) and in *Nilmoney Singh* v. *Beer Singh* (4). Those were cases relating to the Pachete Raj and in both the report of Lala Khanya, tehsildar of Pachete, made in 1799 was much referred to. On reference to these cases, it is plain that in 1799 the Digwars in the Pachete Raj occupied a position which so far as it differed at all from that of the Ghatwals did so in being superior rather than inferior to that of the Ghatwals of that particular region. It is certain

(2) 6 M. I. A. 101 (1855).
(3) 9 I. A. 104 (1882).
(4) 18 W. R. (P. C.) 321 (1872).

NAM NARAIN SINGH v. TEKAIT GANJHU.

that in the latter of the two cases referred to, the Plaintiff, the Pachete Rajah, made no attempt to dispute that the 57/½ mouzahs held by the Digwars in that zemindari were, as he put it, Government mouzahs and could not be resumed by him; and that Digwars were there treated as servants who were required to perform police service for Government—were, in fact, as stated by Counsel in argument at p. 110, Vol. 9 I. A., appointed by and subject to the Magistrate "and free of all obligations to the zemindar." The Judicial Commissioner in *Beer Singh's case* (4) observes that "there can be little doubt that these rural police were variously named at different times and in different districts, but as guardian of the Ghats or passes they are better known in latter times as Ghatwals."

Probably the term Digwar might be applied to the humblest class of persons engaged in this species of police duty or to a person of much higher social rank who held an estate on this kind of service. So might the term Ghatwal. There might be tabedar Ghatwals, as well as jaghir Ghatwals.

The documents called "copies of *sannads*" are Exhibits 22, 23, 24 said to be copies of *sannads* granted in A. D 1795, Ex. 25 A. D. 1806, Ex. 27 A. D. 1853 and Ex. 28 A. D. 1855. As to these it is enough to say that there is no proof whatever that *sannads* corresponding to them were ever granted or that if they were, these are correct copies of them. They do not even purport to be copies of *sannads* actually executed. There is nothing in them

(4) 18 W. R. (P. C.) 321 (1872).

or in the evidence relating to them to justify the admission of them in evidence; they were properly treated as inadmissible, and as worthless, in the Court below.

Exhibits 2A55 and 2A56 have been held to be inadmissible by the lower Court.

They are said to be copies of lists of Digwars, Ghatwars, and Bouihars for the years A. D. 1799 and 1806 respectively, which lists are said to have been furnished to the executive officers at the time in accordance with their duty towards Government by the Rajahs of Ramghur.

The originals of which these documents are put forward as copies, were called for from the Deputy Commissioner and were not produced and these papers are it was contended admissible as secondary evidence of them.

They were admitted by the Acting Judicial Commissioner who sat during that part of the hearing of the case at which they were put in, so far as his marking them as evidence in the case can have that effect, and they do not appear to have been objected to at the time. But according to the course pursued during the conduct of this case, all the documents produced seem to have been marked and admitted *de bene esse*, all questions as to their admissibility being reserved until the case should be finally disposed of after arguments.

We do not find that in the memorandum of appeal any objection is taken to the rejection of these documents on the ground that they had been admitted without objection on the part of the Defendants and Defendants certainly did argue before the lower Court after evi-

dence had closed, as we understand, that those papers were not admissible. We think we must treat them as not precluded from pressing that objection in appeal before us.

As to these documents it is to be observed.

1. That there is no evidence that the lists of which they purport to be copies were actually sent to the Government officials.

2. That there is no evidence that lists similar to these in form, and in the nature of the very minute particulars given, were as a matter of usage, or of duty, sent by the Rajahs to the Government in former or in recent times. Reg. 12 of 1807 was not in force at the date which the latter of these lists bears; and the Regulation then in force, 22 of 1793 did not require such lists as these are to be furnished.

3. There is no evidence that copies of lists such as these were regularly kept according to the course of business (assuming that there was a course of business) in the Rajah's *sheresta*. No other copies before or after these in date, are produced by the Plaintiff similar to these nor any list of any kind until the comparatively recent date of A. D. 1864.

4. There is nothing except their alleged age to bring these documents within sec. 90 of the Evidence Act. They do not purport to be written by any known person, nor do they bear upon the face of them any form or mode of authentication of any kind. Bukshi Bhugwan Das says he heard from Joy Kissen they were prepared in Raja Moni Nath Singh's time. That is all.

5. Lastly as to their credibility, they are wholly different in their character from an undoubtedly authentic list, Ex. A to A84, put in by the Defendants, and produced from the records of Government to which we shall refer later on.

They were used before us, and, if they are not genuine, they must have been framed to support the contention that the Digwars whose holdings are mentioned in them were only, as the Plaintiff now contends, subordinate Digwars holding the land possessed by them as wages. They would not, in our opinion, establish that contention if they were accepted. They may well be construed as limited to this:—As setting out an estimate on the one side of the value of the land held by Digwari service, and on the other of the number of men who are to be kept up by the holders of the land granted. In early times—and these lists if genuine run back nearly 100 years, and probably relate to land held long before on this service—the value of the land let out on this sort of service would naturally coincide tolerably closely with the money value of the services for which it was granted. In truth, we are disposed to think, that these lists if admitted might, from some points of view, rather support the Defendants' than the Plaintiff's case. There is however no evidence that lists of this character were ever made out. Nor have we any means of judging whether, if lists of this kind ever were in use, those before us have or have not been given terms of expression calculated to give colour to the Plaintiff's case that the Digwari service was originally at any rate a personal service rendered to his ancestors.

We observe that the witness Bukshi

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

Bhugwan Das whose employment it is to look after the Plaintiff's cases, says that the list made by him and Joy Kissen Das was prepared from those two lists and other papers. We gather that this must be the list 2A21 : he says the list he and Joy Kissen made was prepared in pursuance of orders received from the thakbust authorities when conducting the survey in A. D. 1859, which survey lasted for some years, certainly up to 1864. No doubt a list in the form of 2A21 was sent in 1864 S. But how long before that date the lists dated A. D. 1799 and 1806 were in existence, there is nothing to show.

We heard the Appellant's Counsel upon these documents. We thought it possible that they might be let in as statements against interest inasmuch as they go to show an interest in the Defendants' predecessors in the mouzahs in question. But there is nothing to show who made them, or to connect them with any former Rajah as declarations made by him. On considering them we feel constrained to reject them as being destitute of any of those guarantees of genuineness (whether as to themselves or as to that of which they are offered as secondary evidence) which the law requires.

Next as to Ex. 2A21. Its original was, as we have said—or is stated to have been—prepared by Bhugwan Das and Joy Kissen. Its value so far as it has any is in the *kyfeut* which begins with the words "There is no Ghatwalli in my estate. The Digwars are appointed as servants by me, &c.," which we are told is the correct translation.

The original was called for from the Deputy Commissioner's Office, and after about a year and a half Ex. D21 and a letter D18 were extracted from that office. D21 which is in the Persian character is identical with 2A21 save in the *kyfeut*, which is wholly different, and is unfavourable to the Plaintiff's case. It says "the Digwars are under the person in possession and the patwaris are not under me" indicating that independent position of the Defendants or Digwars which the Plaintiff repudiates.

There can be no doubt that Rajah Ram Nath did send such a list as this. D18 which is the covering letter which accompanied it, is proved to be his and on it there is an order for the transcription into Persian character of the Hindi list which it covered.

This order is in the handwriting of Bajrung Behari who was alive when the suit was heard and in Tirhoot. He was not called. There is nothing save the existence of the list in the Government records, to connect D21 with the Persian transcription ordered ; and no proof that any such transcription was made. There is absence of proof of the loss of the Hindi original, but very loose evidence of search. Still, slight as it is, we think there is enough evidence to render D21 admissible, *valeat quantum.*

So far as it goes, it slightly aids the Defendants' case and contributes to throw doubt on the Plaintiff's Ex. 2A21.

But 2A21 is itself of so little value (if it has any) that it is scarcely material to discredit it. So far as it goes, however, it is completely discredited, or contradicted (it matters little which) by A1 to A84.

That exhibit is an undoubtedly authentic list, produced from Government

NAM NARAIN SINGH v. TEKAIT GANJHU.

records, each page of which contains or contained the seal of Rajah Ram Nath. It was made in A. D. 1843 and one of the headings of the different columns into which it is divided is "name of Laghnedar, Alakidar and Ghatwal." In that column of the document appear the names of the different predecessors of the Defendants, as we shall presently notice.

This document confirms the *kyfeut* of D21; and on the evidence, so far as there is any, that exhibit must be held to be correct, and 2A21 spurious so far as it differs from it.

Of the principal documents relied on by the Appellant before us, there remains but the two copies of *ekrarnamas*, 2A29 and 2A30. The latter is a registered document it is proved. The *ekrar-nama* 2A29, dated 8th Assar, Sudi 1910, corresponding with A. D. 1853, relates to three of the villages in question. We were referred to the evidence of Radhika Das, page 58, of Domun Lal, page 88, and of Bissumbhur Das, pp. 109-10, as proving this document. The first two witnesses do prove the handwriting of the document: but Bissumbhur Das proves the execution of an *ekrarnama* by Tekait, Pertap, Baiju and Gendawri Ganjhu. The document in question purports to be by Maniar Cheta Tekait and Gandawri Ganjhu. It is of little consequence. Were this document proved, it would do no more than record a re-settlement of three Digwari Mouzahs from which the Digwars had been for a time removed in consequence of orders from the Government officer, or as he is called in Ex. 26 the attachment *perwana*, "the Court." We shall refer to this again presently. Most of the documents set up by the Plaintiff must therefore in our opinion be rejected. But although we reject them, we ought to refer to the desired use of them, as it bears upon one of the two chief points in the case to which some of the oral evidence also is directed. This point relates to the alleged right of resumption by the Rajah at pleasure.

One of the tests applied in the Ghatwalli cases to try the powers of resumption asserted by the zemindar, was, whether the service on which the land was held was public, or personal to the zemindar [see the case in *Raja Nilmoney Singh Deo* v. *The Government* (5) and *Nilmoney Singh* v. *Beer Singh* (4) in the Privy Council]. For if the service be personal to the Rajah, as in the last case was alleged, it may be that the Rajah dispensing with it or the occasion for it ceasing may resume: we say "may be," for perhaps even in that case it may not in every case necessarily follow that he can do so. We need not discuss this.

It was, however, the aim of the Appellant to show that the services in the present case were personal. Hence the argument that where in the statement in the lists (for though we reject them, we must refer to this in stating our view of the argument) the statement "for self" appears, that is an indication that the service was personal, and that the holder of the mouzah or mouzahs was bound to personally discharge it. We do not, of course, attribute to the Plaintiff such a confusion of terms as would be involv-

(4) 18 W. R. (P. C.) 321 (1872).
(5) 6 W. R. 121 (1866).

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

ed in the suggestion that because the service was to be that of the Digwari tenant personally, he would therefore be only bound to a service personal, and not public, within the meaning of the decided cases. But we understand Plaintiff's argument to suggest, that, where service by the Digwari holders in person may appear to have been stipulated for, that stamps such a character on the holding as to show or tend to show that such Digwari holders were of a subordinate order and were mere servants of the Rajah, carrying out under his personal orders the service which he was bound as between himself and Government to have performed.

To this contention (if we rightly apprehend the learned Counsel for the Appellant as making it) there appear to us to be two answers.

In the first place, in the lists which are, as correct statements of fact and apart from the *kyfeut*, undisputed, *i e.*, 2A21 and D21, the Digwari holders are less in number than the sirdars mentioned in the fourth column, in some cases. Take the first named persons in 2A21A, namely, Maniar and Tekait. They are the Digwari holders: they are two; No. 3 Chitu Ghanju is one: the Sirdars are two. No. 17, two Digwari holders, 3 Sirdars. See also Nos. 20, 27, 36, 41, 42, the Sirdars are 4. Take the *ekrarnama* 2A30: the Digwari holders created, or recognised, in the transaction there recorded are two: the Sirdars are eight. There are other examples in the exhibits in the case relied on by Plaintiff; but these are enough.

In the second place personal service rendered in commanding the guards of passes or roads does not necessarily involve the holding of a subordinate position such as to argue a merely personal relation to the Rajah. It may be consistent with the enjoyment of considerable social rank. It certainly was in the case of the Ghatwals of Beerbhoom whose office may have been originally one of personal service, although ultimately it came to be one which might be held even by a female. In the present case, the magnitude of the holdings, to which we have before adverted, seems to us to negative the existence of any such humble relation between the Defendant and the Rajah such as he asserts, and as they eagerly repudiate. In the documents other than the lists, whether those rejected or that which has been admitted, *viz.*, the *ekrarnama* of 1875, there is not a trace of submission to expulsion from the holding granted save in the case of non-performance of the service upon which the holding is granted.

Then as to the oral evidence upon the question as to the right of the Rajah to resume at pleasure, or notwithstanding the tenant's competence and readiness to perform the services.

As to this, we must limit ourselves to stating the conclusion at which we have arrived. We think it clear that the Appellant has not shown any exercise on the part of the Rajah and his predecessors of the right to resume save in cases in which the holder of the lands granted failed to perform the services to which he was bound by the conditions of his tenure. In such cases resumptions have been shown to have taken place, followed in almost

NAM NARAIN SINGH v. TEKAIT GANJHU.

every instance proved by the letting of the land resumed to other persons upon similar terms to those under which it had been previously held; in one case a part of the land previously held by Digwars seems to have been otherwise applied by the Rajah. In but one did the whole of the land resumed for default remain in the Rajah's hands. Another Digwar added the service to his own.

We think it also clear, from the plaint, and the evidence, taken with the plaints, that the power of Government, although generally exercised through the Rajah was always recognised as supreme with respect to the supervision over the Digwars in regard to the discharge by them of their duties. In the evidence for the Appellant the acts of the Rajah with respect to defaulting Digwars are spoken as his, and no doubt in form they were, but we have no doubt that in effect he acted under the impulse and by the authority of Government and as representing it, or rather, the Commissioner or Agent General for the time being in that respect.

Upon the whole, we are of opinion that the evidence documentary and oral fails to show that the Rajah ever possessed or exercised a right to dismiss the Digwars and to resume the Digwari grants, save in cases of default or that by the terms under which persons held Digwari grants, any such power was given or reserved to the Rajah.

It is argued however and this is the second point in the case that the lands are in the zemindari; that the Rajah is *primâ facie* entitled to them; and that unless the Defendants establish the under-tenure which they claim, is entitled to a decree for possession.

As to this contention we think we must have regard to the case made by the Plaintiff, and the real controversy in the suit. No doubt the suit was ill framed, and ill-managed on the Plaintiff's side and on the Defendant's, too. Had the Plaintiff's suit been treated in this appeal, as perhaps it might have been, it may be that it would not have survived the opening. The whole case bristles with objections to any attempt at disposing of it on strictly applied rules. We think we ought to deal with it, as far as we can, upon the real dispute between the parties that is, whether under the circumstances, the Rajah has a right to resume as the executive officer appears to have told him he had. The right to resume is the sole right claimed by him and whether he has that right or not is in truth the sole question disputed.

We must look at the statement of facts on which he claimed that right. The Defendants are entitled in our opinion to the benefit of any admissions made by him in claiming it.

He claims that the Digwars have no right to hold and that therefore, *i.e.*, for that reason alone, the persons who hold under or through them can have no right at all to hold possession. So far, as to the Defendants deriving title from Digwars the case against each is the same. He makes no claim in this suit by reason of any alienation made without his assent, supposing that he could do so.

He claims against the Defendants as being persons who hold under grants to their ancestors from his own. His case is that as a matter of fact the mouzahs held by the Defendants have descended

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

from father to son. It is natural that a case should be a little modified in appeal in the hands of more instructed advisers contemplating, perhaps, with impartial disapproval the Plaintiff's and the Defendants' mode of shaping their case. But what we have stated was the Plaintiff's case throughout. His witness, the record keeper Radhika Das, says at p. 62 "The mouzahs which have been sued for have descended from father to son;" and we think there is no doubt on the evidence that as a fact these mouzahs have as a rule so descended.

For the decision of this case therefore we must take it as admitted by the Plaintiff that the Defendants, whoever they were, took and now hold under the terms of the original grant whatever they were; and that any defence open to the original grantees is open to them. Ex. A1 to A84 appears to us to be conclusive, coupled with the Plaintiff's evidence and admissions on this question. It is clear from it that Defendants' predecessors had a service tenure at a fixed rent, 45 years ago, in these very mouzahs. The nature of the service is amply proved outside this document. But it proves that the tenure was by service and at a fixed rent besides, a holding somewhat inconsistent with the idea of an enjoyment of a piece of land as wages.

In truth the whole case points but the one way, in our opinion. It is to be lamented that the course described by Chief Justice Garth in *Leelanund* v. *Thakoor Munrunjun Singh* (6) with regard to the Khurrukpore Raj should have been followed so minutely in the present by the executive officers, and unfortunately, by the Bengal Council. We cannot help fearing that an ill-drawn Act, VIII of 1878, and ill-conceived proceedings of the executive before and after its passing, have caused the present unfortunate litigation.

We think upon the evidence and the authorities (cited below) that the Digwars on this estate held either first under Government, which there is some ground to suppose they did, or second under the Rajah subject to performing the Digwari service; that there is no proof of any default by them, that the assessment by the Government of them under Act VIII of 1878 is a continuance of their service and that in no case can the Rajah take possession against them.

We have said that Exhibits A1 to A84, coupled with the Plaintiff's evidence and admission, are conclusive as to the particular jaghirs included in them upon the questions arising in the case. We may however add that, having regard to the numerous decided cases with regard to the local police grants in the district, and having regard to the history of the district as set out in the books of authority referred to, it is impossible to shut our eyes to the fact that a customary tenure under perhaps different names exists along the border of the whole of this hill-country in this part of Bengal, the existence of which species of tenure in that country cannot be disregarded in construing the relation of parties situated as the parties in this case are. Nor should we disregard the fact, brought out by the learned Counsel for the Appellant when he was kind enough to furnish us with a large scale map of this region, that these mouzahs in question are to be

(6) I. L. . 3 Cal. 251 (1877).

NAM NARAIN SINGH v. TEKAIT GANJHU.

found ranged in the near vicinity of, and in a manner ranged along the road, the ghats of which (Karo-Behara) the tenure-holders were bound by their service to guard. We need not deal at length with the cases cited. We think it clear that, having regard to Leelanund Singh's cases, the Khuruckpore cases, [*Lelanund Sing* v. *The Government of Bengal* (2), *Raja Lilanund Sing* v. *The Government* (7), *Rajah Leelanund* v. *Thakur Munoorunjun* (1), *Leelanund* v. *Thakoor Munrunjun Singh* (6)] and the Pachete cases [*Raja Nilmoney Singh Deo* v. *The Government* (5), *Nilmoney Singh* v. *Beer Singh* (4), *Rajah Nilmoney Singh* v. *Bakra Nath Singh* (3)] which we have already referred to, the claim made by the Rajah in this case has been, in so many words, condemned by anticipation in deciding the cases about Ghatwalli tenures.

One word as to the Act of 1878, Bengal Council. It is contended that the service to which the Digwars were appointed ended by the default of the Digwars in 1877, and the dissatisfaction of the Government with the service rendered expressed by the executive officers and recorded in the *Gazette* is pointed to as proof of that default.

We entirely agree with the lower Court in considering that no such default is shown. It amounts to no more than the substitution for an old fashioned and imperfect system of police of a new system supposed to be of a superior quality. It is in making that substitution that the executive officers assessed the Defendants, at first authoritatively before the passing of the Act, and subsequently acting or supposing themselves to act under its provisions. We think that it is impossible, having regard to the fact that these Digwars were assessed for road police purposes in an amount, at any rate until 1882, immensely beyond any burden which, in the form of supply by them of patrols, had formerly rested upon their holdings, to regard this system as anything but a continuance in the form imposed by statute of the discharge of their previous public duties, and upon that ground alone we hold that no default can possibly be held to be proved in this case from the action of Government, while of default by them in the conduct of the old fashioned system, there is no adequate proof whatever.

Lastly as to the effect of the *ekrarnama* of 1877, that document applies, as we understand, to the present case alone. There is no such document in the other cases shortly to be heard. One of the two grantees whose obligation is recorded in that *ekrarnama* is a party to this appeal; and we think it impossible, having regard to the terms of that document, to hold that in the absence of the default as referred to in that document and so long as the grantee or grantees are willing to discharge the service prescribed to them, the terms of that grant, at any rate during their lifetime and that is enough to dispose of the present case, are such as to render it possible for the Rajah to resume as

(1) I. A. Sup. Vol. 151 (1873).
(2) 6 M. I. A. 101 (1855).
(3) 9 I. A. 104 (1882).
(4) 18 W. R. (P C) 321 (1872).
(5) 6 W. R. 121 (1866).
(6) I. L. R. 3 Cal. 251 (1877).
(7) 2 B. L. R 114 (1866).

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

against them. As we have said we have dealt with these matters for the present as not formally disposing of the appeal, although substantially what we have just now said will be the judgment in the case. The points which we have now determined will govern the hearing of the appeals in the other cases; and we shall formally pronounce the judgment in accordance with the terms we have now laid down when deciding the other appeals.

APPEAL NO. 192

(*Called Lot II in the judgment*)

In this case there are, 1st an *ekrarnama*, p. 137, put in by the Plaintiff, 2nd Sawan Budi 1863; 2nd a *sannad* of 6th January 1871 by Colonel Money acting under the Court of Wards, p 326; and 3rd a *perwana* by the Deputy Commissioner to the Rajah, November 1865. The other documents are inadmissible The *ekrarnama* bears the character of that noticed in the preceding case; namely that admitting liability to expulsion from the *jaghirs* granted in case of default; it does no more.

The *sannad* is of too recent a date to be of much value. At most it is a reletting, or a confirmation of 5½ mouzahs to the son of deceased holder Bhao Singh in accordance with custom of the Maharajah's cutcherry. It certainly could not operate as a surrender of a tenure already existing such as form the exhibit next to be referred to. The *perwana* of 1865 is of some importance as an act of authority by the Deputy Commissioner calling upon the Rajah to compel Bhao Singh, the jaghirdar, to pay the Digwars under him their salaries; and requiring the Rajah, "should Bhao Singh act contrary to the conditions of the Ghatwalli settlement," to take action. It confirms the view expressed by us in the first case, as to the nature of these tenures, both as being held by public service, and that service being of a Ghatwalli nature.

In A38 Bhao Singh's name appears as *jaghirdar* of those 5½ villages. They were plainly held on Ghatwalli service to be done upon the Tesri ghat.

APPEAL NO. 193

(LOT V)

As to the right of resumption this case stands on the same footing as those already dealt with.

The names of the fathers of the first 3 Defendants appear in A66 as *jaghirdars* of the mouzahs claimed: they were Goorodyal, father of Roopdyal, Sodu Nath, father of Chet Singh, and Ramdyal, father of Pahari.

These Defendants are alleged by the other Defendants in this case to have assigned to them, whether as *mokuraridars* or as mortgagees in possession, interests in possession in the whole of the mouzahs in dispute. The fact of these partial alienations was not disputed in appeal before us and this circumstance no doubt accounts for the confession of judgment by two out of the three principal Defendants. But for the reasons stated in the previous cases we think Plaintiff not entitled to the *khas* possession claimed.

APPEAL NO. 180.

(LOT III)

As to appeal No. 180, Lot No. III in the judgment of the lower Court, there is no doubt as to the execution of the *kabuliyat* by Purdhan Ram Lall who,

NAM NARAIN SINGH *v.* TEKAIT GANJHU.

nevertheless, takes an active part in the defence of these suits, filing a written statement in which the case applicable to the body of the Defendants is set up.

Now, it is to be noticed, that the suit is not brought as against the Defendant upon the lease and *kabuliyat*. Had it been, it would have been fairly open to the Defendant to apply to have the suit as against him tried separately. The point is not merely a technical one. The suit as originally framed was a suit brought against a whole community of persons on one ground said to be applicable to them all; and the allegations in the 9th paragraph of the plaint as to the execution of leases and *kabuliyat* are, in truth, merely statements of facts made in support of the general right claimed: it is not alleged in that paragraph that this Defendant or any of the Defendants set out in the list to the plaint had taken leases nor are he and they sued as lessees. In short the suit is not brought against this Defendant on the *kabuliyat*: and he is not called upon to consider, prepare and make any defence respecting it.

Upon the case before us we are of opinion, further, that a good defence to the suit upon the lease, had it been sued upon, might most probably be made. Such of the Digwars as submitted to take leases, did so, according to the Plaintiff, upon being called together by Col. Boddam and asked to give up their Digwari lands and take settlements. We should hesitate before allowing these persons to be bound by leases accepted by them under such circumstances. We are however relieved from the necessity of either deciding such a matter, or of sending back this particular case for evidence as to what actually led to the execution by this Defendant of the *kabuliyat* and the acceptance by him of the lease, by the fact that no suit is brought against him on this document, and no relief claimed against him on the strength of it.

APPEAL NO. 181.

(VII)

This case has no special feature in it and must be decided on the same grounds as the first.

APPEAL NO. 182.

(VIII)

This case stands on the same footing as No. 193. Original owners admit claim, but have assigned.

APPEAL NO. 183.

(IX)

Save as to 4 annas same as the last case. As to 4 annas Plaintiff is entitled to a decree against the Defendant Danukhdari as to whatever rights that Defendant may have as between himself and the Defendant Kunjbehari, as to which we of course say nothing. As against Kunjbehari the appeal must be dismissed.

The result in all the cases, except Appeal No. 183, is that the judgment of the lower Court must be affirmed and the appeals dismissed, with costs in all of them other than Nos. 181 and 182, which we dismiss without costs the Respondents not appearing. In Appeal No. 183 the decree will be in the terms of our judgment in that case.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JANUARY 13, 1908. [No. 9

Contents.

NOTES

THE PROVISION IN CL 18 OF THE INDIAN LIMITATION Bill has, except for an error of omission which we notice below, our entire approval. The Select Committee in their report on the Civil Procedure Code Bill of 1903, justly observe that the purpose of sec. 424 of the Civil Procedure Code (which requires two months' previous notice to be given to the Defendant in all actions against the Secretary of State or any other public officer) is "to give notice and facilitate compromise, but not to shorten the period of limitation." The clause accordingly provides for the exclusion of this period in computing the period of limitation for such suits.

THIS REASONING HOWEVER APPLIES EQUALLY TO SUITS which have to be instituted, after notice, against Police Officers and Municipal employees for wrongful acts committed in the course of the discharge of their duties. See, for instance, the provisions of sec. 42 of the Police Act V of 1861 and sec. 363 of the Bengal Municipal Act III, B. C. of 1884. Sec. 634 of the Calcutta Municipal Act III, B. C. of 1899, may also be noticed in this connection. But the interpretation of the section as given in *The Corporation of Calcutta* v. *Shyama Charan Pal*, 9 C. W. N. 217, has in most cases the opposite effect of extending the period of limitation. We think that the terms of the clause should be made more general so as to cover all suits in which a notice of the claim has to be given to the Defendant as a condition precedent to the institution of the suit, provided of course such notice itself does not, as in ejectment suits against tenants, constitute the cause of action.

UNDER THE PRESENT CODE OF CIVIL PROCEDURE AS also under the amending Bill all Courts are to pronounce judgment in open Court, but as far as we are aware this rule is seldom observed in the Mofussil Courts. There, as a rule, judgments written at home are brought into Court, and only the result is communicated to the pleaders or parties. This provision of the law should be strictly complied with, principally on the ground that arithmetical, clerical or other errors, and sometimes very serious ones, can be corrected by the pleaders then and there in case judgments are read out in open Court. The judgments should, moreover, be signed after they have been read in Court. In the present state of Mofussil practice applications have frequently to be made for correction of such errors resulting in the waste of the Court's time as also in throwing away a considerable amount of unnecessary costs. We must say, however, that the Subordinate Courts find it necessary to depart from the rule because they are always hard pressed for time. The Legislature may well represent to the Executive Government the need for relieving the pressure on these hard worked officers. Such shortcomings as these have arisen from this one cause.

RULE NO. 2 OF ORDER VI WHICH IS BASED UPON Order 19, Rule 4 (of the English Rules), provides that 'Dates, sums and numbers shall be expressed in figures.' The English Rule is as follows:—"Dates, sums and numbers shall be expressed in figures *and not words*." We are not in favour of the adoption of the English rule in this country. Plaints, written statements and other documents are often drawn up in vernacular and sums and numbers are expressed in the vernacular notation which when referring to land vary in different localities. It is therefore all the more necessary that the quantities should be expressed in words and not

in figures only. Even sums of money are sometimes expressed in pies and sometimes in gundas and therefore unless they are expressed in words they are likely to lead to confusion.

THE PROVISIONS CONTAINED IN SEC. 310A, C. P. C., will be found in Rule 88 of Order XXI with certain alterations. Similarly Rule 89 embodies the provisions of sec. 311 with certain alterations. Under Rule 88 when immoveable property is sold "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale may at any time within thirty days from the date of sale apply to have the sale set aside on his depositing in Court . . . . ." a certain amount. The expression "holding an interest therein" does not seem to be sufficiently expressive. It may be questioned hereafter whether the above expression includes a lessee or a mortgagee. It seems to be preferable to use the same expression as in Rule 89, *viz.*, any person whose interests are affected by the sale. We do not see any reason why a person whose interest is not affected should be allowed to come in.

THE WORDS USED IN SEC. 310A ARE AT PRESENT AS follows :—*Any person whose immoveable property has been sold* . . . . may at any time within thirty days from the date of sale apply to have the sale set aside. In sec. 311 the words are the same, *i.e.*, "any person whose immoveable property has been sold" (besides the decree-holder). Both sections contemplate the same classes of persons. Having regard to the word used in the proposed amendment it may be questioned whether a person who may come in under Rule 88 could also come in under Rule 89. But reference to clause (2) of Rule 89 would seem to indicate that the Legislature intended by the two rules to provide two alternative remedies to the same classes of persons. Further, the amending Rule 88 may easily be construed as excluding persons who by succession or otherwise may acquire the rights of a person entitled to apply under the rule, within 30 days from the date of sale. Such a result could hardly have been contemplated by the framers.

THE LATE MR. L. P. PUGH.

It is with deep sorrow that we announce the death of Mr. L. P. Pugh, the most senior member of the Calcutta Bar. He was born on the 3rd of August 1837 and passed away in peace on the 6th of January 1908. He was thus over 70 years of age when he died. It was only during last year that he rapidly broke down in health and retired from the High Court. Before that his stately figure, dignified manners, natural courtesy and good nature, his patient industry and legal erudition had secured for him a unique position at the Bar. He was held in great regard and high respect by the Bench, the Bar and all sections of the community both European and Indian. He had received his early education in Winchester College which is the oldest of English public schools and finished his academic career at the Oxford University of which he was a Master of Arts. He got called to the Bar at the Lincoln's Inn in November 1862 and joined the Calcutta Bar in the following year. He was then known as Evans and the earlier references to Mr. Evans in the law reports refer to him, and not to his brother, Sir Frederick Evans, who joined the Calcutta Bar later on. In 1868 he assumed the name of Pugh by Royal License. From 1868 to 1885 he held high offices in his native county of Cardiganshire in Wales. He was a Justice of the Peace and also a Deputy Lieutenant of his county and represented Cardiganshire in the House of Commons as a Liberal Member from 1880 to 1885. He also practised for a time on the Chancery Side of the High Court in England. All this varied experience and deep study had made a very sound jurist of him. As a consulting lawyer on questions which lay outside the pale of ordinary practice or the Anglo-Indian Codes, he had no equal in this country. It was at his instance and through his advice that some very interesting questions of International and constitutional law were taken before the Judicial Committee of the Privy Council in *Yusufuddin's* case (2 C. W. N. p 1) and their Lordships held that the Independent Native Princes in ceding certain jurisdiction to the British Government along the Railway lines in their territory had not parted with their sovereign right over the same. When no senior Counsel was available for defending Mr. Tilak at the sedition trial before the Bombay High Court, Mr. Pugh readily accepted his brief and zealously defended him. His liberal views did not undergo any change even in the autocratic atmosphere of India. During Lord Elgin's Viceroyalty when the Chalmer's Sedition Bill was introduced for amending the Indian Penal Code and the Code of Criminal Procedure, Mr. Pugh, as head of a committee, drew up representations on behalf of the Bar pointing out the highly objectionable nature of the intended legislation. Because of the liberality of his views and his sterling independence he commanded the confidence of the people and also the respect of Government. He was appointed to officiate as the Advocate-General for some time and, later on, a member of the Viceroy's Council. It is said that many years ago he was offered a seat on the Bench of the Calcutta High Court and that he refused it on the ground that it was merely an officiating appointment. Had he been made a permanent Judge of any High Court in India, he would have surely added to its strength, prestige and learning. We cannot conclude without an acknowledgment of our deep sense of obligation to the illustrious

deceased who as the president of our Editorial Committee guided us in conducting this journal for many years. We deeply mourn his death and convey our heartfelt condolence to the bereaved family.

CURRENT INDIAN CASES.

KHADHU SINGH *v.* BALJIT SINGH, I. L. R. 29 All. 423. *Civil Procedure Code, sec. 506.*

Where the submission to arbitration was signed by certain Defendants personally and by the pleader as representing the rest of the Defendants, one amongst whom had not signed the *vakalutnama*, *held*, that the reference was invalid and consequently the award was not binding on any one of the parties.

SHAM LAL *v.* MISRI KUNWAR, I. L. R. 29 All. 426. *Civil Procedure Code, secs. 521, 522—Appeal—Award.*

An appeal lies against a decree founded upon an award on the ground that it was not delivered by the arbitrator and that in fact it was no award.

RAMJIWAN *v.* KALI CHARAN, I. L. R. 29 All. 429. *Civil Procedure Code, sec. 506.*

A *vakalutnama* in general terms is not sufficient to authorise a pleader to make a valid application for reference under sec. 506, C. P. C., but when the order for reference was made upon such an application and the party complaining acquiesced in the submission the award was not set aside on revision.

MAHARAJAH OF BENARES *v.* NANDA RAM, I. L. R. 29 All. 431. *Instalment bond—Waiver.*

In an instalment bond it was stipulated that on failure of payment of one instalment the creditor would be able to sue for and recover the entire amount of instalments then remaining unpaid, *held*, that the creditor had the option to waive his right.

Reviews.

THE LAWS OF ENGLAND. *Being a complete statement of the whole law of England by the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great Britain 1885-86, 1886-92 and 1895—1905, and other lawyers. Vol. I. London. Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers. 1907.*

When Lord Halsbury laid down his office of Lord High Chancellor for the third time, it was little expected that at his time of life and at the end of a career of strenuous labour he would engage himself in the stupendous task of working out a comprehensive account of the whole law of England. But nothing is extraordinary for a man past eighty who to this day is found regularly sitting in the highest Court of Appeal and disentangling intricate questions of law and fact and coming to a decision amid the conflicting views of the Courts below and of the opposing counsel before their Lordships' Bars.

In the arduous task of editing this great work, his Lordship is assisted by lawyers of great eminence. The contributions, too, are by lawyers of proved ability and repute. But the master-mind of Lord Halsbury is throughout discernible, even through the details of this work. His Lordship has not only contributed a very luminous introduction but has had the whole of the work passed under his supervision.

The present volume is the first instalment of this great work. It fulfils the high expectations which its authorship naturally raises in one's mind, and bears out the claim made in the publishers' announcement that it is "neither an encyclopædia, a digest of cases nor a dictionary. It rather takes the form of a series of treatises on every branch of the law by experts in each particular branch." The form of a dictionary is retained in so far as the arrangement of the titles is alphabetical. But only the most comprehensive titles have been selected for exhaustive treatment and cross-references are freely given both for the purpose of avoiding repetition as also to supply the links necessary for connecting the subjects dealt with under different titles into a harmonious whole. It is not within the scheme of the work to include historical and theoretical matter and they have been excluded except where they are essential to the right understanding of the existing law.

The statement of the law proceeds, as in some of the most approved text books of English law, unhampered by the citation of reasons, illustrations and authorities, which are relegated to notes at the foot of the page. But the "notes," sometimes exceed the "statement" in bulk, a result which could not well be avoided seeing that it is aimed to present a *full and complete* statement of the law in a *practical* and readily accessible form.

The titles dealt with in the present volume are:—Action, Admiralty, Agency, Agriculture, Aliens, Allotments, Animals, Arbitration, Auction and Auctioneers, Bankers and Banking. From the importance given to Agriculture, Allotments and Aliens, it will be seen that the authors have been fully alive to modern developments. It will interest those who observe the signs of the times to note that "Building Societies," "Clubs," "Education," "Friendly Societies," "Income Tax," and "Intoxicating liquors," will be among the titles to be specially dealt with.

The present work, we believe, is itself a sign of the times. Reform of the law has been talked of, ever since Bentham delivered his caustic and not always well balanced criticisms of the law of England as it was in his time. Reform accomplished has, however, consisted merely of legislative enactments

of an empirical character and not always well advised. As Gladstone truly said you must have first a comprehensive account of what law is before you commence amending it, and the present editor justly observes that a great many law reformers have failed because they have not observed the necessity of this preliminary inquiry. It is precisely this preliminary inquiry that has been undertaken in this work.

This again, it may be noted, is the first instance of a work of this nature being initiated not by the State but by the private enterprise of a body of lawyers. The reform of law which is still in the air will not, we believe, be the work of a state legislature but of the lawyers themselves, but lawyers who will have drawn their inspiration not so much from old books and authorities as from a living study of the complex and rapidly evolving social fabric of the present day which in its working is bringing into existence new ideas of rights and obligations, not dreamed of by Bracton or Lyttleton and not foreshadowed to Bentham or Mill.

The learned editor truly observes that the great difficulty is to state the law as it is without giving such an authority to the mode of its statement as to make itself equivalent to a statute. From this point of view also it is fortunate that the work has not been undertaken at the instance of the Legislature.

The work, we believe, will be specially appreciated in India where the practitioner in law cannot ordinarily do without a considerable number of English text books and yet finds that he does not possess all that he needs for purposes of reference. In the present work, he will find just what he has been wanting "a complete statement of the whole law of England."

THE CONSOLIDATED DIGEST OF INDIAN CASES, 1901—1905. *By S. Srinivasa Aiyar, B.A., B.L., Vakil, High Court, Madras. Printed at the Ananda Steam Press, Madras. 1907.*

Woodman's Digest is brought up to the year 1900. The present work consolidates and digests the cases reported in authorised as well as unauthorised reports between the years 1901 and 1905. We have been familiar with Mr. Aiyar's annual compilations. The present work does not merely consolidate the annual digests for the years 1901 to 1905. The whole matter has been rearranged, as far as possible in logical sequence. The notes of decisions are reasonably concise and altogether the digest is up to the standard of the best works of its kind.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Edmund and others* v. *Martell.* Before the LORD CHIEF JUSTICE, LORD ALVERSTONE and LORDS JUSTICES BUCKLEY and KENNEDY. 28th October 1907.

Costs—Depriving successful party of costs—Judicial discretion—Leave to appeal—Judicature Act, 1873, sec. 49.

Plaintiffs brought this suit against the Defendants who were lessees having liberty to erect three dwelling-houses on the demised land and no more, for alleged acts of waste. The Judge found that the Defendant had converted one room into a shop entailing subsidiary alterations and that a stable had been built by an under-lessee to the Defendant's knowledge. The lease contained no covenant prohibiting the lessee from turning a dwelling-house into a shop nor did it confer any power upon the lessee to erect shops or to convert dwelling-houses into shops. There was a covenant however by the lessee not to carry on any noisome or noisy trade or business on the premises, but no breach of covenant was alleged in the present action. The Judge, Mr. Justice Sutton, held that no injury or damage had been caused to the reversion, that on the other hand the inheritance might have been improved. This was a case of "ameliorating waste" and he accordingly gave judgment for Defendant, at the same time depriving her of her costs on the ground that the Defendant should have approached the landlord before making alterations.

Held—That this was not a ground for depriving the successful party of the costs of the litigation. The Judge had not exercised his judicial discretion at all in this matter. No leave to appeal was required in such a case and the present appeal lay notwithstanding that no leave had been taken.

Mr. Upjohn, K. C., and *Mr. Ricardo* for the Plaintiffs.

Mr. S. T. Evans, K. C., and *Mr. John Sankey* for the Defendant.

Appeal allowed.

KING'S BENCH.—*Whitehead* v. *Palmer.* Before MR. JUSTICE CHANNELL. 1st November 1907.

Administrator ad colligenda bona—*Power to sell—Vesting of lease.*

In this case one Mrs. Leconteur, who had a lease of certain premises at £450 a year having died, a sister of hers applied for letters of administration. A caveat was entered by some person and on the application of the deceased's sister, the Defendant was appointed administrator *ad colligenda bona.* Application was made at the same time that the Defendant should have liberty to sell the lease, as it was hoped that the sale would fetch a premium

approaching £1,000, an asset which would go a great way towards securing the solvency of the estate and accordingly power was given to him to sell the lease. Defendant entered upon the premises and endeavoured unsuccessfully to sell and a quarter's rent thus fell due after the death of Mrs. Leconteur, after which the lessor instituted the present action for ejectment on the basis of a forfeiture clause together with a quarter's rent and mesne profits. The Defendant did not give up possession till after judgment was pronounced against him.

Held—That the appointment of the Defendant as administrator *ad colligenda bona* coupled with a power to sell had the effect of vesting the lease in the Defendant, and he was liable to pay rent but that he was only liable up to the value of the premises, as it was settled law that where the rent under a lease was in excess of the value of the premises, the executor or administrator who had entered, if he pleaded properly, was only liable up to the amount of the value of the premises. His Lordship thought £450 was the value of the premises and he held the Defendant liable to pay rent and mesne profits at the rate of £450 a year.

Mr. E. M. Pollock, K. C., and *Mr. G. W. Powers* for the Plaintiff.

Mr. Howard D'Egville for the Defendant.

PRIVY COUNCIL.

[APPEAL FROM BENGAL]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
18, November.

RAI RADHA KRISHNA RAI BAHADUR and others, Petitioners, Appellants,
v.
BABU NAURATAN LAL, Respondents.

Special leave—Substantial question of law—Sec. 596, Civil Procedure Code—Alienation by Hindu lady, tenant for life—Legal necessity.

This was an application for special leave to appeal under the following circumstances:—

On 2nd October 1904, the Respondent instituted a suit against the Petitioners in the Court of the Subordinate Judge of Patna to recover possession of certain villages, which originally belonged to Radha Krishna who died on 7th November 1879, and was succeeded by his daughter, Mussammat Sheo Koer. That lady executed the following deeds of mortgages by her general agent, her son Sheoratan Lal, who predeceased her, in favour of the predecessor in title of the Petitioners and in favour of one Bal Kishen Das, *viz.* :—

On 1st December 1883, a mortgage for Rs. 20,000.
On 16th December 1883, a mortgage for Rs. 2,000.
On 6th April 1885, a mortgage for Rs. 10,000 and
On 16th July 1885, a mortgage for Rs. 7,000.

On 23rd November 1888, the mortgagees obtained decrees on the said mortgages and in or about the year 1891 the predecessor in title of the Petitioners in execution of those decrees purchased the property in suit.

On 10th June 1902, Mussammat Sheo Koer died and the Respondent, who is her son and next heir on her death to the estate of the said Radha Krishna, brought the present suit, alleging that the said mortgages were not executed for legal necessity so as to bind the reversioner, that Sheoratan Lal was not duly authorised to act for his mother and that the said decrees were fraudulently obtained without the knowledge of Mussammat Sheo Koer.

On 31st July 1906, the Subordinate Judge delivered his judgment and decided that Mussammat Sheo Koer executed the power-of-attorney in favour of her son and that she knew what she was doing. He also held that the said decrees were not fraudulently obtained and that the compromise was made with the knowledge of Sheo Koer. As to whether the debts were contracted for legal necessities, his judgment was as follows:—"I now come to legal necessity. Babu Radha Kishen died on 7th November 1879, at his death he was possessed of some 70 villages and the income from them amounted to about Rs. 35,000 in the year. I do not believe that Babu Radha Kishen left any considerable cash balance. He left no debt. Sheo Koer's succession was opposed by Badri Narain. He claimed to be adopted by Babu Radha Kishen. Sheo Koer's application for succession certificate was contested by him without effect. Sheo Koer got the certificate on the 20th February 1880, Budri Narain also opposed her application for registration under the Land Registration Act and in those proceedings he was unsuccessful.

"Then on the 5th August 1881 he instituted a suit for declaration of his title as the adopted son of Radha Kishen and for possession. This suit was decided against him on the 10th October 1882. He filed an appeal to the High Court on the 12th March 1883. There was a demand of security for costs.

"The security furnished was insufficient and the appeal was rejected on the 2nd June 1885. There was an application for review and Budri Narain also preferred an appeal to the Privy Council. Their Lordships of the Privy Council remanded the case for hearing on the merits. The High Court heard the appeal and dismissed it. There the litigation rested. The bonds which resulted in sales that are in question in this suit are four in number (as set out above). The first bond recites that the money was required for the expenses of defending the appeal by Budri Narain, for the expenses of a daughter's marriage and for the payment of Dr. Madho Babu's debt.

"The evidence is that it was represented that the marriage expenses would come up to five or seven hundred rupees. There is no evidence that Sheo Koer was under any necessity to borrow for this

small amount and there is no evidence to connect the daughter's marriage with the debt."

The Sub Judge further held that the amount recited in the bonds as required for the purposes of the litigation were altogether too large.

"Sheo Koer was an illiterate Purdanashin lady. There is no reliable evidence that she knew when these debts were incurred. Her son, Sheo Ratan, contracted the debts under his power of-attorney. He was a young man between 25 and 30 and given to drinking and association with nautch girls.

"There is no knowing how much of these moneys he spent on the litigation and how much on his evil ways and even whether he received the full amount written in the bonds. If all the money was spent on the litigation the expenses appear to have been unreasonable, if not reckless. The creditors if they contemplated binding the estate of the reversioner were to use greater circumspection and to make proper enquiries about the immediate need.

"I decide that no case of legal necessity has been established." A decree was accordingly made for delivery of possession of the property in suit.

Against that decree the Petitioners appealed to the High Court of Judicature at Fort William in Bengal, and on 14th June 1907 that appeal was dismissed. The High Court decided that there was a large cash balance on the death of Radha Kishen, that in consequence of the litigation with Budri Singh the whole of the collections were not stopped, and therefore that it was not proved that the lady had not sufficient funds with which to meet the expenses of the litigation. The High Court also held that the evidence failed to prove that the loans were taken with the knowledge or consent of Mussammat Sheo Koer and that there was not sufficient evidence that the lady really understood and consented to the terms of the compromise. On the true construction of the power-of-attorney it was found that Sheo Ratan Lal was not authorised to borrow money for his mother and it was suggested that he borrowed for himself and spent the money in extravagant living.

The Petitioners applied to the High Court for leave to appeal against that decree to His Majesty in Council on 25th July 1907. Their application was rejected on the ground that "no substantial point of law was involved in the appeal."

Mr. DeGruyther for the Petitioners.—The judgments of the Subordinate Judge and the High Court are not in accord except broadly that the loans were not justified by legal necessity. On this point the Subordinate Judge finds that there was no large cash balance on the death of Radha Kishen, while the High Court found there was no necessity for the loans because the cost of the litigation could be met from the said cash balance which the lower Court found to exist. Both the Courts in India have misapplied the law governing transactions of this class as finally settled in the case of *Hunooman Pershad* v. *Mussamat Mabooee*, 6 Moore's Indian Appeals 393. They have disregarded the fact that the extravagance of Sheo Koer's son in spending the income to which Sheo Koer was absolutely entitled may have occasioned the necessity for loans, and wrongly assumed that the money lent was spent in extravagance instead of necessities. The Subordinate Judge also erred in law in requiring proof of the application of the monies borrowed to the necessary purpose for which they were borrowed, and in holding that even monies if borrowed and spent in a litigation to uphold the title of the lady and the next reversioners to the estate would not be loans for necessary purposes within the meaning of the Hindu Law unless the total amount spent in the litigation was in his opinion reasonable. The Courts came to the same conclusion of fact on different grounds. But the question whether there was any legal necessity arising from certain facts is a question of law. The present appeal does, therefore, raise substantial questions of law.

Application refused.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 695 OF 1907. CHINTAMONI SINGH, Petitioner *v.* THE EMPEROR, Opposite Party. Heard, 4th, 6th, 7th and 10th December 1907. Judgment, 20th December 1907.

Bad livelihood—Sec. 110, Cr. P. C.—Sec. 256, Cr. P. C.—Applicability of—Transfer of a proceeding under sec. 110, Cr P. C., under sec. 192, Cr. P. C.—Power of the District Magistrate to order—Sec. 529, cl. (f), irregularity—Duty of the Court to test carefully evidence for prosecution when dealing with a case under Chap. VIII, Cr. P. C.

The facts are briefly these :—

The Petitioner was the *sirman* or rent collector of a rich estate and the protege of an influential zemindar. On the report of the Assistant Superintendent of Police, the District Magistrate recorded an order under sec. 112, Cr. P. C., to the effect that he had received information from the Assistant Superintendent of Police, Araria, that the Petitioner was, by habit, a robber, that he habitually protected and harboured dacoits and habitually committed mischief and extortion and abetted the commission of these offences and that he was of so desperate and dangerous a character as to render his being at large without security being required of him hazardous to the community. The order accordingly required the Petitioner to show cause why he should not be called upon to execute a bond of Rs. 500 with two sureties of Rs. 500 each for his good behaviour for a

period of three years. The hearing of the case began before the District Magistrate who after the examination-in-chief of 109 witnesses for the prosecution and the cross-examination of one of them transferred the case to the file of Mr. C. H. Reid, Sub-divisional Magistrate of Araria, who proceeded regularly with the case from the 19th June 1905, till the 12th July 1906. The prosecution closed its case on the 15th November, when the Petitioner was called upon to make his defence. The Counsel for the Petitioner objected that the Court could not put his client on his defence before he had again cross-examined the witnesses for the prosecution. This objection was overruled by the Court on the ground that the prosecution witnesses had been fully cross-examined before the prosecution closed its case. Then the examination-in-chief of the defence witnesses commenced on the 7th December 1905 and in the course of 68 sittings evidence of 48 witnesses was recorded. On the 2nd February 1906, the trying Magistrate passed an order directing that the examination-in-chief of further witnesses for the defence must be finished within 30 hours. In consequence of this order only 741 witnesses out of 1,760 witnesses which the defence cited could be examined.

At the conclusion of the proceedings which lasted over 237 sittings, the Petitioner was bound down to be of good behaviour. He appealed to the Sessions Judge who affirmed the order of the trying Magistrate. The Petitioner then obtained this rule from the High Court on the 17th July 1907. Various points of law were raised by the Petitioner's Counsel with respect to which their Lordships hold :—

(1) That it was not necessary under the law to give a list of witnesses either in the report of the Police to the Magistrate or in the order of the Magistrate under sec. 112, Cr. P. C.

(2) That the District Magistrate was competent under sec. 192, Cr. P. C., to transfer this case to the file of the Sub-divisional Magistrate. That under sec. 192, Cr. P. C., the power of transfer is not restricted to criminal cases but extends to cases of every description triable under the Criminal Procedure Code. That even if it were held that the District Magistrate had no power to transfer, his action in transferring the case could only amount to an irregularity which would be cured by the provisions of sec. 529, cl. (*f*), Cr. P. C.

Akhbar Ali Khan v. *Domi Lal*, 4 C. W. N. 821, followed.

(3) That sec. 256, Cr. P. C., has no application to a case under sec. 110, Cr. P. C., and a person called upon to show cause under sec. 110 has no right to cross-examine the prosecution witnesses under sec. 256, Cr. P. C.

(4) That under the circumstances of the case the trying Magistrate was justified in putting a time limit on the examination of defence witnesses.

(5) That in dealing with cases under Chap. VIII of the Criminal Procedure Code, Magistrates ought, especially where no previous conviction is proved, to take great care to test the evidence for the prosecution.

(6) That in the present case the evidence of general reputation coming from the people of villages where dacoities had taken place although the Petitioner did not live amongst those people, is evidence of general repute as required by sec. 117, Cr. P. C. The case of *Isri Persad*, I. L. R. 23 Cal. 621, distinguished.

Mr. Hill, *Mr. P. L. Roy*, *Mr. Gregory* and *Babus Dasarathi Sanyal*, *Satish Chandra Ghose*, *Sarat Kumar Mitra* and *Moulvi Mahomed Mustafa Khan* for the Petitioner.

Mr. Norton for the Crown.

B. C. *Rule discharged.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J., and HARINGTON and STEPHEN, JJ. PRIVY COUNCIL APPEAL No. 1 OF 1907. JAI BERHAM AND OTHERS, Appellants *v.* ANANTA RAM MARWARI AND OTHERS, Respondents. 10th December 1907.

Security bond for costs of Respondent in the Privy Council—Enquiry by Subordinate Judge—Practice—Notice.

The security bond for the Respondents' costs in the above Privy Council appeal was executed by a third party and the bond was sent to the District Judge of Dumka for enquiry and report as to the sufficiency of the security. The District Judge of Dumka sent the bond to the Subordinate Judge of Godda for enquiry who without any notice to the Appellants enquired into the matter and reported the security to be insufficient. The District Judge simply forwarded the report to the High Court, on the arrival of the report the Appellants filed the following objections under the Rule XIX, Chap. IV of the High Court Appellate Side Rules. (1) That under Rule XVIII of the High Court Rules the security bond can only be tested by the District Judge alone and he cannot delegate his power to the Subordinate Judge. (2) Notice ought to have been given to the Appellants (after the arrival of the bond) to produce evidence in support of the sufficiency of the security and as no such notice was given the Appellants could not produce evidence.

Held—It had all along been the practice for the District Judge to send the security bond to the Subordinate Judge within whose jurisdiction the property was situate to enquire into the sufficiency of the security for report and that it was the duty of the Appellants to enquire about the arrival of the security bond and to produce evidence and notice need not be given to them. As the security was found insufficent, six weeks time was allowed to the Appellants to deposit Rs. 4,000 in cash or Government Promissory notes.

Babu Sarat Chandra Basak for *Babu Kshetra Mohun Sen* for the Appellants.

Babu Joy Gopal Ghosha for the Respondents.

A. T. M.

CIVIL APPELLATE JURISDICTION. Before BRETT and HOLMWOOD, JJ. APPEAL FROM APPELLATE DECREE No. 369 OF 1906. BHOUL SAHU AND ORS., Plaintiffs, Appellants *v.* BABU BAIJNATH PROTAP NARAIN SINGH AND OTHERS, Defendants, Respondents. Heard, 20th and 21st November 1907. Judgment, 11th December 1907.

Bond executed by guardian—Suit to recover from minor's estate—Promise how far binding—Document, purporting to bind—Pleadings.

The Plaintiff brought an action to recover a sum of money due on a bond executed in his favour by the Defendant No. 2 as mother and guardian of Defendant No. 1. The bond was executed on the 24th March 1901 and renewed a previous bond executed on the 24th August 1894. Defendant No. 1 came of age on the 29th May 1901 and the suit was instituted on the 1st October 1904 to recover the money due on the oond out of the estate of the Defendant No. 1 or for a joint decree against both Defendents.

The Court of first instance held that the money due on the bond had been borrowed by Defendant No. 2 as his guardian for the benefit of the estate of Defendant No. 1 and gave the Plaintiff a decree for the amount claimed, to be realised out of the estate of the Defendant No. 1, at the same time declaring that Defendant No. 1 was not personally liable for the debt due under the decree.

On appeal the District Judge reversed the judgment and decree of the Court of first instance and dismissed the Plaintiff's suit in its entirety. The Judge agreed with the Subordinate Judge in holding that the bond in suit was duly executed by the Defendant No. 2 for consideration and that it was valid and genuine. He also held that it was executed by the Defendant No. 2 in her capacity as guardian and on behalf of Defendant No. 1 who was at the time of its execution a minor. He dismissed the suit however, disagreeing with the Subordinate Judge on the following grounds: He held that as it is settled law that a guardian cannot bind a minor by a personal covenant therefore the suit on the contract must fail. He further held that though the Plaintiffs might have succeeded in a suit upon the ground of necessaries supplied, or benefits rendered, there was no evidence except as to the sum of Rs. 1,000 that any portion of the money was borrowed by Defendant No. 2 for either of these purposes, and that as regards the sum of Rs. 1,000 which was borrowed on the registered bond of the 24th August 1894 the claim was barred by limitation as the guardian Defendant No. 2 had not done any act within 3 or 6 years from the date of that bond to extend the period of limitation so as to bind the Defendant No. 1.

The Plaintiffs appealed to the High Court.

Held—That while a liberal construction should be given to pleadings so as to give effect to the meaning to be collected from the whole tenour they ought to be expressed with sufficient definiteness to enable the opposite party to understand the case he is called on to meet.

Indur Chunder Singh v. *Radha Kishore Ghose* (I. L. R. 19 Cal. 507 at p. 512) applied.

Held—The suit was intended to be a suit to recover the sum due under the bond from the estate of Defendant No. 1 on the ground that the debt recoverable under the bond had been incurred by the Defendant No. 2 as mother and guardian of Defendant No. 1 for necessaries and for the benefit of the estate.

Held further—A guardian cannot bind his ward personally by a simple contract debt by a covenant, or by any promise to pay money or damages, but subject to modification that the promise will not bind the minor unless it has been made merely to keep alive a debt for which the ward's property was liable.

Held also—A guardian cannot bind his ward's estate except by a document purporting to bind it.

In the present case, the promise to repay the money in each bond was a personal promise and there was nothing in either of the bonds to indicate that in the event of her failure the estate of the minor would be liable, or that by the bond she purported to bind the minor's estate. Hence the Plaintiffs were not entitled to any relief.

Their Lordships observed as follows:—

"When a third person enters into dealings with the guardian of a minor, and advances money for necessaries for the minor or for the benefit of the estate and takes a bond for the debt from the guardian the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt."

Dr. Rash Behari Ghose and *Babu Shyama Prosanna Mazumdar* for the Appellants.

Mr. O'Kinealy (Advocate-General) and *Babu Lakshmi Narayan Singh* for the Respondents.

A. T. M. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 490 OF 1904.

BRETT, J. SHARFUDDIN, J. 1907. Heard, 12, 13, 14 & 15 February. Judgment, 18 March.	BROJO NATH BOSE and others, *v.* RAJA SRI SRI DURGA PERSAD SINGH.

Service tenure—Digwar of Ghat Tasra in Jheria—Police duties—Government control—Rights of the zemindar—Right in sub-soil—Mokurari lease of underground rights granted by Digwar, suit by zemindar questioning—Government a necessary party.

The Digwar of Tasra and Raharaband in Jheria has been holding under a tenure which is ancient and hereditary, subject to the payment to the zemindar of a fixed rent only, and on condition of the performance of certain police or public services for the due discharge of which the holder has been responsible to the Government which alone has exercised the power of appointment to and dismissal from office.

His position is analogous to that of the Ghatwals of Birbhum.

The underground rights including mining rights belong to the Digwar, the right to receive the fixed rent alone being reserved to the zemindar.

SRIRAM CHUKRABUTTY *v.* KUMAR HARI NARAIN SINHA (38) *followed.*

Government has an interest in maintaining intact the mouzahs set apart for the remuneration of the Digwar, and it has all along assumed itself to possess the right to do so.

Where therefore the zemindar instituted a suit against the Digwar with the object of establishing his exclusive right to the sub-soil and minerals,

Held—*That the Government was a necessary party in the suit.*

This was an appeal preferred on the 6th of October 1904, against the decree of Babu Mahendra Nath Roy, Subordinate Judge of Manbhum, dated the 14th of June 1904.

The appeal arose out of a suit for declaration that all sub-soil rights to the minerals in Mouzahs Tasra and Raharaband in Pergunnah Jheria belonged to the Plaintiff zemindar, and for recovery of a sum of Rs. 16,000 on account of coal dug up by the Defendants and for a permanent injunction restraining the Defendants from digging up coal in future in the mouzahs.

The Subordinate Judge had decreed the Plaintiffs' suit in full. Hence this appeal by the Defendants Nos. 1 and 2.

The facts of the case are fully stated in the judgment.

Mr. Hill, Babus Jogesh Chandra Roy and *Ratan Chand Boral* for the Appellants.

Dr. Rash Behari Ghose, Babus Jogesh Chunder Dey and *Lalit Mohan Ghose* for the Respondent.

The JUDGMENT OF THE COURT was delivered by

BRETT, J.—The Plaintiff-Respondent is the proprietor of the permanently settled estate of Pergunnah Jheria within which Mouzahs Tasra and Raharaband are situated. Defendant No. 1 was in December 1887 appointed Digwar of Ghat Tasra by order of the Deputy Commissioner of Manbhum on the dismissal for misconduct of Digamber Singh, the

(38) 10 C. W. N. 425: S. C. 3 C. L. J 59 (1905).

previous Digwar. Defendant No. 1 at the same time received possession of the two Mouzahs Tasra and Raharaband as the Digwari jaigir attaching to his office, and since that date, continued to pay to the zemindar a yearly sum of Rs. 64 in respect of those two mouzahs. On the 2nd January 1892, Defendant No. 1 with the consent of the Deputy Commissioner of Manbhum executed in favour of Defendant No. 2, Mr. Mathewson, a *mokurari patta* of all the surface and sub-soil rights in Mouzahs Tasra and Raharaband, excluding only 4 bighas of land in Raharaband on which his *kachari bari*, *etc.*, stood. In that lease a clause was inserted that the rights and interests of Government over the surface lands and underground rights in the said two mouzahs shall not in any way be interfered with or affected by the settlement.

On the 17th December 1897, Defendant No. 2 executed a deed of assignment of his rights under that lease to the Tasra Coal Co. Ld., Defendant No 3, on whose behalf he had been acting in taking the lease. The Coal Company in accordance with the settlement subsequently dug out and raised coal from the sub-soil of the two mouzahs.

The Plaintiff alleged that Digamber Singh had been in possession of the two mouzahs under an ordinary *sankarari* (yearly) ijara settlement on payment of a yearly rent of Rs. 64 and that he had no permanent rights in the two mouzahs, and he contended that Defendant No. 1 on his appointment as Digwar by the Deputy Commissioner of Manbhum did not acquire any higher right in the mouzahs than the *sankarari* ijara right, and therefore that he acquired no right to the minerals. He alleged that the mineral rights belonged to him as landlord and that the Defendants by granting and receiving a lease of the sub-soil rights, and by digging up the coal, had wrongfully infringed his rights.

He accordingly brought the suit, (1) to have it declared that all sub-soil rights to the minerals in the two mouzahs belonged to him, (2) to recover the sum of Rs. 16,000 on account of 8250 tons of coal dug up within the 3 years prior to institution of suit, and (3) to obtain a permanent injunction restraining the Defendants from digging up coal in future in the two mouzahs.

The Defendant No. 1 in his written statement first contended that Government was a necessary party to the suit and that the suit could not proceed unless Government was made a party. He further alleged that the assertion made by the Plaintiff in his plaint that Digamber Singh had held the two mouzahs under a *sankarari* ijara settlement was false, that, on the contrary, the mouzahs had all along been held from before the advent of the British Government as a Digwari jaigir by the person who held the appointment of Digwar of Tasra Ghat and as such rendered Police services to Government, that the jaigir was permanent and hereditary and had been held by the Digwar all along on payment of a fixed quit rent or Digwari Panchak to the zemindar, that Digamber Singh having been dismissed from his appointment as Digwar by Government for misconduct the jaigir had passed to him, Defendant No. 1, on his appointment as Digwar, that the sub-soil rights as well as the surface rights in the jaigir be-

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

longed to him, and that as he had granted the lease to Defendant No. 2 with the consent of the Deputy Commissioner of Manbhum the lease was valid. He denied the right of the Plaintiff as zemindar to the minerals. The other Defendants supported this line of defence.

The Subordinate Judge has decreed the suit in full in favour of the Plaintiff, and the Defendants have appealed to this Court.

Six issues were raised in the lower Court. The Subordinate Judge first dealt with the question raised by the Defendants, *viz.*, whether Government was a necessary party to the suit and whether the suit could proceed without making the Government a party. In support of the plea raised by the Defendants, the cases of *Mahomed Israile* v. *Wise* (1), *Krishno Lall Nag* v. *Bhyrub Chunder Deb* (2) and *H. H. Cannon* v. *Bissonath Adhicari* (3) were relied on. The Subordinate Judge held that these cases did not apply as in the present case the Plaintiff did not complain of any unlawful act on the part of Government, and therefore he had no cause of action against Government. Relying on a passage in Daniell's Chancery Practice (Vol. I, p. 264) and on the case of *Kashi* v. *Sadashiv* (4), he found that though Government might have been a proper party, it was not a necessary party. He accordingly decided the issue in favour of the Plaintiff.

The 2nd issue raised was whether the suit was barred by limitation. The Subordinate Judge remarks in the judgment that this point was not pressed but at the same time he has held that the plea cannot stand. Brojo Nath Bose, Defendant No. 1, claimed to have been digging out the coal from the sub-soil from 1888, but the Subordinate Judge held that there was no regular or systematic working of the coal till after the Company took possession under the lease granted to Defendant No. 2 on the 2nd January 1892, and the suit was instituted on the 18th December 1903, *i.e.*, within 12 years of that date.

Further he held that if the Defendants in digging out the coal were trespassers or wrong-doers such possession would give them no title by prescription, and in support of this view, he relied on the cases of *Mohini Mohan Roy* v. *Promoda Nath Roy* (5) and *Secretary of State for India* v. *Krisnamoni Gupta* (6).

The 3rd and 4th issues involve the important questions in dispute in the case, *viz.*, has the Plaintiff any right to the minerals in dispute; and is the Defendant No. 1 an ijaradar under the Plaintiff? Neither party was able to produce much documentary evidence in support of their respective cases. This seems to have been due to the fact, as the Subordinate Judge points out, that the part of the country in which the mouzahs are situated was previously in a frequent state of disturbance and that the public offices and records were burnt both before and at the time of the Mutiny. The Plaintiff however relied on a *lotbandi* of Pergunnah Jheria for the years 1208—1801, and on a Register of appoint-

(1) 13 B. L. R. 118 (1874).
(2) 22 W. R. 52 (1874).
(3) 5 C. L. R. 154 (1879).
(4) I. L. R. 21 Bom. 229 (1895).
(5) I. L. R. 24 Cal. 256 (1896).
(6) I. L. R. 29 Cal. 518 (1902).

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

ments of Ghatwals and Chowkidars from 1st February 1832 to 29th July 1839. This document, it is to be observed, is not quite correctly described by the Subordinate Judge in his judgment. In the former document Mouzah Tasra is entered as yielding a yearly profit of 45 rupees. In the latter there is no mention of any Digwari jaigir of Tasra and Raharaband. The Plaintiff also produced receipts from 1250 to 1282 (1844 to 1876) in which Palwan Sinha, whom the Defendant allege to have been a Digwar, was described as an ijaradar or etmandar. He also relied on a *safabandi* of 1857. The Defendants on the other hand relied on two Isum navisi papers of the years 1845 and 1861; in the first of which Bahal Sinha is described as Digwar of Mouzahs Tasra and Raharaband, and in the other Palwan Sinha is similarly described, also on an application made in 1285 (1879) by Digwar Palwan Sinha of Tasra for the appointment of his son Matabbar as Digwar and on the order passed thereon dated 8th May 1879; and on certain orders, one passed in 1884 appointing Digamber Singh as Digwar in place of Matabbar, another on 14th March 1885 dismissing Digamber Singh, another of December 1887 appointing Girish Chandra Ghose to act in place of Defendant No. 1, Brojo Nath, who was appointed Digwar: also on the Register of Ghatwali lands in Manbhum in 1880 to 1883 and the survey maps of Ghatwali lands of Tasra and Raharaband prepared in 1881. They also produced copies of a judgment in a case instituted by Government in 1885 to set aside sales of some of the lands in the two mouzahs as being Digwari lands, of two Road-cess returns filed in 1872 and 1898 on behalf of the landlord describing Palwan as the Digwar of the "Digwari lands Tasra and Raharaband at an annual rental of Rs. 64," and relied on statements made by Digámber in 1862 at the time of a survey of the mouzahs and on receipts from 1890 to 1896 in which Brojo Nath is described as Digwar.

The Subordinate Judge after a careful consideration of this evidence came to the conclusion that it was impossible to accede to the contention of the Plaintiff that the Digwars were ordinary ijaradars liable to be ejected at the pleasure of the zemindar, and held on the contrary that the mouzahs in dispute are Digwari mouzahs.

In order however to determine the other more important issue whether the Plaintiff, or the Defendant No. 1 as Digwar, is entitled to the mineral rights in the two mouzahs, the Subordinate Judge first devotes his attention to determining when the mouzahs were constituted Digwari mouzahs. He points out that Pergunnah Jheria in which the two mouzahs are situated originally formed a part of the District of Birbhum; by Reg. XVIII of 1805 it was transferred to the district of the jungle mehals which was then constituted and in 1814, Prithi Singh, the zemindar, was invested with the management of the Police in his estate of Jheria. By Reg. XIII of 1833 the district of the jungle mehals with certain exceptions was formed into a new District of Manbhum. The head-quarters of the jungle mehals was at Bankura and he concludes that the fact that no mention is made of the Digwari jaigir of Tasra and Raharaband in the Register of appointments of Ghatwals and Chowkidars

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

from 1st February 1832 to 29th July 1839 obtained from Bankura goes to support the conclusion that the Digwari tenure was not created before 1839.

Referring to cls. 4 and 13 of sec. 7 of Reg. XVIII of 1805 he comes to the conclusion that the Digwars of Jheria were as much servants of the landlord as of the Government, and he accepts the evidence of Matabbar Sinha, and of Joy Lal Sinha, son of the dismissed Digwar Digamber Singh, to support the view that the Digwars were servants of the landlord, though liable to dismissal by the Magistrate. By Reg. XIII of 1853, the zemindar of Jheria was divested of his powers over the Police, and the Subordinate Judge considers that the fact that the earliest evidence of the existence of the Digwari jaigir of Tasra and Raharaband is the Isumnavisi of 1845 supports the view that the jaigir came into existence after the Permanent Settlement.

He next considers the question whether the Digwars can be regarded as independent talukdars, and finding that they do not fall into any of the classes described in sec. 5 of Reg. VIII of 1793 he holds that they cannot claim to be actual proprietors of the soil, or to hold a higher position than mere lease-holders as described in sec. 7 of the Regulation. He also held that as the Defendant had failed to produce strict evidence of his title, and as his predecessors had failed to establish their right to separation within one year from the passing of Reg. I of 1801 it was impossible to hold that they were independent talukdars.

He next deals with the contentions of the Defendants, *viz.*, (1) that the tenure existed prior to the Permanent Settlement, and therefore the tenure-holders were not affected by it, (2) that the tenures were hereditary and permanent that they were appropriated by Government and set apart for Police purposes and as they were not included in the Permanent Settlement, the property in the soil was with the tenure-holders, and (3) that the tenure in dispute was analogous to the Ghatwali tenures in Birbhum and that the same incidents attached to it.

As to the 1st contention he finds that as there is no evidence of the existence of the tenure earlier than 1845 the most that can be presumed is that it was in existence at the time of the Permanent Settlement.

As to the second he holds on the authority of the cases of *Forbes* v. *Meer Mahomed Tuquee* (7) and *Jagadindra Nath Roy* v. *Secretary of State* (8), that the *onus* is on the landlord to prove that the land in dispute was included in the assessment of the Permanent Settlement, and he relies on the *lotbandi* of 1801 produced by the Plaintiff as sufficient proof, in the absence of evidence to the contrary, that Tasra and Raharaband were included in the lands assessed at the time of the Permanent Settlement. The entry in that document he holds to be sufficient to prove that a quit rent was paid by the zemindar and on the authority of the case of *Gadadhur Banerjee* v. *The Government* (9), he holds this is sufficient to establish the fact that the mouzahs were included in the

(7) 13 M. I. A. 438 (1870).
(8) I. L. R. 30 Cal. 291 (1902).
(9) 6 W. R. 326 (1866).

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

lands assessed at the Permanent Settlement.

He next holds that as a service tenure the lands in dispute either fall within the provisions of sec. 41 of Reg. VIII of 1793 and as such are the property of the landlord or within the provision of sec. 8 of Reg. I of 1793. Conceding for the sake of argument that they fall into the latter class he finds that all that Government could reserve would be the produce of the lands and not the lands themselves and relying on a report of Mr. Millet, dated 26th March 1842, and a despatch of the Secretary of State, dated the 25th March 1880, he concludes that notwithstanding the reservation in respect of Police services the proprietary interest in the soil in the villages included in the Permanent Settlement was vested in the zemindar. Also on the ground that prior to the Permanent Settlement the zemindars had only rights to collect the rents and no right to the soil itself the holders of small tenures of one or two villages for the discharge of Police duties could not have had higher rights. He therefore concludes that the Digwars cannot be held to be proprietors of the soil so as to be entitled to the mineral rights in it.

He next proceeded to deal with the cases relied on by the Defendants. They were *Lelanund Sing Bahadoor* v. *Government of Bengal* (10), *Joykishen Mookerjee* v. *Collector of East Burdwan* (11), *Kooldeep Narain Singh* v. *Mahadeo Singh* (12), confirmed in appeal by the Privy Council in *Kooldeep Narain* v. *Government* (13), and approved by the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (7), *Munrunjun Singh* v. *Raja Lelanund Singh* (14), confirmed in appeal in *Lelanund Singh* v. *Munurunjun Singh* (15), *Raja Nilmoney Singh* v. *The Government and Beer Singh* (16), *Bukronath Singh* v. *Nilmoni Singh* (17), confirmed on appeal, *Nilmoni Singh* v. *Bukronath Singh* (18), *Anundo Rai* v. *Kali Prosad Singh* (19), confirmed on appeal in *Kali Prosad Singh* v. *Anundo Rai* (20). In these cases the questions raised related to the right of the Government or of the landlord to resume Ghatwali tenures on discontinuance of services or the like or the liability of the tenure to sale for the debts of a Ghatwal, and the Subordinate Judge held that they did not apply to the present case, or affect the conclusion at which he had arrived on a consideration of the regulations, that the proprietary right to the soil was vested in the landlord.

Dealing with the last contention he holds that it cannot be concluded that, even if the Ghatwali tenures in Manbhum were analogous to those in Birbhum, all the incidents which attached under the Regulations to the latter could be held to attach to the former. He further holds that the enactments relating to the Birbhum Ghatwals were of the nature of private statutes and could not be extended to strangers and he

(10) 6 M. I. A. 101 (1855).
(11) 10 M. I. A. 16 (1864).
(12) 6 W. R. 199 (1866).
(13) 14 M. I. A. 247 (1871).
(7) 13 M. I. A. 438 (1870).
(14) 3 W. R. 84 (1865).
(15) 12 B. L. R. 124 (1873).
(16) 18 W. R. 321 (1872).
(17) I. L R. 5 Cal. 389 (1879).
(18) I. L.R. 9 Cal. 187 (1882).
(19) I. L. R. 10 Cal. 677 (1884).
(20) I. L. R. 15 Cal. 471 (1887).

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

distinguished those tenures from the present by the fact that the rent was payable in respect of the former direct to Government.

He, therefore, comes to the conclusion that the three contentions failed.

Returning then to the questions whether the right in the minerals belonged to the zemindar or to the Ghatwal, he comes to the conclusion that a Ghatwali tenure is one of the class in which an office is granted the performance of the duties attaching to which is to be remunerated by the use of certain lands and relying on the case of *Radha Pershad Singh v. Budhu Dashad* (21), he holds that the position of a Digwar was that of a servant. Further referring to the case, *Ramchandra* v. *Venkatrao* (22), he finds that the grant of a tenure such as that at present in dispute very rarely amounted to a grant of the soil and that the burden of proving that there was a grant of soil lay heavily on the party alleging it. He held the present Defendant has failed to prove any such grant, and he points out that the policy of the Mahomedan Government was averse to grants in perpetuity of the soil. He further finds that the settlement of the tenure did not amount to a grant of an estate burdened with the performance of public duties.

Referring to the state of the law in England he points out that a tenant for life is not entitled to work mines [*Ecclesiastical Commissioners* v. *Wodehouse* (23)]. He also points out that the case of *Gordon Stuart and Co.* v. *Tikaitnee Seobas Kowarie* (24) in which the right of a maintenance-holder to work mines was in question did not support the view that the right to the minerals passed with the maintenance grant to the grantee, while the case of *Tituram Mukherjee* v. *E. E. Cohen* (25) supported the opposite view.

He, therefore, comes to the conclusion that the right to the coal and other minerals is in the zemindar.

On the remaining issues he held that the Plaintiff was entitled to a permanent injunction and to recover Rs. 1,851-11 on account of the coal taken.

The findings of the Subordinate Judge and his reasons for the same have been set out at greater length than would otherwise have been desirable because the Appellants traverse his findings on all the points except that on the fourth issue which was that the mouzahs are Digwari mouzahs. Also in support of the appeal and in opposing it, we have been referred to all the authorities dealt with by the Subordinate Judge as well as to others.

The question raised in the suit is one of first impression and as it is of importance and by no means easy of solution it has been necessary to set out the case of each party in some detail.

Before considering the rights which attach to the Digwari tenure it will be as well first to consider its character and the circumstances under which it was created and has passed from one holder to another. From the copy of the Register of Ghatwali lands as ascertained during the survey in 1880 to 1883, Ex. N1, filed by the Defendants, it appears that

(21) I. L. R. 22 Cal. 938 (1895).
(22) I. L. R. 6 Bom. 598 at p. 606 (1882).
(23) (1895) 1 Ch 552 at pp 561-2.
(24) W. R. Gap. No. 370 (1864).
(25) 1 C. L. J. 517 (1901).

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

Mouzah Raharaband covers 6025 bighas and Mouzah Tasra 897 making a total of 6922 bighas. The rent payable yearly to the landlord is 64 rupees. It is not clear however how much of this land is now under cultivation ; but even though the learned pleader for the Respondent has ridiculed the idea that the possession of such a tenure entitles the holder to be regarded as a Warden of the Marches, it certainly seems to place him in a higher position than a Ghatwal or Chowkidar holding a few bighas of land or receiving small salary for his support. In the report made on the 18th June 1799 (Ex E), a distinction is drawn between Digwars and Jaigirdars on the one hand and Ghatwals and village Chowkidars on the other. The two former, it is stated, 'get jaigirs of villages and have no fixed salary in cash. Ghatwals receive a salary in cash and village Chowkidars get land in some places and in others cash. The entries in the General Register of the Revenue-paying land in estates borne on the Revenue roll of the District of Manbhum prepared under Act VII of 1876 (Ex. 14 filed by the Plaintiff) differ materially from the entries in the Register previously referred to and no explanation of the difference has been given.

This tenure was admittedly held by Digamber Singh up to 1887 when he was dismissed by the Deputy Commissioner of Manbhum for misconduct, and Defendant No. 1 was appointed Digwar in his stead and was placed in possession of the tenure. Digamber Singh was appointed Digwar in 1884 (29th February) in place of Matabbar Singh who resigned (Ex. Y). He appears to have been the brother of Matabbar. His predecessor was appointed Digwar on the 8th Falgoon 1285 (the 25th April 1879) on an application made by his father, Pahlan Singh, who retired on account of old age (Ex. X). In that application, Pahlan Singh described the post as "the hereditary post of Ghatwal." In the Isumnavisi of 1861, filed by the Defendants (Ex. V), Pahlan is entered as Digwar and in the Isumnavisi of 1845 (Ex. 5), Bahal Singh is entered as Digwar; the latter was a nephew of Akbar (see evidence of D. W. 3) who was the previous Digwar. In the evidence of Digamber Singh (Ex. 7) given on the 10th February 1862, it is stated that the two villages were settled with Akbar some 50 years before that date, and there seems to be no reason to distrust the truth of that statement which was made long before the present dispute arose. This carries the tenure back to 1814 when Prithi Singh the zemindar of Jheria was granted a Sannad (See Ex. 5, dated 23rd August 1814 and Ex. 6) investing him with the care of the Police in his estate, that is to say, up to nearly 100 years before the date of the present suit.

The tenure is therefore an ancient one. It has remained in the possession of members of the same family up to 1887 when Digamber Singh was dismissed for misconduct, having devolved successively on members of that family on the death or resignation of any incumbent of the office. Both office and tenure have therefore been hereditary though there appears to have been a condition, that in the event of dismissal by Government of a member of that family for misconduct and in the event of there not being

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

a member of the family suitable for appointment, the office and tenure would pass to the person appointed as Digwar by the Government. On the dismissal of Digamber and on the appointment of Defendant No. 1 as Digwar the tenure passed to Defendant No. 1. All orders, for the appointment and dismissal of the Digwars have been made by Government, the zemindar never having had any voice in the matter (see Exs. V, X, Y, Z, JII, 22. 20. T1—W, and the evidence of Girish Chandra Ghose, D. W. 8); all that the zemindar has received in respect of the tenure for this long series of years has been the rent of Rs. 64, which from the receipts filed appears to have remained fixed and unchanged all along. The services rendered by the Digwar have been Police or public services and the Digwar for the time being has been held responsible for the due discharge of those services to Government and not to the zemindar Reg, XIII of 1833 deprived the zemindar of Jheria of his Police functions and since then the Digwars have been directly under Government.

The learned pleader for the Plaintiff-Respondent has set up in this Court a case with regard to the creation of the tenure which does not appear to have been advanced in the lower Court. The case is that when Raja Prithi Singh was invested with the control of the Police in 1814 he appointed his ijardars to do the work for him under his orders and that the ijardar of Tasra and Raharaband was in that position. The duty of the ijardar is said to have been to collect the rents of the mouzahs and to pay them to the zemindar, and as remuneration for his services, partly as rent collector and partly as Digwar or Police officer, he was allowed to hold and receive the profits of the *mán* lands in the mouzahs. This view it is contended is supported by the *lotbandi* (Ex. 11) for 1208 B. S., by the copy of the Register of revenue-paying estates in Manbhum (Ex. 14), by the receipts in which the person holding the tenure is described indiscriminately as Digwar, talukdar, ijaradar or etmamdar, by the *safabandi* of the estate, dated the 15th September 1857, (Exhibit 15) when the estate was under the Court of Wards, by para. 25 of the report of Rai Charan Ghose, Deputy Collector, dated 17th September 1875, with covering letter of the Deputy Commissioner of Manbhum of 3rd May 1875 (Ex. F), by the evidence of Gonesh Kuiri Chakladar (P. W. 6) and of Jailal Sinha (P. W. 9), by the deposition of Digamber Singh (Ex. 7) and by the report of the Police (Ex. T1) and the receipt given by Defendant No. 1 when he was placed in possession of the lands of the tenure on appointment as Digwar (Ex. W). These documents do not however appear to us to support the view contended for. It is not alleged on behalf of the Appellant that the Digwar did not hold a certain portion of the two mouzahs in his khas possession but it is alleged that he received the profits of that land as well also as all the other profits and rents of the two mouzahs, subject only to a yearly payment of Rs. 64 as rent to the landlord. This view is supported by the petition of Defendant No. 1, dated 22nd November 1891, Ex. I, asking the permission of the Deputy Commissioner to grant the lease

to Defendant No. 2. The payment of the uniform amount of Rs. 64 a year to the landlord for a long series of years is also hardly consistent with the view that the person in possession of the tenures was a rent-Collector for the landlord. The evidence of the Chakladar, a servant of the zemindar, and of Joy Lal Singh, the son of the dismissed Digwar Digamber, is not entitled to complete reliance. The *safbandi* in fact proves nothing as it contains no entry relating to the mouzahs and the entries in the Register, Ex. 14, not being supported by any evidence do not afford any assistance. The *lotbandi* will be dealt with later on, but as it appears to have been prepared for a special purpose it cannot be accepted as of much value in determining the question.

On the other hand the circumstance that the Digwar has all along been responsible to Government for the due discharge of his duties, that the appointments to and dismissals from the office have been all along made by Government and that the tenure has passed to the persons whom Government has appointed, are entirely inconsistent with the suggestion that the holder of the tenure was a servant under the landlord responsible to him for the due collections of the rents of the estate. Government would not have been able to dismiss a servant of the zemindar without the consent of the zemindar.

We hold, therefore, that the view put forward by the learned pleader for the Plaintiff-Respondent cannot be accepted and that the holder of the two Mouzahs Tasra and Raharaband did not hold them as a simple ijaradar under the landlord responsible to him for the rents of the tenure, and receiving as his remuneration only the *mân* lands. The tenure has all along been a Digwari tenure ancient and hereditary, held subject to the payment of a fixed rent to the landlord, and on condition of the performance of certain Police or public services, for the due discharge of which the holder has been responsible to the Government which alone has exercised the power of appointment to or dismissal from the office.

This being in our opinion the character of the tenure we have now to consider the different points which were urged before the Subordinate Judge and have been argued before us.

The first of these is whether Government is a necessary party and whether the suit should have been dismissed for non-joinder of Government as a party Defendant. The learned Counsel for the Appellant in contending that Government is a necessary party has dwelt on the fact that whether or not Government itself has an interest in the minerals it has as trustee for the public a substantial interest in the tenure and as such is bound to oppose any attempt to reduce the profits of the tenure in value and so to render it less useful for the purpose for which it was created, that is to say, for the remuneration of the holders for the discharge of their public services. The two mouzahs having been set aside as an appendage to the public office of Digwar it is contended that a tenure was thereby created and the person with whom the settlement was made acquired by it rights to the whole produce or profits of the land whether derived from the surface or

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

sub-soil. All that the landlord reserved was the right to the quit rent of Rs. 64. The Digwars in succession have all along been responsible to Government for the due discharge of their public duties, and there is corresponding duty on the part of Government to them to protect their rights in the tenure from infringement. The Government has a further duty in the interests of the public to protect the rights of the Digwar from encroachment by the zemindar.

It appears that in an objection raised in certain proceedings before the Survey Officer in 1883 (see copy of judgment, dated the 16th March 1883, Ex. 27) the zemindar, the grandfather of the present Plaintiff, did not dispute that the two Mouzahs Tasra and Raharaband had been set apart as Digwari or public service lands. In the suit in 1885 (see copy of plaint, Ex 51) Government asserted a right to the mouzahs as Government Police Digwari land, and sued to have set aside a sale of a portion of the lands in the two mouzahs in the execution of a decree for debt against the Digwars and obtained a decree (see Ex R1). In 1881 the two mouzahs were measured and demarcated as Ghatwali lands, and they were included in the Register of Ghatwali lands of 1880 to 1883. It has already been shown that the Government has all along exercised the right of appointing and dismissing the Digwars, and it has, therefore, an interest in maintaining intact the mouzahs set apart for their remuneration. The lease of the mineral rights to the Defendants Nos. 2 and 3 was granted by Defendant No. 1 only after he had taken the permission of the Deputy Commissioner of Manbhum and had explained that the profits from the two mouzahs were insufficient for the due discharge of his duties. The permission to grant the lease was given subject to the condition that he inserted in the deed a clause to the effect that the settlement was made without prejudice to the rights of Government and a clause to that effect was inserted in the deed.

The Government, therefore, has all along asserted a right in the two mouzahs on the ground that they are public service lands, and in granting permission to the Defendant No. 1 to give the lease to the other Defendants, the Deputy Commissioner on behalf of Government has maintained the same position. The Plaintiff in the present suit claims exclusive right to the minerals.

We think that the rule stated in Daniell's Chancery Practice, Vol. I, page 264, and the case of *Kashi* v. *Sadashiv* (4), on which the Subordinate Judge has relied, cannot be taken to apply to the facts of the present case. Nor, do we think, is the case of *Ven Gelder Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (26), on which the learned pleader for the Plaintiff has relied before us, on all fours with the present case. Here a right to the tenure as one set apart for public purposes has all along been advanced and acted on by Government for a long series of years without apparently any objection having been raised by the Plaintiff and though the right to the profits from the sub soil has not been directly claimed either by Government on its own behalf or on

(4) I. L. R. 21 Bom. 229 (1895).
(26) 44 Ch. D. 374 (1890).

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

behalf of the holder of tenure still now that the Plaintiff advances an exclusive right to the sub soil profits it is a matter in which the Government has a substantial interest as affecting the profits derivable from the tenure. The Digwar's personal interest in the tenure terminates with his life while the exclusive rights which the Plaintiffs claim are such as affect the profits of the tenure permanently, and in the permanent interests of the tenure the Government is concerned for the reasons already stated. The three cases on which reliance was placed before the Subordinate Judge, and which have also been relied on before us on behalf of the Defendants Respondents, are not quite on all fours with the present. But the facts of this case are, in our opinion, even stronger to support the view that the Government is a necessary party in this suit. Indirectly, the Plaintiff in this suit seeks to defeat rights which the Government has all along assumed itself to possess on behalf of the public and which in other proceedings in other Courts it has claimed with success. In sanctioning the grant of the lease by Defendant No. 1 to Defendant No. 2, the Government has asserted these rights. Under all these circumstances, we feel bound to differ from the view of the Subordinate Judge and to hold that Government was a necessary party in the suit.

The next question whether the suit was barred by limitation which was not pressed before the Subordinate Judge has however been argued before us and it is necessary for us to determine it. For the Appellants it has been argued that the evidence proves that the Defendant No. 1 began to dig out coal in 1888, that the Road-cess notices from 1889 to 1902 (Exs. VI-5 to VI-18) show that cesses were realised during those years from him on the coal dug out at values varying from Rs. 65 to Rs. 2,400, that in 1891 the negotiations were first entered into with the Coal Company for the grant of the lease, that application for permission was then openly made to the Deputy Commissioner and was granted on the 8th December 1891, that the lease was executed on the 2nd January, 1892 and finally transferred to the Coal Company on the 17th December 1897. All these facts show that there was an open assertion of the right of the Digwar to the sub-soil coal adverse to the zemindar since 1888. The fact that the present suit was not instituted till the 18th December 1903, *i.e.*, till 15 days before the expiry of 12 years from the date of the lease, though the zemindar must have been aware that the Digwar was asserting rights to the sub-soil coal so far back as 1888 indicates, it is urged, that the zemindar acknowledged that the sub-soil rights to the coal belonged to the Digwar. It has been contended that this is not a case of constructive possession by a wrong-doer but one of actual possession openly asserted and it is argued that this is one of the special cases contemplated by Hall, V. C., in the remarks made in his judgment in *Ashton* v. *Stock* (27).

For the Respondents, however, it is contended that all that the Digwar did from 1888 to 1892 was to take the surface coal or coal washed out by the action of the Damudar River (see the

(27) 6 Ch. D. 719 at p. 726 (1877).

evidence of P. W. 4, P. W. 6 and P. W. 7), and that this did not amount to an assertion of a right to the sub-soil coal. The account filed by the Defendant's witness, Girish Chandra Ghose, is characterised as worthless. It is further argued that even if the Digwar dug out the sub-soil coal during those years he was acting as a wrong-doer and on the authority of the case of *Mohini Mohan Roy* v. *Promoda Nath Roy* (5), it is argued that constructive possession applies only in favour of a rightful owner and need not (as a rule) be extended in favour of a wrong-doer, whose possession must be confined to land of which he is actually in possession, and on the authority of the case of *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry* (28) that occupation by a wrong-doer of a portion of land only cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by prescription. All then that the Defendants could have acquired a right to by prescription was the coal actually taken out by them and not to all the sub-soil coal. And as bearing on this point reference has been made to the cases of *Earl of Dartmouth* v. *Spittle* (29), *Ashton* v. *Stock* (27) and *Lord Courtown* v. *Ward* (30).

We have seen the accounts which were produced by Girish Chandra Ghose and we think they are of no value as evidence. We agree with the Subordinate Judge that the sub-soil coal was not regularly or systematically worked till

(5) I. L. R. 24 Cal. 256 (1896).
(27) 6 Ch. D. 719 at p. 726 (1877).
(28) I. L. R. 31 Cal. 397 (1903).
(29) 19 W. R. Eng. 444 (1871).
(30) 1 Sch. & Lef. 8 (1802).

the lease was granted to the Company in 1892 and we are unable to attach any value to the Road-cess notices which were apparently issued on information furnished by Defendant No. 1 himself. There is moreover no direct evidence to prove that the right to the sub-soil coal was asserted by Brojo Nath Bose, the Digwar, to the knowledge of the Plaintiff before 1892 though there may have been no concealment that he was working the coal and we hold, following the view adopted in the cases relied on by the Plaintiff-Respondent, that the suit was not barred by limitation.

We have now to consider the important question in the case, *viz.*, whether the right to the sub-soil coal or minerals belongs to the Plaintiff as zemindar or to the Defendant No. 1 as Digwar. We have already noticed the circumstances under which the tenure appears to have been created, the conditions under which it has been held, and the manner in which it has devolved on each Digwar in succession. It is not necessary for us to repeat in detail the description of the course of special legislation in Bengal so far as it imposed on the zemindar the management of the Police in their estates and affected the position of the persons appointed to discharge those duties. This has been set out in the judgment of the Subordinate Judge. Pergunnah Jheria in which Mouzahs Tasra and Baharaband are situated was admittedly originally included in the district of Birbhum. In 1805 it was included with other pergunnahs in the District of the jungle mehals, the head-quarters of which was at Bankura. In 1833 it, with other pergunnahs, was

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

formed into the District of Manbhum. It is clear from the documentary evidence (see Report of Mr. Money, Deputy Commissioner of Manbhum, dated 14th November 1864, Ex. L1, the Report of Col. Morton, Deputy Commissioner of Manbhum, dated 3rd May 1875, (Ex. F) and Hunter's Statistical Reports, Vol. 17, p. 281), that in the first half of the last century the whole of the country covered by the jungle mehals and the neighbouring districts was in a very disturbed state and that public offices and records were on several occasions destroyed by fire, that during the Mutiny the main portion of the records of the Manbhum District met with a similar fate, and that in consequence, requests had to be made to the collectors of the neighbouring districts to send copies of quinquennial and decennial papers to afford the required information regarding the different estates in the different pergunnahs in the District (see Rubkari, dated 19th September 1857) (Ex. 2). Jheria was one of those pergunnahs. The reply received (see Ex. 1, dated 13th October 1857 and Ex. 13) was to the effect that the papers relating to the pergunnahs were not in existence, and that only the old *lotbandies* of certain pergunnahs and a copy of a book showing the lands and jamas of Chabla and Panchkote for the year 1202 were to be found. It is not, therefore, surprising that the documentary evidence which each party is able to produce to prove the origin of the tenure is small and not of a very substantial character.

The ancient document on which the Plaintiff mostly relies is the copy of the *lotbandi* of 1208 B. S. (Exhibit II). It bears the heading "List of *Lotbandi* of Collector's Revenue for 1208 B. S. in respect of Pergunnah Jherriah, District Birbhum," and it appears to be one of the papers which were sent to Manbhum on 13th October 1857. This document has been attacked by the learned Counsel for the Appellant as being a copy of a copy and inadmissible in evidence, and also on the ground, that its genuineness is open to suspicion. The first ground of attack is based on the endorsement on the face of the document which runs "Copy, Sd. R. C. R. Extra-Assistant Commissioner." There is, however, nothing to prove the meaning of this endorsement and the objection does not appear to have been pressed in the lower Court. We see no reason to treat the document as inadmissible on the ground set forward. Its genuineness is attacked because there was some delay in its production by the Plaintiff, because the officer who produced it had only been one year in office and because the report of the Naib Mahafiz, dated the 7th March 1859, (Ex. D) would not have been made if the *lotbandi* had been received in 1857. It is also suggested that it is manifestly incorrect as it mentions Tasra with profits of Rs. 45 but makes no mention of Raharaband and it is argued that the explanation advanced by the Subordinate Judge that Raharaband is an offshoot of Tasra cannot be accepted because Raharaband is the larger of the two mouzahs. We do not think these objections are sound. The delay in the production of the document was not serious, and the accident, that the officer who produced it had been one year only in office is not material. The report of the Naib Maha-

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

fiz related to Ghatwali and jaigir lands which find no place in the *lotbandi*, and the list of papers, dated the 13th October 1857, (Exhibit B) goes to support the view that the document is genuine. The omission to give in the *lotbandi* the profits of Raharaband would not be of importance unless it were proved that at that time any profits were derivable from that mouzah. The survey map prepared in 1881 show that even then a large portion of the mouzah was covered with jungle. The document is, therefore, in our opinion admissible in evidence and genuine. Its value as proving that in the year 1208 there was no Digwari tenure of Tasra and Raharaband has to be considered. The document appears to have been prepared under cl. 2, sec. 29 of Reg. VII of 1799, in view of a possible sale of the whole or a part of the pergunnah for arrears of Government revenue, and its object was to show to intending purchasers the value of the produce of the different mouzahs in the pergunnah in the past year and also to enable the Collector after such a sale to re-assess the Government revenue on the two portions in accordance with the provision of Arts. X and XI of Reg. I of 1793, and Reg. I of 1801. The statement would ordinarily not specify Digwari tenures but would only mention the rent payable on them to the landlord. The omission of any mention of the Digwari tenure of Tasra and Raharaband can hardly be accepted as proof that no such tenure was then in existence.

The next document of ancient date relied on by the Plaintiff is (Exhibit 4), the Register of appointments of Ghatwals and Chowkidars from the 1st February 1832 to the 29th July 1839. This document contains no mention of the Digwari tenure of Tasra and Raharaband, and to this fact the Subordinate Judge has attached considerable importance as indicating that the tenure was not then in existence. This document, however, is not as the Subordinate Judge has described it a Register of Ghatwali lands but of appointments of Ghatwals and Chowkidars. It is to be observed that in the report (Exhibit E), dated 18th June 1799, made by Ranji Tehsildar, a distinction is drawn between Digwars and Jaigirdars who were remunerated by jaigirs of villages and the Ghatwals and Chowkidars who were remunerated by fixed salaries in cash or plots of lands in their villages. In the Register there are only two instances of persons who held one village each all the rest being remunerated by salaries or by a certain number of bighas of land in their respective villages. If the holder of Tasra and Raharaband was a Digwar, he would not be likely to be entered in the Register, and, even otherwise, if there had been no appointment to the office between January 1832 and July 1839, there would be no entry in the Register. We are unable to agree with the Subordinate Judge that this Register supports the view that the Digwari tenure was not in existence in those years.

From the provisions of cls. 4 and 13 of sec. 7 of Reg. XVIII of 1805, the Subordinate Judge comes to the conclusion that the Digwars were servants of the landlords as much as of Government and he considers that this view is confirmed by the evidence of Matabbar Singh and Joy Lal Singh. These two witnesses are

BROJO NATH BOSE v. RAJA SRI SRI DURGA PERSAD SINGH.

relations of Digamber Singh who was dismissed for misconduct and their evidence does not appear to us to be entitled to reliance. The evidence oral and documentary on the other hand goes conclusively to prove that the services rendered by the Digwars were Police or public services, that for the due discharges of those services the Digwars were responsible to Government which alone had power to appoint or dismiss them. There is nothing to support the view, which the Subordinate Judge accepts, based on the Regulation alone, that the Digwar of Tasra and Rahara-band was a servant of the landlord. The view we take is supported by Hunter's Statistical Reports, Vol. 17, p. 257, where it is pointed out that the services paid by "the Ghatwals of Manbhum were from the first military or Police services and never acquired a menial or personal character." The Digwars appear to have held a position superior to the Ghatwal. See Hunter, Vol. 17, p. 334. We are unable to agree with the conclusion of the Subordinate Judge on this point.

The oldest documents on which the Defendants rely to prove their Digwari tenure are Exhibits U and V., the copies of the Isumnavisi papers 1845 and 1861, the former of which shows Bahali Sinha as Digwar of Tasra and Raharaband, and the latter shows Pahlan Singh as Digwar.

The learned pleader for the Plaintiff-Respondent contends that these documents are of no value and in support of this contention relies on the remarks made by Mr. Clay, Deputy Commissioner of Manbhum, in his Report of the 3rd June 1869 (Exhibit K1), as to the worthlessness of such documents as evidence, and on the case of *Fergusson* v. *The Government and Dwarka Nath Singh* (31), in which similar documents were rejected as evidence. The value of such documents as evidence in a particular case must, however, depend on the special circumstances under which they are offered for belief. Supposing them to stand alone without any evidence to support them it is probable, having regard to the circumstances under which they are said to have been in the first instance prepared, that they would be of little value to prove the facts contained in them. But when, as in the present case, they are supported by other evidence they certainly are entitled to more credit. The documents, Exhibits X., Y., Z., III., 22, 20 and T, to which reference has already been made and which prove the retirement of Pahlan Singh and the appointments of Matabbar, Digamber and Brojo Nath Bose in succession as Digwars, certainly support the two Isumnavisi papers as proving that the Digwari tenure was in existence when the two documents were prepared. The Defendants also rely on the depositions of Digambar Singh, dated the 8th and 10th February 1862 (Exhibits 7 and 8), which were given long before the present dispute arose. These carry the tenure back at least to 1814 when Prithi Singh was entrusted with the maintenance of the Police in his estate of Jheria. There seems no good reason for discrediting these statements made so long ago and before the present dispute arose. The receipts given by the zemindar for the rent, produced by the Defendants, are also relied on as proving that the

(31) 8 W. R. 232 (1867).

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

existence of the Digwari tenure was then openly asserted and admitted. The Register of the Ghatwali lands in Manbhum prepared in 1880 to 1883 and the maps prepared in 1881 are relied on as proving the existence of the tenure and it is pointed out that its existence was also taken for granted in the proceedings before the Survey Officer in 1883, and was openly asserted by Government in 1885.

Under all these circumstances, we hold that the evidence for the Defendant is sufficient to establish the existence of the Digwari tenure certainly as far back as 1814, and we are unable to agree with the Subordinate Judge that the evidence fails to prove that the tenure was in existence before 1845. We think that the evidence of the Defendants makes out a probable and consistent story of the creation of the tenure and of its continuance down to the date of suit. We accept it as true.

There is, it is true, no direct evidence to prove the existence of the tenure prior to 1814, and we have to determine whether when the tenure was created the zemindars intended to reserve anything except the quit rent of Rs. 64. The fact that the same rent has been accepted all along would seem to support the view that the right to the rent was all that it was then intended to reserve. The rights to the sub soil coal do not appear to have been thought of then. Nor can those rights be held to have been covered by the provisions of the Mahomedan Law taken from the Hedaya to which attention is drawn in Mr. Millett's Report of the 26th March 1842, as they related only to mines of precious metals.

In order to prove the respective titles of the zemindar and Digwar to the mineral rights, we have been referred by the learned representatives of both parties to a long series of rulings in which in neighbouring districts and in the estate of Pachete in the District of Manbhum, the rights of Digwars have been considered and dealt with. We are aware of the danger of attempting to generalise from one class of persons to another possibly different class, and we propose to deal with those cases only so far as they may appear to throw some light on the relations of the zemindars and Digwars in the present case. The learned Counsel for the Appellant has indeed gone so far as to suggest that as Pergunnah Jheria originally formed a part of the District of Birbhum, and as the rights of the Ghatwals in Birbhum have been recognized by Government by special legislation in Reg. XXIX of 1814 and Act V of 1859, we should hold that the Digwar in the present case has the same rights as those conferred by statute on the Ghatwals of Birbhum. All however that we think we should be justified in doing is to ascertain whether there is a sufficient analogy between the legal position of the Digwar of Tasra and Raharaband and that of the Ghatwals of Birbhum to justify the inference that the incidence attaching to the tenures of the former should be regarded as similar to those attaching to the latter. At the same time, we are not prepared to agree with the Subordinate Judge that the enactments dealing with the Ghatwals of Birbhum are of the nature of private statutes.

Now we find that in the case of Ghat-

wali tenures in Khuruckpur in Bhagalpur District, it was held in the case of *Raja Lilanund Singh* v. *The Government of Bengal* (10), that such tenures did not fall within cl. 4, sec. 8 of Reg. I of 1793 and that, as they were included in the Permanent Settlement, they could not be resumed by Government, and in the case of *Munrunjun Singh* v. *Raja Lilanund Singh* (14), that in respect of the same class of Ghatwals it was found that they held a perpetual hereditary tenure at a fixed rent in money and service, and that except for misconduct on their part, they could not be evicted by the zemindar. This was confirmed on appeal by the Privy Council, *Lilanund* v. *Munrunjun* (15). The same view was taken in the case of *Tekait Manoraj Singh* v. *Raja Lilanund Singh* (32). A similar view was taken by this Court in the case of *Jogendra Nath Singh* v. *Kali Charan Roy* (33) with regard to a Ghatwali tenure in Bankura. In the case of *Anundo Rai* v. *Kali Prosad Singh* (19), confirmed by the Privy Council in *Kali Prosad* v. *Anundo Rai* (20), it was held that a Khuruckpur Ghatwali tenure is transferable if the zemindar assents and accepts the transfer.

In the case of *Kooldeep Narain Singh* v. *Mahadeo Singh* (12) with regard to a Ghatwali tenure created by a sannad, dated 1743, in a pergunnah adjoining Khuruckpur, a Full Bench of this Court held that the tenure was permanent and hereditary, that it was held at a fixed quit rent, and therefore that the landlord was not entitled to resume it on the ground that the Ghatwal had ceased to perform the services, if Government refused to renounce the claim to the services. This was confirmed by the Privy Council on appeal, *Kooldeep Narain* v. *Government* (13); a similar view was taken by the Privy Council in the case of *Forbes* v. *Meer Mahomed Tuquee* (7). This related to a tenure in Pergunnah Sultanpore in the District of Bhagalpur.

In the case of *Bukronath Singh* v. *Nilmoni Singh* (17), confirmed by the Privy Council in *Nilmoni Singh Deo* v. *Bukronath* (18), it was held with regard to a Ghatwali tenure in Pergunnah Pachete, District Manbhum, that though the mouzahs which made up the jaigir were included in the area of the zemindari at the time of the Permanent Settlement, yet as the share of profits which were retained by the jaigirdar formed no part of the assets on which the Government revenue was fixed, that as the succession to the jaigir was subject to the sanction of Government and as the jaigirdar was liable to render public services, the tenure being in Pachete which formerly was included in the District of Birbhum, the jaigir was analogous to one described in Reg. XXIX of 1814, and further that the jaigir was not liable to attachment and sale in execution of a decree for debt against the predecessor of the jaigirdar. Pergunnah

(10) 6 M. I. A. 101 (1855).
(12) 6 W. R. 199 (1866).
(14) 3 W. R. 84 (1865).
(15) 12 B. L. R. 124 (1873).
(19) I. L. R. 10 Cal. 677 (1884).
(20) I. L. R. 15 Cal. 471 (1887).
(32) 2 B. L. R. 125n. (1865).
(33) 9 C. W. N. 663 (1905).

(7) 13 M. I. A. 438 (1870).
(13) 14 M. I. A. 247 (1871).
(17) I. L. R. 5 Cal. 389 (1879).
(18) I. L. R. 9 Cal. 187 (1882).

Pachete is close to Pergunnah Jheria in Manbhum.

In respect of a tenure in the District of the Sonthal Pergunnahs in the case of *Binode Ram Sen* v. *Deputy Commissioner of the Sonthal Pergannahs* (34), it was held that the rents of a Ghatwali tenure are not liable for the debts of a former deceased holder of the tenure on the ground that the rent was assessed so as to leave the holder of the tenure what was at the time considered sufficient or the performance of his services and each Ghatwal was entitled to the whole of it, and in the case of *Chittro Narain Singh Tekait* v. *Assistant Commissioner of the Sonthal Perganahs* (35), it was held that a transfer by Government on default on the part of the Ghatwal was valid.

In the case of *Forbes* v. *Meer Mahomed Tuquee* (7) already referred to, it was noticed that a clear distinction must be drawn between the grant of an office the performance of whose duties are remunerated by the use of certain lands and the grant of an estate burdened with certain duties; and in the case of *Radha Pershad Singh* v. *Budhu Dashad* (21), it was also held that a further distinction must also be drawn between a grant for services of public nature and one for services, private or personal to the grantor.

The former class of grants in each instance were liable to resumption by the grantor, while the latter class were not so liable.

(7) 13 M. I A. 438 at p. 463 (1870).
(21) I. L. R. 22 Cal. 938 at p. 941 (1895).
(34) 7 W. R. 170 (1867).
(35) 14 W. R. 203 (1870).

In the case before us, it has in our opinion been fully established that the services to be performed were Police service and purely of a public nature. The zemindar having certain public services to perform settled a certain number of villages with the Digwar on the condition that he would perform those services due to Government, and reserved for himself only a quit rent of Rs. 64. The same rent has been paid ever since, and the tenure has passed to different members of the family who have in turn been found by Government fit to discharge the public services. On default, Digamber Singh was dismissed by Government and the tenure passed to Brojo Nath Bose, Defendant No. 1, who was appointed Digwar by Government in his place. The tenure was, therefore, in our opinion created in the first instance to enable the holder to discharge public duties and has all along been so regarded. We hold, therefore, on the authority of the case last mentioned, that the tenure is not liable to resumption by the landlord.

In the suit No. 33 of 1885 (Ex. RI), the Government successfully asserted that the lands were not liable to sale for debts of the Digwars as they were Police Digwari lands and on the dismissal of Digamber Singh, the tenure was transferred by Government to Defendant No. 1. These circumstances show that the tenure corresponds with those in the Sonthal Pergunnahs which formed the subject of the two cases noted above and a transfer by Government on default of the Ghatwal would be valid [*Chittro Narain* v. *Assistant Commissioner of the Sonthal Pergannahs* (35).]

(35) 14 W. R. 203 (1870).

BROJO NATH BOSE *v.* RAJA SRI SRI DURGA PERSAD SINGH.

It has also been established that the tenure is ancient, that it is hereditary, and that it has been held all along at a fixed rent of Rs. 64. At the same time, it would appear that the mouzahs of which it consists were included in the zemindari for assessment at the time of the Permanent Settlement. In these respects it resembles the tenure in Pergunnah Pachete. The question then arises, whether we should follow the view taken in the case of *Bukronath Singh* v. *Nilmoni Singh* (17) and hold that the tenure must be regarded as analogous to the Ghatwali tenures in Birbhum so as to carry the same incident. It is clear that it was treated as such by the Deputy Commissioner of Manbhum, when he gave the sanction to the lease of the mining lrights; a sanction which is required by Act V of 1859 in the case of mining eases granted by the Ghatwals in Birbhum. The opinion of the local officer is no doubt not conclusive, but we think, that in a matter like the present, where local knowledge is valuable it is entitled to some consideration.

We find further that as early as 1816, the Nizamat Adalut regarded the Ghatwals of the jungle mehals as similar to those in Birbhum (see Ex. A). In 1883 (see Ex. R) and in 1903 (see Ex. S), the Government asserted its right to control the Digwars in executing leases of mineral rights, and the evidence of Gopal Mollah (D. W. 4) is to the effect, that all leases executed by Digwars were subject to the control and sanction of Government. The evidence of the Digwars who are witnesses for the Defendants (D. W. 1 & D. W. 6) is also to the effect that Government exercised entire control over the Digwars, and that the zemindar had no power of control over them. It further appears (see Ex. Q1 and Ex. A1) that leases of sub-soil rights have been granted by Digwars in other parts of Manbhum without any objection having been taken by the zemindar.

We think that all these circumstances justify us in holding that the position of the Digwar in the present case is analogous to that of the Ghatwals in Birbhum, and in inferring that he has been recognized throughout as possessing the same rights. In this view of the case, we hold that the mineral rights in the tenure do not belong to the zemindar.

The argument of the learned pleader for the Respondent based on Mr. Millet's Report of the 26th March 1842, the letter from the Secretary to the Board of Revenue to the Government of Bengal, dated 9th January 1872 (Exhibit 16A), and the Despatch of the Secretary of State for India, dated 25th March 1880 (Exhibit 26), that Government has disclaimed all title to mineral rights in lands which were included in the Permanent Settlement, and that, therefore, such rights belong to the zemindar, cannot have weight in determining the question before us, which is whether the zemindar or the Digwar is entitled to the mineral rights. The question as between the zemindar and Government is not in issue.

Further, we hold that on other grounds also we should arrive at the same conclusion. We have found that the tenure was created not later than 1814, that it has been held at the same rental ever since, that it has descended by inherit-

(17) I. L. R. 5 Cal. 389 (1879).

ance to members of the family of the original grantee until Digamber Singh in 1887 was dismissed for misconduct, that the zemindar has never exercised the power to appoint or dismiss a Digwar holding the tenure, that this power has all along been exercised by Government, that the tenure passed on the transfer by Government, and that the only profit which the zemindar has received from the tenure during the long course of years has been the rent, which seems to have been a quit rent Under such circumstances we think that the only possible conclusion at which we can arrive is that the tenure was created as a permanent tenure on a fixed rent, and that it was heritable [see *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (36) and *Dhunput Singh* v. *Gooman Singh* (37)]. All that the zemindar reserved was the fixed rent of Rs. 64, such being the case, we see no reason to differ from the view taken in the case of *Sitaram Chukrabutty* v. *Kumar Hari Narain Sinha* (38) and hold that the Digwar, as holder of a permanent tenure, possesses all underground rights including mining rights, unless there is an express reservation to the contrary [see also *Shyama Charan Nundy* v. *Abhiram Goswami* (39), *Tituram Mukerji* v. *Cohen* (40)]. In this case no such reservation is shown to have been made in fact, nor can it be implied from the conduct of the zemindar.

(36) I. L. R. 22 Cal. 533 at p. 543 (1891).
(37) 11 M. I. A. 433 at p. 466 (1867).
(38) 10 C. W. N. 425 : s. c. 3 C. L. J. 59 (1905).
(39) 10 C. W. N. 738 : s. c. 3 C. L. J. 306 (1905).
(40) 9 C. W. N. 1073 : s. c. I. L. R. 33 Cal. 203 at p. 215 (1905).

We are of opinion that the cases of *Bagdu Majhi* v. *Raja Durga Prosad* (41) and *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (42) relied on for the Respondent, are not in point. In the former, the Defendant was holding under an ijara created 12 years before suit, and the latter was a case of a maintenance grant.

Further, we hold that the conclusion at which the Subordinate Judge has arrived, based on the finding that the Defendant No. 1 was not an independent talukdar is not sound. The learned Counsel for the Appellants explains that Defendant No. 1 never set up the title of an independent talukdar. His contention was that sec. 5 of Reg. VIII of 1793 was not exhaustive and that the Digwari tenure held by Defendant No. 1 was a peculiar tenure, analogous to the Ghatwali tenures in Birbhum, referred to in the preamble of Reg. XXIX of 1814 to which the provisions of the then existing Regulations did not apply. This indeed has been the case urged throughout before us, and we think that no conclusion adverse to Defendant can be drawn from the fact that he has failed to prove that he is an independent talukdar.

We are unable, therefore, to agree with the conclusion at which the Subordinate Judge has arrived, that the title to the sub-soil rights in the Digwari tenure in suit is with the zemindar, the Plaintiff.

It is not necessary to determine the other points raised in the subsequent issues.

The result is that the appeal is decreed

(41) 9 C. W. N. 292 (1904).
(42) 2 C. L. J. 20 (1905).

with costs and the suit of the Plaintiff is dismissed with costs, the hearing fee being assessed at Rs. 500 (Five hundred rupees only).

Appeal allowed

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
2, December.

FATIMA BIBI and others, Appellants,

v.

SHEIKH AHMED BUKSH and others, Respondents.

*Mahomedan Law—Gift—*Marz-ul-mout—*Right test to be applied—Practice where concurrent findings of fact are under consideration.*

Where the question was whether a certain deed of gift made by a deceased Mahomedan donor in favour of his son was invalid by reason of the Mahomedan Law of Marz-ul-mout *relating to gifts made in death illness and the Courts in India applied the test which was treated as decisive on this point,* viz., *was the deed of gift executed by the donee under apprehension of death?—their Lordships held that the test applied was the right one.*

Appeal from a decree of the abovementioned High Court, dated 14th August 1903, affirming a decree of the Subordinate Judge of Cuttack, dated 20th August 1900.

The principal question for their Lordships' consideration was whether under the Mahomedan Law a deed of gift executed on 21st May 1897 by one Moulvi Dadar Buksh in favour of his son, Respondent Sheikh Ahmed Buksh, was valid.

One Dadar Buksh, the father of the Respondent Sheikh Ahmed Buksh, was a Sub-Deputy Collector at Khurdah in Bengal. For some years before his death he suffered from diabetes. Towards the end of 1896 he was advised that he should go on leave as he was suffering from a serious disease. On 4th April 1897, the Civil Surgeon of Puri certified that he had examined Dadar Buksh on the morning of that day, and found him much worse than when he examined him on 10th December 1896. He was of opinion that he was totally unfit for work on account of albumenuria, and should be granted six months' leave for rest and change of climate. Dadar Buksh was granted leave by the Collector of the district in anticipation of sanction and went to his home at Cuttack. He was there examined by a Medical Board consisting of the Civil Surgeon of Cuttack and the medical officer of the regiment stationed there at the time. They certified on 9th May 1897, that he was suffering from albumenuria and considered the state of his health to be such as to render it highly inconvenient for him to proceed to Calcutta for the purpose of examination by the Medical Board there as directed by the Government.

On 21st May 1907, Dadar Buksh and his wife, Mussammat Salimatunnissa, the *pro forma* Defendant No. 7, executed a joint deed of gift (*hibanama*) in favour of their son, Ahmed Buksh, the Respondent, who was then a minor. His mother conveyed to him certain properties she had acquired by purchase on 10th July 1879, and his father conveyed to him a portion of his immoveable estate. It set out that as the grantee had not attained majority the offer and acceptance duly took place between the grantors and the grantee's maternal uncle, Munshi Maho-

med Ibrahim. The deed of gift was registered on 25th May 1897.

Dadar Buksh died on 27th May 1897, leaving him surviving a widow, the said Mussammat Salimatunnissa, a son, the said Ahmed Buksh, and six daughters, *viz*,—(1) Fatima Bibi, married to Syed Nurul Huq; (2) Khadja Bibi, married to Syed Abu Ahmed; (3) Zohara Bibi; (4) Zainab Bibi; (5) Zoheda Bibi; and (6) Khatima Bibi, married to Syed Abu Mahammad.

On 26th March 1898, the three married daughters presented to the Deputy Collector petitions for registration of their names, in respect of 7 pice interest each in the estates named in the petitions, which they claimed as heirs of their father. The widow of Dadar Buksh put in an objection on behalf of her minor son Ahmed Buksh, in which she stated that Dadar Buksh had executed a deed of gift on 21st May 1897, by which he gave all the said properties to his son. The Deputy Collector, holding that the matter involved intricate questions of Mahamedan Law, referred the cases to the District Judge of Cuttack for determination under sec. 55 of Act VII of 1876 (B. C.). On 2nd July 1898, the District Judge delivered his judgment on the matters referred to him. He decided that the deed of gift was made during the death illness (*marz-ul-mout*) of the donor and was consequently invalid. His answer to the reference, therefore, was that the Petitioners, the three married daughters of Dadar Buksh, were entitled to be registered to the extent of 7 pice each. On appeal against that order the High Court of Judicature at Fort William in Bengal made on 31st January 1899 an order refusing to interfere under sec. 622 of Act XIV of 1882.

On 27th December 1898, Khatima Bibi, one of the married daughters, executed a deed of release in favour of the said Ahmed Buksh, in which she admitted that the deed of gift executed by her father was valid.

On 15th July 1898, Syed Nurul Huq, the husband of Fatima Bibi, applied to the District Judge of Cuttack to be appointed guardian, under Act VIII of 1890, of the three minor and unmarried daughters of Dadar Buksh for the purpose of protecting their interest in the property left by their father on the ground that their mother was not a fit person to be their guardian as she had an interest adverse to that of the minors and done acts prejudicial to their interest. On 18th March 1899 an order was made appointing the applicant as such guardian.

On 1st July 1899, Ahmed Buksh having regard to the abovementioned orders of Court and the claims made by five of his sisters, instituted the present suit in the Court of the Subordinate Judge of Cuttack. The five sisters, who contested his claim, were made the principal Defendants and his mother and sister, who admitted it, were made *pro forma* Defendants. The plaint asserted the validity of the said deed of gift and its recognition by Khatima Bibi. It treated the order of 2nd July 1898, for registration of the names of the three married daughters of Dadar Buksh as tantamount to dispossession of the Plaintiff to the extent of the shares claimed by them, and prayed for a restoration to possession of the gifted property to that

extent (3 annas, 6 pies), and a declaration of title and confirmation of possession in regard to the remaining interest in the said property

In answer to the suit the widow confessed judgment and Khatima Bibi did not appear. The other five daughters of Dadar Buksh, who contested the same, filed a written statement in defence, wherein they denied the execution of the said deed of gift in fact, and alleged that, if executed in fact, it was not intelligently executed by Dadar Buksh. They asserted that if duly executed the deed was invalid under Mahomedan Law because executed during death illness, because improperly registered, because insufficiently stamped and because the gift was not completed by delivery of possession. Of the six issues fixed by the Subordinate Judge only one is material for the purpose of this report: "Is the *hebanama* propounded by the Plaintiff a genuine and valid document?"

The Subordinate Judge delivered his judgment on 20th August 1900, and decided that the deed was duly stamped and duly registered. In regard to the alleged invalidity on the ground that possession of the gifted property was not given to the donee, he found as a fact that possession was delivered and as a question of law that delivery of possession was not necessary under the Mahomedan Law when the donor and donee were father and minor son. On the general question of the validity of gift made in death illness (*marz ul mout*) he held that by Mahomedan Law, to invalidate a gift the donor must at the time of the gift be under apprehension of death, and that as a fact Dadar Buksh was not, on 21st May 1897, under such apprehension. In accordance with the above findings he made a decree granting the Plaintiff the relief prayed for with costs, except in regard to one house, as to which he held that the Plaintiff ought to have sued for possession, not for a declaration of title. His judgment on the issue set out above was as follows:—

"I think it will be better to examine first the law on the subject of death-bed gifts (*marz-ul-mout*) and then apply the law to the facts of this case.

From the cases reported in *Ashruffunnissa* v. *Azeemun* (1), *Enaet Hossein* v. *Kureemoonissa* (2), *Saduk Ali* v. *Bibee Pearee* (3), *Wazir Jan* v. *Saiyyid Altaf* (4), *Hassarat Bibi* v. *Golam Jaffar* (5) and from text-books of Justice Ameer Ali and Shama Charan Sarkar, it appears that gifts made by Mahomedans while under apprehension of death are invalid. In *Hassarat Bibi* v. *Golam Jaffar* (5), Justice Ameer Ali said in determining whether the donation of a person suffering from a mortal disease comes within the doctrine of *marz-ul-mout* gifts, several questions have to be considered, *viz.*

(1) was the donor suffering at the time of the gift from a disease which was the immediate cause of his death;

(2) was the disease of such a nature as to induce in the person suffering the belief that death would be caused thereby or engender in him the apprehension of death;

(1) 1 W R 17 (1864).
(2) 3 W. R. 40 (1865).
(3) 9 W R. 142 (1868).
(4) I. L. R. 9 All. 357 (1887).
(5) 3 C. W. N. 57 (1898).

FATIMA BIBI v. SHEIKH AHMED BUKSH.

(3) had the illness continued for such a length of time as to remove or lessen the apprehension of immediate death or to accustom the sufferer to the malady.

This being the law on the subject, let us determine what the state of Dadar Buksh's health was at the time he executed this deed." . . .

The finding of the learned Sub-Judge based on the testimony of Salimatunnissa Bibi (his wife), Babu Balaram Bose (the Sub-Deputy Collector) and Dr. Bhusan Chandra, was that he was suffering--(1) from diabetes for 5 or 6 years; (2) from albumenuria for at least 12 months and occasional fevers. With all these maladies on him he worked and then came home on sick leave about 4 weeks before his death. Thus the disease he had been suffering from, was of long continuance and hence accustomed him to it as also lessened the apprehension of death.

As to the actual state of the patient's health at the time he executed this document he found the opinion of his attending physicians to be that they did not on the 9th of May think that the patient was in danger of death and that the doctor who treated him on the 20th and 21st did not think him to be in danger of imminent death, and the deed was executed on the 21st.

The next question for consideration was what Dadar himself and his relatives thought of his illness. Dadar a little after his arrival at Cuttack drove to a dispensary and walked to the dispensary room. He also drove to Docter Bhushan's place and walked with the latter up to a certain distance. Thus the condition of his health was not such as to inspire him with apprehension of death. His wife deposed that neither he nor his relatives had apprehended death. She is the best person to depose on this point being naturally his constant companion, especially during illness. Several respectable persons who had visited Dadar during his illness were examined by Defendants and not a single person was questioned about Dadar's apprehension of death. It was Nurul Huq only who deposed on this point, but the learned Sub-Judge placed no reliance on his uncorroborated testimony, especially when it was found to be opposed to medical evidence.

The Court, therefore, found that at or about the time this deed was executed, neither Dadar nor his friends and relatives were under apprehension of death.

One other circumstance which proved that Dadar Buksh was not under apprehension of death at the time was that the *hebanama* made mention of his future heirs. Now the idea of death could never enter the head of any man who was thinking of begetting children.

The Sub-Judge in view of all these circumstances held that Dadar was not under apprehension of death and therefore the deed was not invalid.

True, Dadar Buksh died within 7 days after the execution of the deed, but the Mahomedan Law does not say that is a deed of gift is executed during illness and that illness ends fatally, the gift will be invalid. But it says that to invalidate a document executed during illness the donor must apprehend death.

Cross-appeals by the Appellants and the Respondent, Sheikh Ahmed Buksh, to the High Court of Judicature at Fort

FATIMA BIBI *v.* SHEIKH AHMED BUKSH.

William in Bengal were disposed of by one judgment, *Fatima Bibee* v. *Ahmad Baksh* (6). Except as to the question of fact, *viz.*, whether possession was actually delivered on the execution of the deed in question, in regard to which no opinion was expressed, the High Court affirmed the judgment of the Subordinate Judge on all questions of law and fact and dismissed the appeals with costs.

The Appellants, thereupon, preferred the present appeal to His Majesty in Council.

Mr. Jardine, K. C., and *Mr. Ross* for the Appellants.—There is evidence to show that Dadar was very ill. That fact raises a presumption that the gift in this case was invalid under the law of *marz-ul-mout* and shifts the onus on the other side, which must prove that the gift was good because the law of *marz-ul-mout* did not apply to the present case It is submitted that the Respondent has not discharged that onus.

The High Court is not right in saying that the question is merely whether Dadar was under apprehension of death. That is not a correct test. One must look to the surrounding circumstances to find whether there was apprehension of death and not only to the state of mind of the patient as the lower Courts have done. Here all the surrounding circumstances go to show that there was apprehension of death and the gift is, therefore, bad. Baillie in his Digest of Mahomedan Law, (2nd Ed.), Book VIII, Ch. VIII, at p. 552, says that the most valid definition of death illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as, for instance, when he is a *fakeeh*, or lawyer, from going to the *musjid*, or place of worship; and when he is a merchant, from going to his shop; and whether, in the case of a woman, it does or does not disable her from necessary avocations within doors. Ameer Ali in his Mahomedan Law, (3rd Ed.), Vol. I, at p. 22, gives the same passage but curiously enough has fallen into an error by putting it in inverted commas as the translation of the *fatawa*. The correct translation of the *fatawa* is given in the *Calcutta Law Journal* (1905), Vol I, No 12, para. 16, p. 131n. Reference was made to the following: "Appendix C. referred to in para 16 of the review being a correct translation of what is at p. 453 of Baillie's Digest, 1st Ed., to supply the place of the passage in Baillie's beginning with words. 'The most valid definition of death illness is that, &c. . . . .' These words so reproduced here within inverted commas, are words of Mr. Baillie himself introducing the subject and have no place in the Doorool Mukhtar, p. 246, to which reference is made in the foot-note by Mr. Baillie." The evidence shows that the illness here was one which it was highly probable would issue fatally, and consequently the gift is bad

There is no concurrence in the judgments of the lower Courts and therefore the finding is not concurrent in the true sense.

Mr. DeGruyther for the Respondent.—The question with reference to the invalidity of a gift under the law of *marz-ul-mout* has been recently considered by the Judicial Committee in the case

(6) I. L. R. 31 Cal. 319 (1903).

FATIMA BIBI *v.* SHEIKH AHMED BUKSH.

of *Ibrahim Goolam Ariff* v. *Saiboo* (7) and the principles there laid down should be applied to the present case. In order to establish *marz ul-mout* there must be present at least three conditions: *firstly*, proximate danger of death, so that there is, as it is phrased, a preponderence of *khauf* or apprehension, that is, that at given time death must be more probable than life; *secondly*, there must be some degree of subjective apprehension of death in the mind of the sick person; *thirdly*, there must be some external indicia, chief among which would be the inability to attend to ordinary avocations: *Sarabai* v. *Rabiabai* (8) followed in *Rashid Karmalli* v. *Sherbanoo* (9). The Courts in India after examining the whole of the evidence have concurrently found on all the three points in favour of the Respondent. The evidence actually goes to show that death in this case took place suddenly. The gift is good as found by the Courts in India

Mr. Jardine replied that *Sarabai* v. *Rabiabai* (8) followed the decision of the Calcutta High Court in this very case under appeal.

Their LORDSHIPS' JUDGMENT was delivered by

LORD COLLINS.—The question in th case is whether a certain deed of gift made by one Moulvi Dadar Buksh deceased in favour of his son Sheikh Ahmed Buksh is invalid by reason of the Mahomedan law of *marz ul-mout* relating to gifts made in death illness. The deed was executed on the 21st May 1897, and on the 27th of the same month Moulvi Dadar Buksh, the donor, died. A great number of objections to the deed were urged by the Appellants (the Defendants) before the Subordinate Judge, all of which were considered in great detail and overruled by him in a most elaborate judgment in favour of the Respondents. That judgment was affirmed on appeal by the High Court at Fort William, and it is the concurrent judgments of these two tribunals that this Board is now called upon to overrule. The only point which the Appellants have argued on this occasion was that which no doubt goes to the root of the matter, *viz*, whether the gift was invalid under the law of *marz ul-mout*. The test which was treated as decisive of this point in both Courts was, Was the deed of gift executed by Dadar Buksh under apprehension of death? This, which appears to their Lordships to be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, and it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. Their Lordships are, however, clearly of opinion that the reasons given both by the Subordinate Judge and by the High Court, which they will not repeat, establish a large preponderance of probability in favour of the conclusion at which they both arrived.

Their Lordshps will therefore humbly

(7) 11 C. W. N. 973 : S. C. 9 Bom. L. R. 572 (1907).

(8) I. L. R. 30 Bom. 537 at p. 551 (1905)

(9) I. L. R. 31 Bom. 264 (1907).

FATIMA BIBI v. SHEIKH AHMED BUKSH

advise His Majesty that this appeal be dismissed.

The Appellants will pay the costs of the first Respondent, who alone defended the appeal.

Solicitor: *Mr. G. C. Farr* for the Appellants.

Solicitor: *Mr. W. W. Box* for the Respondents.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD ROBERTSON.	MA WUN DI and anr., Appellants,
LORD COLLINS.	v.
SIR ARTHUR WILSON.	MA KIN and ors., Respondents.
1907. 2, December.	

Marriage—Presumption arising from cohabitation with habit and repute—Conditions precedent to its application—Practice—Point not submitted to either Court in India raised before the Privy Council.

Before applying the general presumption of marriage arising from cohabitation with habit and repute it is necessary to make sure that there are the conditions necessary for its existence, viz., *firstly, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise; and, secondly, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.*

The differences between English and Oriental customs about the relations of the sexes made such caution specially necessary in the present case.

Their Lordships of the Judicial Committee declined to entertain a point urged by the Appellants as being covered by the language of one of the issues raised in the case when it appeared that the parties by their conduct of the case had construed it in a narrower sense.

Appeal from a decree of the Chief Court of Lower Burma, dated 19th March 1906, affirming on appeal a decree of the District Court of Amherst at Moulmein, dated 27th June 1905, which dismissed the Appellants' suit with costs.

Maung Gale, the disposition of whose property was the subject of the appeal, was by religion a Buddhist, and was a native of and domiciled in Burma. Up to 1887 he resided in Moulmein with his wife, Ma Kin, the first Respondent, and his five children, the remaining Respondents. In that year he went to Chiengmai (Timmé) in the Siamese Shan States where he traded with money sent by his brother, Maung Tha Hnyin, and with the exception of expeditions into the teak forests and occasional visits to Moulmein, he lived there until his death in July 1894. On his death his estate was taken possession of by H. B. M. Consul in Siam, and was shortly afterwards made over to the deceased's brother, Tha Hnyin, who retained possession of the whole. Subsequently his wife, Ma Kin, who had continued to reside in Moulmein, was, in 1898, appointed administratrix of his estate by the Courts in Burma, and she shortly afterwards commenced proceedings against Tha Hnyin for recovery of the deceased's property—which ultimately became the subject of appeal to His Majesty in Council—and the action was compromised by the payment, on 1st July 1902, by Tha Hnyin to the first Respondent as such administratix, of

MA WUN DI *v.* MA KIN.

Rs. 53,000. Shortly afterwards the first Appellant, Ma 'Wun Di, claimed her share, as one of his widows, and the share of her son, the second Appellant, Maung Myat Pu, from the first Respondent, as administratrix, and on 27th January 1905 commenced the suit, now under appeal, in the District Court of Amherst in Lower Burma against the Respondents as Defendants. The Appellants alleged in their plaint that the first Appellant was lawfully married to Maung Gale at Chiengmai in 1887, where she lived and cohabited with him and assisted him in his business until his death, that the second Appellant was the only child of Maung Gale and the first Appellant, that according to Burmese Buddhist Law the Appellants were entitled to a half share of Maung Gale's estate, and that the first Appellant had applied to the first Respondent for payment of the same, but the first Respondent denied that the Appellants were heirs of Maung Gale or entitled to any share of his property. The Appellants, therefore, prayed that it might be declared that they were respectively a widow and son of Maung Gale, and that as such they were entitled to a half share of his estate; consequential relief was also asked for.

The first Respondent in her written statement put in issue the allegations of the Appellants. She alleged that the first Appellant was not the wife of Maung Gale but that her status was only that of one of numerous concubines taken by him from time to time during his stay in Siamese territory, most of whom were discarded by him some time before his death, and that the first Respondent would herself have been discarded by Maung Gale had he not died before he could carry out his intention. The first Respondent also stated that she had heard that Maung Gale had a child by the first Appellant but that she had never seen the child and she put the first Appellant to proof of the fact that the second Appellant was the child in question. She further alleged that neither of the Appellants was entitled to receive anything out of Maung Gale's estate but were only entitled to retain what he gave them during his lifetime, and asserted that for the past fifty years it had been the practice of Moulmein foresters to take to themselves women of the country when visiting and residing in Siamese territory, but never, so far as she could ascertain, had the children of such women been considered legitimate children entitled to inherit.

Of the five issues fixed by the District Judge it is necessary to mention the following three only :—I. Whether the first Plaintiff, Ma Wun Di, was the legally married wife of Maung Gale? II. Whether the second Plaintiff, Maung Myat Pu, was the legitimate son of the late Maung Gale? III. Whether either or both Plaintiffs are entitled to a share in the estate left by Maung Gale? And, if so, to what share? And to what share are the heirs entitled?

The District Judge decided that the first Appellant was not the legally married wife of Maung Gale and that the second Appellant was not his legitimate son. He considered that as a result of his findings on the first two issues it was not necessary to go into the other issues and dismissed the Appellants' suit with

MA WUN DI v. MA KIN.

costs. In the course of his judgment he observed as follows :—

"I am not satisfied that any wedding ceremony as alleged took place. Had any ceremony taken place it would have been done on a grand scale. Maung Gale's servant Maung Nyein would undoubtedly, as alleged, have been present and would have given it as the first proof of Ma Wun Di being Maung Gale's wife instead of stating as he did that he knew she was Maung Gale's wife "because they lived together, eat together, slept together, and went about together. Holding that there was no wedding ceremony the next point to consider is the conduct and relationship of Maung Gale and Ma Wun Di. On this point it is admitted that Maung Gale kept three other Shan girls in the same house with Ma Wun Di. That each occupied a separate room and that Maung Gale divided his attention amongst them, sometimes eating and sleeping with one and sometimes with the others The witnesses one and all say that Maung Gale acknowledged Ma Wun Di as his wife and that she was regarded as such by the public. Now, it is impossible to believe that had Ma Wun Di been the acknowledged wife of Maung Gale (a man who lived like a prince) that he would have kept her in the same house and on the same level with three other women who were admittedly concubines and made her subordinate to a servant like Maung Bin. Again Maung Gale's letter Exhibit I proves clearly that he only regarded Ma Wun Di as a temporary mistress or "monkey wife" and that he intended to discard her like the others when he returned to Moulmein. Not only as the events which occurred during the lifetime of Maung Gale prove that Ma Wun Di was nothing more than a temporary mistress, but the subsequent conduct of Maung Shwe On and Ma Wun Di on his death corroborate the same and prove conclusively that not only was she not regarded by the public as the legal wife of Maung Gale, but that even she herself did not consider herself as such. The learned Advocate Maung Chit Hlaing lays great stress on the documents Exhibits A and B. It is true that in these documents Ma Wun Di is described as the wife of Maung Gale, and at first sight they appear to be strong proof of Maung Gale having acknowledged her publicly as his wife. Ordinarily they would be; but when one comes to consider the circumstances of the present case, and that it is the custom for Burman foresters to take on a temporary mistress or "monkey wife" during their stay in Siam, I do not think any importance can be attached to the entries. For the above reasons I am satisfied that Ma Wun Di was merely a "monkey wife" or temporary mistress of Maung Gale and not his legal wife. For the above reasons issues one and two are decided in the negative. On the finding of the first two issues it is unnecessary to go into the other issues."

The Chief Court of Lower Burma on appeal by the Appellants affirmed the judgment and decree of the District Judge. The judgment as far as it is material to this report was as follows :—

"The learned Advocate for Appellants has referred to the well-known principle, that the presumption of marriage arising from cohabitation with habit and repute can be rebutted only by the clearest and

MA WUN DI v. MA KIN.

most satisfactory evidence. It would in my opinion be quite unreasonable to allow this presumption to arise or have any weight in the case of a woman who enters into a union with a man with her eyes open to the fact that the man has already a legally married wife. It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare, and that it is considered disrespectable On the contrary, I should be inclined to say that if a woman, cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened, if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife.

"The Appellants place much reliance on two documents. One is a certificate of nationality as a British subject of Maung Gale, in which under the heading "Names of female relations living with Maung Gale" is entered "Ma Wun Di, wife." The other is a decree of a Siamese Court for money against Maung Gale, husband, and Ma Wun Di, wife. I do not think that these documents offered a very strong inference that the relation of husband and wife actually existed.

"On the whole I think that the evidence is quite as consistent, and in fact more consistent with concubinage than with marriage. The conduct of Ma Wun Di subsequent to the death of Maung Gale raises the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of first by the British Consul, and then by Maung Gale's relations from Moulmein, without raising a protest. Though Maung Gale died in 1894, and though a law suit was going on about his estate for many years, she never intervened, and it was not till 1902, eight years after Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman or to obtain a share of his estate.

"As regards Maung Gale it is very clear from his letter to his wife in Moulmein —Ex I—which was written in 1890, three years after he had united with Ma Wun Di, that he did not regard Ma Wun Di as having the status of a wife.

"There is much evidence on the record that shows that it is customary for Burman foresters from Moulmein, who have to spend long periods in Siam on business, to take concubines in that country. One witness states that these girls can be got for Rs. 5 or 10 each Maung Gale was a special sinner in this respect. At the same time he would have five or six concubines, all under the age of 16. Several of these lived in the same house as Ma Wun Di, and the evidence does not convince me that she differed in any way from them, except that she may have been the head of the harem."

The Appellants, thereupon, appealed to His Majesty in Council.

Mr. Roskill, *K. C.* and *Mr. J. W. McCarthy* for the Appellants.—In both

MA WUN DI *v.* MA KIN.

of the lower Courts the onus of proof of the marriage was thrown on the Appellants. But where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage: *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1). There is undisputed evidence in this case proving that the first Appellant and the deceased lived together as man and wife, and therefore a valid marriage must be presumed. That presumption shifts on the Respondents the onus of clearly proving that there was no valid marriage in this case. But the Respondents have not adduced any such evidence to rebut that presumption and therefore the lower Courts were wrong in deciding, as they did that there was no marriage between the first Appellant and the deceased. Again, the Chief Court expressly held that such a presumption could not arise or have any weight in the present case. But it is submitted that that finding is wrong, because the presumption of marriage from cohabitation with habit and repute does arise in a country where concubinage is not considered immoral: *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (1). Evidence shows that the position occupied by the first Appellant was quite different from that of other women in the house in Siam, where she was treated as a wife. She is described as wife in two official documents. One of them is a certificate of nationality issued from the British consulate at Chiengmai, under the hand and seal of the Vice-Consul, to Maung Gale as a British subject, which was renewed in 1891, wherein the first Appellant is described as wife, and none of the other women were so described. The other document is a copy of the judgment in a suit in the International Court at Chiengmai, carried on appeal to the Court of Appeal at Bangkok, in which the deceased and the first Appellant were sued as joint Defendants and as husband and wife. An experienced writer, late of Education Department, Siam, describing Siamese wedding says:—"No registers are signed and no official record of events is made. . . . . The whole ceremony above described is only observed in the case of the first or chief wife, who always remains the legal head of her husband's household. Other wives are merely bought as so much merchandise, all formality being omitted except such as attends the payment of the purchase money. Polygamy is extensively practised amongst the higher classes, but it is controlled in the case of the poor by the fact that a man must not have more wives than he can keep. . . . . No disgrace of any kind is attended to the condition of a subordinate wife, but she does not hold a high social position. Very often she inhabits a house separated from that in which the head wife resides. Upon the death of the husband her children are legally entitled to a share of the property, but they do not share on equal terms with the children of the first wife. Then too, a bought wife can be sold or given away, while the head wife can only be divorced. It sometimes happens that a

(1) L. R. 6 App. Cas. 364 at p. 371 (1881).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JANUARY 20, 1908. [No. 10

Contents.

NOTES.

THE PRIVY COUNCIL CASE OF *Bibi Phul Kumari v. Ghanshyam Misra*, which was reported at p. 169 of the present volume of this journal, decides an important point of law as to the amount of Court-fee payable in a declaratory suit. The Plaintiff had preferred a claim to certain properties which were attached in execution of a decree obtained against her vendor. Her claim having been rejected by the execution Court, she instituted a suit under sec. 283, C. C. P., and prayed for a declaration of her title and possession of those properties and for a permanent injunction on the decree-holder not to execute his decree against the said properties. She paid a Court-fee of Rs. 10 for the declaration and a further sum of Rs. 10 for the permanent injunction. Both the Subordinate Judge and the High Court held that the Plaintiff's suit was not only for a declaration but also for consequential relief inasmuch as the Plaintiff asked for a permanent injunction, and rejected the plaint as being insufficiently stamped, as *ad valorem* fee on the value of the decree was not paid.

IN ONE SENSE IT MIGHT BE SAID THAT THE PLAINTIFF'S prayer for a permanent injunction was a prayer for consequential relief. But their Lordships of the Judicial Committee overruling the decisions of the Calcutta and the Allahabad High Courts held that there was really no prayer for consequential relief. Their Lordships observed, "for the right determination of the question at issue it is necessary to ascertain what are the object and the nature of the suit." As the real object of the suit was to set aside a summary decision of the execution Court which rejected the claim preferred by the Plaintiff to the attached properties, the Court fee payable was held to be Rs. 10 in accordance with the first head of Art 17, Sch. II of the Court Fees Act. Here the Plaintiff's prayer for permanent injunction was held not to have changed the nature of the suit and the Plaintiff was required to pay the amount of Court-fee he would have to pay if such an injunction was not asked for.

THERE IS ANOTHER FEATURE IN THE CASE WHICH deserves notice. The Plaintiff herself misconceived the nature of her suit. She regarded the prayer for permanent injunction as a prayer for a distinct relief which it was necessary for her to ask in the suit and for which she paid a Court fee of Rs. 10 apart from the declaration sought for in the suit. Still she was not held bound to pay the proper Court-fee for the relief by way of injunction. Her prayer for injunction was held to be superfluous.

SUPPOSE AFTER A HAS OBTAINED A DECREE AGAINST B on a mortgage-bond and attached the mortgaged properties in execution of a decree, B brings a suit for a declaration that the mortgage-bond was forged and that the decree was fraudulent and he asks for a permanent injunction upon the decree-holder mortgagee not to execute the decree against the mortgaged properties. The question arises what is the amount of the Court-fee payable in this suit. The answer to this depends upon the question whether the prayer for a permanent injunction is a prayer for consequential relief or not. Here it might be said that the real object of the suit is to

have it declared that the mortgage-bond and the decree obtained upon it are void and inoperative. If this object is gained by the suit, there would ordinarily be no further necessity for a permanent injunction upon the decree-holder not to execute his decree. For if the decree be declared to be void, there would remain nothing to be executed.

BUT IN THE CASE OF *Umatul Batul* v. *Nanji Kuar*, reported at p. 705 of 11 C. W. Notes, it was held in a similar case that the Court-fee payable is an *ad valorem* fee on the value of the decree against whose execution the injunction was asked for. But it might be argued following the line of reasoning adopted in the Privy Council case that the prayer for an injunction was superfluous in this case also and therefore it should not have been taken into account in determining the amount of Court-fee leviable on the plaint. But once it is admitted that the prayer was not superfluous, the observation of their Lordships of the Judicial Committee at p. 174, (bottom of col. 1 and top of col. 2) leaves hardly any room for doubt that the prayer for a permanent injunction is a prayer for consequential relief and should be valued and paid for accordingly.

IN THE CASE OF *Gajadhar Mahto* v. *Raghubar Gope*, reported at p. 60 of the current volume of this journal, it was held that if A sues B, his co-sharer, for contribution for a certain sum of money paid by him on behalf of the co-sharer to discharge a decree for rent obtained by the landlord against both A and B, B can set-off previous payments made by him on behalf of A to discharge previous decrees obtained by the landlord against A and B, even though the claims of B for contribution against A in respect of these payments are barred by limitation. The reasons assigned in the judgment are: "It is true that at the time when the Plaintiffs (A) made payments in satisfaction of the decree in 1899, the remedy of the Defendants (B) at law to recover from the Plaintiffs the sums which they had previously paid was barred by limitation. But though the remedy might have been barred the right to the debt was not extinguished." If this view of the admissibility of a claim for a set-off be correct then a Defendant when sued by the Plaintiff for a debt can successfully set-off any debt due to him from the Plaintiff even though his claim has been barred long before the Plaintiff's suit.

SUPPOSE A IS INDEBTED TO B, BUT THE CLAIM OF B is barred by limitation. B then somehow or other manages to take a loan from A and refuses to repay the debt. If A sues B for the debt, B will escape his liability to repay the debt by pleading that long before he took the loan from A, A took a loan from him which was never paid. We doubt whether such a view of the law of set-off as laid down in the Code of Civil Procedure is correct. Sec. 111, C. C. P., expressly lays down that the Defendant's claim of set-off must consist of an ascertained sum of money *legally recoverable* by him from the Plaintiff. If the claim of the Defendant against the Plaintiff be barred by limitation, how is it legally recoverable from the Plaintiff? Moreover it has been held that a set-off can only be successfully pleaded when an action could have been maintained for the same debt, see *Rawley* v. *Rawley*, 1 Q. B. D. 469 and *Heera Lal* v. *Bishen Sahay*, 2 W. R. 296. Again a claim to set-off is treated as a cross-suit and the Defendant can recover a decree against the Plaintiff if the amount of the set-off exceeds the demand of the Plaintiff. This also shows that a claim to set-off, in order to be operative, must be pleaded within the period of limitation.

NO DOUBT CASES MAY BE IMAGINED IN WHICH THE question of limitation regarding a claim for set-off may not arise, as where in the course of the same transaction continuing for a long time demands and cross-demands arise between the parties and the amount to which one of the parties is equitably entitled as against the other can be ascertained only after striking out a balance between the demands and cross-demands. But in the case under notice the question of set-off did not arise in the course of one continuous transaction involving demands and cross-demands. Nor did the Court base the decision on such a view of the relation between the parties. The claim of the Defendants in the case was treated as an outstanding debt due from the Plaintiff, the right to recover which at law was however barred by limitation.

CURRENT INDIAN CASES.

EMPEROR *v.* KEHRI, I. L. R. 29 All. 434. *Retracted confession.*

Even when a confession has been retracted, if a Judge believes that that confession contains a true account of the prisoner's connection with the crime he is bound to act so far as that prisoner is concerned on the confession which he believes to be true.

BIHARI LALL *v.* CHUNNI LAL, I. L. R. 29 All. 457 (F. B). *Award—Appeal.*

No appeal lies against a decree upon an award of an arbitrator solely upon the ground of misconduct.

SHEO NARAIN *v.* NUR MAHAMMAD, I. L. R. 29 All. 463. *Sale—Incumbrance.*

Where a share of an immoveable property is sold in execution of a decree for money the presumption is (when a part is encumbered) that the share sold is not encumbered (as far as may be).

J. G. WILLIS *v.* JAWAD HUSAIN, I. L. R. 29 All. 468. *Civil Procedure Code, sec. 622.*

An application may be made under sec. 622, C. P. C, against an order rejecting an application for review of judgment in a Small Cause Court suit on the ground of deficiency in the Court-fee upon the application.

LAMOHAN SINGH *v.* MADSUDAN, I. L. R. 29 All. 481. *Transfer of Property Act, secs. 92, 93.*

In view of secs. 92 and 93 of the Transfer of Property Act, the Court ought not to pass an order declaring that the Plaintiff's right to redeem should be extinguished if the mortgage debt is not satisfied within the period fixed by the decree in case of a usufructuary mortgage.

BADAM *v.* GANGA DEI, I. L. R. 29 All. 484. *Landlord and tenant—Trees.*

A tenant has the right to insist that during the continuance of the tenancy trees shall not be cut down and removed by the landlord.

MANOHOR LAL *v.* BANARASI DAS, I. L. R. 29 All. 495. *Jain community—Adoption of married man.*

The adoption of a married man is valid under the law and custom prevailing amongst the Jain community.

MADHUBN *v.* NARAIN DAS, I. L. R. 29 All 537. *Limitation Act, Sch. II, Art. 175C.*

Art. 175C of Sch. II of the Limitation Act applies to second appeals as well as first appeals.

Review.

A HANDBOOK OF JURISPRUDENCE. *By Tarinidas Banerji, M. A., B. L.*

This small hand-book makes no pretence to be an original work on Jurisprudence but is a careful analysis of the subject from the point of view of different schools of jurists. The introduction is lucid and ably written and will be useful to students first taking up the study of this subject. It is by no means a 'cram-book' and we can thoroughly recommend it, not as a substitute for well-known text-books, but as an aid and addition to the study of the latter.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Rawsthorne* v *Rowley.* Before the MASTER OF THE ROLLS and LORDS JUSTICES FLETCHER MOULTON and FARWELL. 7th November 1907.

Trustees retaining authorised securities—Duty to investigate title.

In 1873 one Miss Mangnall advanced £3,000 to one Mr. A. B. Rowley on the security of a deposit of deeds relating to certain freehold plots, &c. The loan was not to be called in for 5 years, but Mr. A. B. Rowley was to be allowed to repay the sum at any time on giving 3 months' notice. In 1874 Miss Mangnall married and she made a settlement of the £3,000 and the Defendant, W. T. Rowley (a brother of the debtor) and another person, now deceased, were made trustees. The money and the securities were assigned to the trustees upon trust to permit and allow the £3,000 to remain on the particular security, for five years or for such longer period as the trustees should deem proper or in case the amount should have been repaid upon trust for investment. In 1894 Mr. A. B. Rowley's firm stopped payment and it was subsequently discovered that he had parted with one half of the premises covered by the security. This was an action by the beneficiaries under the trust for a declaration that the trustees had been guilty of a breach of trust in permitting the sum to remain invested in the security.

Held, reversing the Vice-Chancellor of the County Palatine of Lancaster, that in retaining authorised securities, there was no duty or obligation on the part of the trustees to make further investigation as to the title of the security or the solvency of the mortgagor, if the trustees were acting in good faith and there were no circumstances to raise suspicion. In this case Mr. W. T. Rowley had acted honestly and he could not be held liable.

Mr. Younger, K. C., and *Mr. Grant* for the Appellant, Defendant.

Mr. Eve, K. C., and *Mr. Cunliffe* for the Plaintiff, Respondent.

Appeal allowed.

CHANCERY DIVISION.—*Lewis and Lewis* v. *Durnford.* Before MR. JUSTICE SWINFEN EADY, 8th November 1907.

Contract in restraint of trade—Solicitor's clerk, bond by, not to act for firm's clients for five years—Reasonable restriction.

The Defendant was for 12 years, up till August 1906, employed as Chancery and Conveyancing clerk to the Plaintiffs who were a firm of Solicitors. This was an application by the Plaintiffs for an injunction to restrain the Defendant till judgment or further order from acting as Solicitor for any corporation or for any person or persons who were in the month of August 1906, or had been within five years previous thereto, a client of the Plaintiffs' firm. The application was based on a bond given by the Defendant in 1901, whereby he undertook *inter alia* not to solicit by letter or otherwise the business of, or act for, any person who was "for the time being or who had within five years previously been a client of the firm." The question was as to the construc-

tion of the bond and whether the stipulation was enforceable.

Held—That the covenant referred to persons who should be clients of the Plaintiffs not at the time of the Defendant's acting for them but at the time when his engagement with the Plaintiffs ended or within five years before that time and that it was not wider than necessary for the protection of Plaintiffs' very considerable practice by restricting one who had been in their confidential employment and had had frequent opportunities of becoming acquainted with their clients and their clients' affairs, from acting contrary to their interests. Breaches of the covenant were not disputed and the parties having agreed to treat the hearing as the trial of the action, a perpetual injunction was granted against the Defendant.

Mr. Eve, K. C., and *Mr. Meyrick Beebee* for the the Plaintiffs.

Mr. Dunckwerts, K. C, and *Mr. Austen Cartwell* for the Defendant.

Suit decreed.

CHANCERY DIVISION.—*In re Sidney, Hengeston* v. *Sidney.* Before MR. JUSTICE SWINFEN EADY. 31st October 1907.

Gift for "charitable or emigration uses"—Uncertainty.

The question in this case was whether a bequest by the testator John Sidney of all his estate not otherwise disposed of, upon trust for such charitable uses or such emigration uses or partly for such charitable uses and partly for such emigration uses as the executors in their absolute and uncontrolled discretion might think fit, was a good charitable gift.

Mr. Justice Swinfen Eady in delivering judgment observed following, *Hunter* v. *Attorney-General*, (1899) A. C. 309, that a bequest which was made for a charitable purpose and also for an indefinite purpose not charitable without any indication as to possible apportionment is wholly void. The present gift again could not be supported on the ground that the words used meant and should be limited to a gift for the benefit of the poor with a view to emigration by assisting them directly or indirectly to emigrate nor was it good as being for public benefit. Emigration was not a thing confined to the poor and he was not prepared to say that it was for the good of the community. The gift was vague and indefinite and not a good charitable gift.

Mr. Macnaghten, K. C., and *Mr. J. E. G. De Montmorency* appeared for the next of kin.

Mr. George Lawrence for the Attorney-General.

Mr. James Rolt for the executors.

PROBATE, DIVORCE & ADM. DIVISION.—*Lewis* v. *Lewis & ors.* Before MR. JUSTICE BARGRAVE DEANE. 4th November 1907.

Will—Execution—Separate sheets.

The question in this case was whether the Will of David Lewis, deceased, was properly executed and arose upon an application for the revocation of letters of administration *cum testamento annexo* granted to the applicant. The Will consisted of two sheets of paper. The testator in writing out these sheets stated at the top of the first sheet as also at the bottom of the second that the writing was his Will. The evidence of the attesting witnesses was that the testator held the two sheets together in his hand and did not let go of them whilst they were being signed on the second sheet and they became separated subsequently. His Lordship held that the Will was properly executed.

As to costs, it was urged that the testator was to blame and the costs should come out of the estate. It appeared that the applicant made the application for revocation after having herself taken out administration because she had been advised that an intestacy would suit her better. At the same time his Lordship thought the case was a proper one for enquiry. No order was made as to costs.

Mr. Barnard, K. C., and *Mr. Gwynne Hall* for the Plaintiff.

Mr. Atkin, K. C., and *Mr. Griffith Jones* for the Defendants.

Suit dismissed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD ROBERTSON.	FISCHER, Petitioner,
LORD COLLINS.	Appellant,
SIR ARTHUR WILSON.	*v.*
1907.	GOPALASAMI and others,
18th November.	Respondents.

Privy Council—Appeal—Appealable value—Indirectly affecting property of large value—Claim of landlord to tree-tax—Leave granted on terms.

This was an application for special leave to appeal in the matter of twelve appeals under the circumstances following:—

The Petitioner who is a mittadar of Salem, in the years 1899 and 1900 instituted 11 suits in the Court of the Deputy Collector of Salem under sec. 9 of the Madras Act, No. VIII of 1865, against the Respondents to enforce the acceptance by them of certain pottahs or leases. The Respondent, Gopalasami Chettiar, had in the year 1897 instituted a suit in the said Court against the Petitioner and his predecessor in-title to challenge the validity of the pottahs tendered to him for the year 1305 Fasli. The principle question involved in all those suits was whether the Petitioner was entitled to insert a covenant in the said pottahs for the Respondents to pay a "tree-tax" in addition to the rent per acre fixed on the lands of tenants at the time of the permanent settlement. The "tree-tax" claimed by the Petitioner was a "charge for every fruit tree coming into bearing as well as for every palmyra tree whose leaves are useful for thatching, growing

on the pottah land of a tenant as soon as the tree comes into bearing or yields useful leaves as the case may be" and that claim was founded on the custom of the mitta. All the suits were tried together and the evidence was recorded in one case as a "test suit" the Deputy Collector stating that "the fullest opportunities had been given to both sides to produce whatever evidence they might have bearing on the issue and as a result, when these suits were decided finally in the Appellate Court, a vexed question of the Salem mitta would be settled as a large body of the tenants would be bound by the decision. On 1st December 1900 the Deputy Collector delivered his judgment and decided that the custom set up was proved and that it was ancient, continued, certain and reasonable and was valid and binding on the tenants. He also decided that so far as the custom related to trees grown with the water from well sunk at the tenants' expense after the year 1865 it could not be enforced under sec. 11 of Madras Act VIII of 1865. Against that decision there were cross-appeals in the District Court of Salem. On 24th December 1901 the District Judge delivered a judgment which governed all the appeals and decided that "a custom of levying a tree-tax on pottah lands over and above the land rent has existed in the Salem mitta from the earliest times of which we have any evidence." He concluded as follows:—"I find that tree-tax in some form or other was levied before settlement and that the method of doubling the land tax was not then unknown, that in the Mitta of Salem and the mittas adjoining tree-tax was levied from the time of the settlement onwards at various rates and in different ways and that a custom exists in the Salem Mitta attaching to each contract for rent a contract to pay tree-tax. I find however that such custom cannot under the present law be enforced so as to deprive a tenant of the benefit of his own improvements and that therefore where the improvement was made after 1865 the tenant is not bound to pay tree-tax for trees raised by means of it and I find that a contract not to pay the tax cannot be inferred from its non-enforcement by the zemindar." Against that decision the Petitioner and the Respondents filed second appeals in the High Court of Judicature at Madras. That Court affirmed the construction placed by the Courts below on the said sec. 11 and reversed the findings in regard to the custom and held that an "implied contract" to pay the "tree-tax" could only be inferred from the acts of the particular tenant charged and not from the fact of payments made by other tenants. The High Court on 8th October 1906 dismissed the Petitioner's application for leave to appeal to His Majesty in Council by an order in terms following. "The amount of tree-tax involved in each of these twelve suits varies from Rs. 1-2 to Rs. 36 per annum the total of the amount in all twelve suits is only Rs. 189. It is therefore clear that even if the appeals be consolidated the value of the subject-matter is far less than Rs. 10,000. The vakil for the Petitioner however says that 'indirectly' the appeal involves a question respecting property of that amount as a number of other suits were decided in accordance with the decision of the High Court in these twelve suits. The vague affidavit however which has been filed does not show this. It says that tree-tax collections in the mitta amount to Rs. 1,500 per annum but that is no guide as to the sum that is affected by the decision since in many cases these payments are the result of contract express or implied or of decrees after litigation and will not be affected by the decision against which leave to appeal is now sought. We cannot therefore give leave to appeal on the ground that the conditions of sec. 596, Civil Procedure Code, are complied with. Then we are asked to give leave on the ground stated in sec. 595 (*c*), *viz.*, that the case is otherwise a fit one for appeal to His Majesty in Council. We do not think that the decision does more than apply the laws as previously laid down by this Court and the hardship would be great if the Defendant whose interest is in each case only a few rupees should be compelled to go to the expense of resisting an appeal to the Privy Council in order to maintain the decree. In these circumstances we refuse to give leave to appeal in any of these twelve cases." The Petitioner, thereupon, made the present application.

Mr. DeGruyther for the Petitioner.—The High Court had no jurisdiction under sec. 584 of the Civil Procedure Code on second appeal to reverse the finding of the District Judge that a custom was proved imposing on each tenant a liability to pay tree-tax. The construction placed by the Courts in India on sec. 11 of the Madras Act VIII of 1865 is erroneous and that the matter raised is one of general public importance. The decision of the question whether or not the custom alleged is proved affects not only all the tenants in this mitta, but also the landlords and tenants of several adjoining mittas and the settlement of the question is one of general public importance as stated by the Deputy Collector who tried these cases. The Petitioner instituted 12 cases in which the total amount claimed as tree-tax even if capitalised does not exceed Rs. 10,000, but if he had gone to the expense of instituting a very large number of other suits so as to make the capitalised value of the aggregate amount claimed by him in such suits a sum of money exceeding Rs. 10,000 he would have been entitled to appeal as of right inasmuch as the amount directly involved in the appeal would have exceeded the appealable amount. The amount claimed by the Petitioner as tree-tax amounts to Rs. 1,500 per annum and the practical effect of the judgment of the High Court will be to deprive him of the said amount so that indirectly the present appeal does involve 'a claim or question to or respecting property' more than Rs. 10,000 in value,

thus fulfilling the requirements of sec. 596 of the Civil Procedure Code. The Petitioner would abide in any event by such order as to costs of the appeals as your Lordships on the determination of the appeal should think fit to make.

Leave granted upon the Petitioner depositing £300 as security for costs to be paid in any event. Appeals consolidated.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD HALSBURY.
LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
10, December.

TEJA SINGH, Petitioner, Appellant,
v.
BOBA BICHITRA SINGH, Respondent.

Leave to appeal—Substantial question of law—Succession to Mutt—Mohunt—Chela.

This was an application for special leave to appeal to His Majesty in Council under the following circumstances:—

In the city of Patna there is a Sikh temple known as Sri Harmandilji built upon the spot where the tenth of the Sikh Gurus was born. It has always been in the possession and management of a mohunt or spiritual head each mohunt having the power to nominate his successor, and in default of appointment the succession is (as the Petitioner submits) governed by a sort of spiritual descent. In the year 1797 Newal Singh mohunt appointed Dyal Singh as his successor and in 1832 Dyal Singh appointed Sukha Singh to succeed him and in 1861 Sukha Singh exercised a power of appointment in favour of Didar Singh. On the death of Sukha Singh disputes arose in regard to the succession. Under the provisions of Act XX of 1863 the District Judge of Patna appointed Genda Singh temporary manager of the affairs of the temple. Didar Singh sued Genda Singh for possession of the temple as mohunt but on 17th July 1872 his suit was dismissed by the High Court of Judicature at Fort William in Bengal on the ground that he was not a person capable of being appointed mohunt. In default of appointment by the last mohunt Genda Singh succeeded to the mohuntship and as such remained in possession till the date of his death when Dharm Singh whom he had nominated as successor became mohunt. On 1st March 1880 Dharm Singh executed a document nominating the Petitioner as his successor and died in November 1894. On 9th October 1882 the District Judge of Patna acting under the provisions of Act XX of 1863 removed Dharm Singh from the management of the temple and appointed Sumer Singh as manager and after Sumer Singh's death he appointed Dalip Singh on 22nd June 1903. On 11th September 1903 the Petitioner instituted a suit in the Court of the Subordinate Judge of Patna against Dalip Singh to recover possession as mohunt of the temple basing his title on the nomination made by Dharm Singh and on apostolic succession as chela of Genda Singh. Dalip Singh having resigned the post of manager in November 1903 the District Judge of Patna appointed the Respondent in his place. On 30th July 1904 the Subordinate Judge delivered judgment and made a decree dismissing the Petitioner's suit holding that Genda Singh was not mohunt of the temple but only manager, that he had no power to appoint the Petitioner, that the appointment of the Petitioner was in fact made by Dharm Singh, and that there was no satisfactory and reliable evidence that the Petitioner was the chela of Genda Singh and that he was disqualified from office being a widower and a *pardeshi*. Against that decree the Petitioner appealed to the High Court of Judicature at Fort William in Bengal but the High Court by a decree, dated 20th December 1905, dismissed his appeal and found that Genda Singh claimed to be mohunt as of right, that he acted as such and performed the functions of mohunt without opposition except from Didar Singh and that his nominee Dharm Singh succeeded him without any objection but that there being nothing before the Court to indicate that he was legally or regularly appointed in accordance with the custom of the Mutt. The High Court further held that the nomination of the Petitioner was invalidated by the removal of Dharm Singh from the management, that the Petitioner had not proved a custom of the Mutt for a chela to succeed as mohunt in default of appointment and that he had not proved that he was a chela of Genda Singh. The High Court was lastly of opinion that the suit was barred by limitation. On 20th December 1905 the Petitioner applied for leave to appeal to His Majesty in Council but his application was rejected by the High Court by an order, dated 10th August 1906, which after deciding that the subject-matter of the appeal was considerably over Rs. 10,000 in value proceeded in terms following:—"No doubt the appeal raises certain questions which may be taken to be of considerable importance to the parties to the suit but we are unable to say on the conclusions of fact arrived at by this Court that they are substantial questions of law within the meaning of the last paragraph of sec. 596 of the Civil Procedure Code. We may add without discussing any of those questions that if the Plaintiff had been rightly found by this Court not be chela of Genda Singh and if the Plaintiff's cause of action arose upon the removal of Dharm Singh from the office of mohunt and that if the *ekrarnama* by which the Plaintiff was nominated to be the next mohunt became unfructuous by reason of such removal of Dharm Singh it is difficult to see how the decision of this

Court when it holds that the Plaintiff has no right to succeed and that his claim is barred by limitation involves a substantial question of law within the meaning of sec. 596." The Petitioner, thereupon, made the present application to His Majesty in Council for special leave to appeal.

Mr. DeGruyther for the Petitioner.—The appeal involves many substantial questions of law, *e.g.*, (*a*) whether the suit is barred by limitation, *i.e.*, whether the cause of action arose on the removal of Dharm Singh in the year 1882 or on his death in 1894; (*b*) whether the removal of a mohunt under the provisions of the Act XX of 1863 invalidates the nomination of a successor to the mohuntship with the effect of putting an end to the office for ever; (*c*) the determination of the true nature and effect of the appointment of a manager under the said Act. The evidence to prove that the Petitioner was the chela of Genda Singh is sworn to by respectable witnesses and there is no evidence on the other side. The High Court has relied on the heading of a plaint in which the Petitioner is described as "chela of mohunt Dharm Singh," although in a deposition in the said suit the Petitioner stated that he was the "chela of Genda Singh" The High Court wrongly admitted in evidence in appeal a deposition of Dharm Singh which is not clear but from which an inference is drawn that Dharm Singh said that the Petitioner was his chela. The Petitioner even if he were the chela of Dharm Singh would be entitled to succeed on Dharm Singh's death. The result of the decisions of the Courts in India is that the temple is left in perpetuity without a mohunt.

Leave granted.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISIONAL No. 1254 OF 1907. PROBHAT CHANDRA CHOWDHURY, Petitioner *v.* THE EMPEROR, Opposite party. 17th December 1907.

Arms Act (XI of 1878), secs. 14 and 19 (f)—Possession of a gun—Meaning of.

The Petitioner was convicted under sec. 19 (*f*) of the Arms Act (XI of 1878) and sentenced to a fine of Rs. 5. The gun which was used by the Petitioner belonged to a gentleman named Rajendra Narain Chowdhury who had been exempted from the operation of the Arms Act. He is now in England. His gun seems to have been left by him with his brother. The Petitioner was the cousin of these two gentlemen. On the 30th March last a mad dog entered the compound of the *bari* of the Petitioner; and he seized a gun which was in the hands of one R, a servant, and fired at the dog. Unfortunately he missed the animal, but a shot from the gun wounded a man. For this the Petitioner was convicted, under sec. 304A, I. P. C., and sentenced to a fine of Rs. 300 and to detention in Court for one day. The Sessions Judge, on appeal, reduced the fine to Rs. 100.

The Petitioner was then again prosecuted under sec. 19 (*f*) of Act XI of 1878, convicted and sentenced to a fine of Rs. 5.

Against this conviction and sentence the Petitioner obtained the present rule.

Their Lordships observed :—

"The Petitioner is not liable under the provisions of sec. 19 (*f*) of the Act. The provisions of sec. 19 (*f*) do not make the mere possession of a gun punishable; they make possession contrary to the provisions of sec. 14 of that Act punishable; and we agree with the learned Counsel who appears for the Petitioner that the temporary possession which the Petitioner had of the gun when he snatched it up and fired it was not the possession contemplated by sec. 14."

Mr. P. L. Roy and *Babu Baikuntha Nath Das* for the Petitioner.

No one for the Crown.

B. C. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1396 OF 1907 ADOM SHEIK, Petitioner *v.* THE EMPEROR, Opposite Party. 17th January 1908.

Bad livelihood—Criminal Procedure Code, secs. 110 and 118—Sureties—Whether inability to control the accused is a ground for refusing.

In a proceeding instituted against the Petitioner under sec 110, Cr. P. C., he was ordered under sec. 118, Cr. P. C., to furnish security for good behaviour by entering into a bond for Rs. 200 with two sureties of Rs. 200 each. Thereupon two persons offered themselves to stand sureties for the Petitioner. The trying Deputy Magistrate asked the Police to make enquiries as to their fitness to be sureties. The Police reported that they were men of substance but expressed a doubt as to whether they would be able to keep the Petitioner under control. The Deputy Magistrate on the receipt of this report passed the following order :—

"The accused had been arrested in a dacoity case. He appears to be a dangerous character and I am of opinion that the applicants are not fit persons to be his sureties. The spirit of the rulings in 1895 Allahabad W. R. 143 and I L. R (?) Allahabad 751 forbids acceptance of sureties who would not be able to control the accused—a thing which I do not consider the sureties capable of. Petition rejected."

Against this order an application was made to the Sessions Judge who by his order, dated the 6th June last, declined to interfere.

This rule was issued against the order of the lower Courts refusing to accept the sureties.

It was contended on behalf of the Petitioner that the order of the lower Court is opposed to the rulings of the Calcutta High Court reported in 6 C. W. N. 593 and 4 C. W. N. 797.

Their Lordships held :—

The Magistrate was not justified in refusing the sureties on the ground that they would not be able to control the Petitioner. The rulings of the Allahabad High Court on which the Magistrate relied are opposed to the rulings of the Calcutta High Court reported in 6 C. W. N. 593 and 4 C. W. N. 797.

Babu Harendra Narayan Mitra for the Petitioner.
No one for the Crown.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER NO 68 OF 1907. RAJ KISHORE DE SARKAR, Appellant *v.* DINA NATH CHANDRA AND ANOTHER, Respondents. 2nd January 1908

Transfer of Property Act (IV of 1882), sec. 99—Purchase by decree-holder—Confirmation of sale—Application to set aside—Procedure.

One of the two properties sold was under mortgage to one of the decree-holders and, in contravention of the provisions of sec. 99 of the Transfer of Property Act, the properties were sold. That was in 1903. In 1906, the judgment-debtors applied to have the sale set aside and one of the grounds urged on their behalf was that the sale was bad, it having been held in contravention of the provisions of sec. 99 of the Transfer of Property Act. The Court below disallowed the objection. The judgment-debtor appealed to the High Court.

Held—That the sale is voidable, if held in contravention of the provisions of sec. 99 of the Transfer of Property Act. It is not absolutely void. The judgment-debtor whose property is sold may ask for the sale being set aside on the ground that the property was mortgaged to the decree-holder, if he applies before the sale is confirmed. After confirmation of the sale, he would be an applicant under sec. 244 of the Code and, in order to enable him to ask that sec. 99 of the Transfer of Property Act might be applied, it is necessary for him to show that he had no knowledge of the sale proceedings and that he was prevented from such knowledge by means of fraud. But if he failed to make out a case of fraud or any of grounds which would entitle him to plead the same right which he had before confirmation, the sale could not be set aside.

Babu Surendra Nath Ghosal for the Appellant.

Babu Tarak Chunder Chuckerbutty for *Babu Dwarka Nath Chuckerbutty* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER No. 158 OF 1907. GOBIND CHUNDER CHANDRA, Appellant *v.* ABHOY CHURAN BAGCHI AND ANOTHER, Respondents. 2nd January 1908.

Mistake of Court—Power to rectify—Civil Procedure Code (XIV of 1882), sec. 244—Sale certificate, mistake in—Possession, delivery of.

Two properties were advertised for sale. The properties were separate and the sale took place of only one of these properties. There was some mistake in the sale certificate as it included both the properties, whereas the second property was not sold at all. Possession was delivered of both the properties in accordance with the sale certificate, but the mistake was afterwards discovered.

An application was made to the Munsif in whose Court the proceeding was pending for the rectification of the error and he directed the rectification. He directed that the sale certificate be produced and amended and he also directed that the delivery of possession of the second property should be cancelled. The District Judge on appeal held that as sec. 244 of the Code did not cover a case like the present disallowed the application. The judgment-debtor appealed to the High Court.

Held—It is an inherent power of a Court to rectify an apparent error of its own motion. The matter would also come under sec. 244 of the Code of Civil Procedure, the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree. In such a case an application under sec. 244 to set aside the sale is not necessary.

Babu Chandra Kant Ghose for the Appellant.

Babu Tarak Chunder Chuckerbutty for the Respondents.

A. T. M. *Appeal allowed.*

Legislation.

Act I of 1908 (An Act further to amend the Legal Practitioners Act, 1879) received the assent of the Governor-General on the 3rd January 1908 and was promulgated for general information : (*India Gazette*, 4th January 1908, Part IV, p. 1 ; *Calcutta Gazette*, 8th January 1908, Part V, p. 1).

Act II of 1908 (An Act further to amend the Indian Tariff Act) received the assent of the Governor-General on the 3rd January 1908 and was promulgated for general information : (*India Gazette*, 4th January 1908, Part IV, p. 3 ; *Calcutta Gazette*, 8th January 1908, Part V, p. 3).

The Indian Limitation Bill was introduced in the Council of the Governor-General of India : See *India Gazette*, 4th January 1908, Part V, p. 1, (see also *Calcutta Gazette*, 8th January 1908, Part VI, p. 1).

MA WUN DI v. MA KIN.

man sells one of his concubines and she takes her children with her, if she has any, so that her sons and daughters possess a father and step-father both living at the same time. . . . . . . Great respect is shown to the condition of motherhood, a wife of low rank with children being of far more importance in the family than even the chief wife should she be childless." In the Kingdom of the Yellow Robe, by Ernest Young, (Constable, 1898), pp. 95, 98 and 99. Women, as well as men, can procure divorce for good cause, widows and divorced wives can remarry. Of the Red Karens (Shans) Mr. Colquhoun writes:—"Marriages are early amongst them and are not binding unless the female has been given away by her parents. . . . . Divorce is easily obtainable if there are no children; but should there be one child the parents are not permitted to separate. Before marriage great license is allowed." Amongst the Shans by A. R. Colquhoun (1885). In Siam at the present day, says Mr. Campbell, "marriage is entirely a matter of arrangement, although the preferences of the young couple are generally considered. . . . Polygamy is permitted; but the principle wife always remains head of her husband's household and the subordinate wives occupy an inferior position." Siam in the Twentieth Century, by J. G. D. Campbell (1902). "Divorce is easily obtainable," *Ibid.* The Chief Judge was wrong when he said that polygamy among the Buddhist is rare and that it is considered disrespectable. The authorities cited do not support that view. Reference was also made to "Le Peuple Salmais, by Leon de Rosny, (Paris, 1885), pp. 78 and 79. It is submitted that marriage must be presumed in this case.

Even assuming there were no valid marriage, as contended, the second Appellant is entitled, under Buddhist law, to a share in the inheritance, inasmuch as his mother, the first Appellant, lived with and ate out of the same dish as the deceased.

[LORD ROBERTSON.—That point was submitted to neither Court in India]

Mr. Roskill.—The Courts in India considered only the first two issues, but the third issue would cover the point.

After some discussion LORD ROBERTSON announced their Lordships' decision on this last point only that their Lordships would not entertain the point.

Mr. Cowell for the Respondents was not called upon.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The question in this appeal is one of fact; and it has been decided against the Appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute, which alone is effective, is habit and repute of that particular status

MA WUN DI v. MA KIN.

which, in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these: a domiciled Burman, Maung Gale, has his house and wife at Moulmein in Burma; his business took him to Siam, and there he lived for years with various other women, and with the principal Appellant, Ma Wun Di, who, for shortness, will be called the Appellant. The Appellant has maintained that while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that while the Appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the Appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion; but her Counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said there is little more pointing to marriage than the use of the word "wife" by some of the witnesses; and the most cursory, as well as the most careful, examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the Appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty:—

"It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectable. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife; and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife."

MA WUN DI v. MA KIN.

There remains to be noticed one point which the Appellants' Counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "a British subject, proposing to travel in Siam." In 1891 he renewed it; and as part of the docket of renewal, which is signed by the Acting Vice-Consul, are the words: "Names of female relations living with Maung Gale: (1) Ma Wun Di, wife: (2) I Mun, sister-in-law." The argument upon this document is that the Appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalised British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

The Appellants' Counsel endeavoured to raise the question whether the second Appellant, who is the son of the first Appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The Appellants will pay the costs of the appeal.

Solicitors: *Messrs. Bramall & White* for the Appellants.

Solicitors: *Messrs. Gregory Day & Co.*, for the Respondents.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM BENGAL].

LORD ROBERTSON.	MUSSUMMAT WALIHAN and others,
LORD COLLINS.	Appellants,
SIR ARTHUR WILSON.	v.
1907.	JOGESHWAR
20, November.	NARAYAN and anr., Respondents.

Practice—Suit for possession—Failure of cause of action—Proper decree to be made—Collateral issues, Court's power to decide and pass declaratory decree.

Where the Plaintiffs asked for possession of their mother's property on the ground that she was dead and the Court held that it was not proved that the lady was dead, the only decree that could be made was that the suit be dismissed. The mere circumstance that some of the media concludendi *might be the same in other actions did not vest the Court with any right or duty to pronounce upon them.*

MUSSUMMAT WALIHAN *v.* JOGESHWAR NARAYAN.

This was an appeal from a decree of the abovementioned High Court, dated the 25th of June 1903, affirming a decree of the Subordinate Judge of Bankipur, dated the 31st of March 1900.

One Gopi Nath, the owner of a village called Dhawlpur Akowna, died on 28th November 1859, leaving him surviving a widow, Gend Koer, and a daughter, Kewal Koer, who was subsequently married to a man called Chandan Lal. Gopi Nath's widow succeeded him and on her death in 2nd December 1868 she was succeeded by her daughter, Kewal Koer.

On 2nd June 1868 Gend Koer borrowed Rs. 2,000 from one Wahid Ali, the predecessor-in-title of the present Appellants, on a mortgage of the said village, and on 25th June 1868 obtained another advance of Rs. 3,000.

After the death of Gend Koer, on 2nd December 1868, her daughter, Kewal Koer, borrowed further amounts from Wahid Ali. On 3rd April 1869 she borrowed the sum of Rs. 2,000. On 6th July 1870 she executed a deed for Rs. 5,000 on account of the amount due on the said deed of 3rd April 1869, and on account of another advance.

Then on 25th June 1872 she executed a consolidated deed for Rs. 22,000 on 25th June 1872, which included a small balance due under the deeds executed by Gend Koer, the amount due under the deeds executed by Kewal Koer, and a fresh loan of rather over Rs. 13,000. She was again in need of money, and on 17th February 1873 borrowed Rs. 5,500, and on 2nd September 1873, Rs. 2,000. Eventually on 23rd April 1875 she executed a consolidated deed covering all the previous transactions for a sum of Rs. 30,000 in favour of Tahur Ulhuq (son of Wahid Ali).

The mortgagee, Tahur Ulhuq, put the deed in suit, and on 28th January 1878 obtained a decree thereon from the Court of the Subordinate Judge of Patna. In execution of the said decree the said village was sold and purchased by Tahur Ulhuq on 26th August 1878, and certain minor interests in the village on 15th January 1879 and 18th November 1879.

Various attempts to set aside the said sales proved unsuccessful and the Appellants remained in possession.

On 14th September 1897 Jogeshwar Narayan and Kusheshwar Narayan, alleging to be sons of Kewal Koer, instituted the present suit in the Court of the Subordinate Judge of Patna. The Defendants were the Appellants representing the mortgagee and purchaser. The plaint set out that the said village was the property of Gopi Nath, that on his death Gend Koer succeeded to a Hindu widow's estate and on her death Kewal Koer also succeeded to an estate for life. The Plaintiffs alleged "that Mussummat Kewal Koer died on 23rd Magh 1304 corresponding to 10th February 1897 and that is the date from which Plaintiffs' title accrued to the heritage of the said Babu Gopi Nath, their maternal grandfather." They alleged that the mortgages executed by Gend Koer and Kewal Koer, and the sale in pursuance thereof were not binding on them. They accordingly prayed for possession upon adjudication of their title to the said village, mesne profits from the date of suit till delivery of possession with costs and interests and for

MUSSUMMAT WALIHAN v. JOGESHWAR NARAYAN.

any other relief that they might be found entitled to.

The Appellants in their written statement denied that Kewal Koer was dead as alleged and that the Plaintiffs were the sons of Kewal Koer and pleaded that the transactions with Gend Koer and Kewal Koer were binding on the Plaintiffs.

The following issues were settled upon the pleadings.

(1) Is Mussummat Kewal Koer dead?

(2) Are the Plaintiffs the sons of Kewal Koer?

(3) According to the law as laid down in the Mitakshara, did Kewal Koer obtain an absolute right in the properties which devolved on her as heir after the death of her mother Gend Koer? If so, are the Plaintiffs precluded from suing?

(4) Were the sums mentioned in the bonds not fully paid?

(5) Were the debts, or any and what portion of them, incurred on account of legal necessities by the widows (or more precisely by the widow and the daughter)?

On 31st March 1900 the Subordinate Judge delivered his judgment. On the first issue he decided that the alleged death of Kewal Koer was not proved and on the second issue he held that the Plaintiffs were the sons of the Kewal Koer and Chandan Lal. On the third issue he decided that "according to the law of Mitakshara a daughter's estate inherited from her father is, like that of a widow inherited from her husband, a limited and restricted estate." On the fourth and fifth issues he was of opinion that the moneys had been paid to Gend Koer and Kewal Koer, but that the transactions were not justified by legal necessity, so as to be binding on the Plaintiffs. On the above findings he made a decree in the following terms:

"Ordered that this suit be dismissed and it be declared that the Plaintiffs are the sons of Mussummat Kewal Koer, and that the properties in claim were not sold for valid expenses. The Plaintiffs do recover $\frac{5}{8}$ths of their costs from the contending Defendants, and the said Defendants do recover $\frac{3}{8}$ths of their costs from the Plaintiffs. The decretal amount shall carry interest at 6 per cent. per annum till realisation."

Against that decree both parties appealed to the High Court. The said Court on 25th June 1905 disposed of both appeals by one judgment affirming all the findings of fact and law come to by the Subordinate Judge and dismissing the appeals with costs.

In maintaining the portion of the lower Court's decree so far as it declared that the Plaintiffs were the sons of Kewal Koer, and that the properties were sold without legal necessity, the High Court observed as follows:—

"It was contended by Mr. Hill for the Defendants that the suit could not be maintained, the cause of action upon which it was founded, *viz.*, the death of Kewal Koer, having failed. No doubt the suit, so far as it asked that a decree for possession be awarded to the Plaintiffs, must fail, as Kewal Koer is not proved to be dead, but the suit practically sought for two declarations, *viz.*, that the Plaintiffs are the grandsons of Gopi Nath, and that they are not bound by the sales held in execution of the decree against their mother, the loans upon which the decree was obtained not having been

for legal necessity. And issues Nos. 2 and 5 involving these questions were raised between the parties in the Court below, and were decided. In these circumstances, it is not desirable that the final decision of those questions should be postponed till after the death of Kewal Koer, when much of the evidence which is now forthcoming, and which was adduced at the trial will have disappeared. The Subordinate Judge has clearly shown how matters really stood."

The Appellants, thereupon, preferred the present appeal to His Majesty in Council.

Mr. DeGruyther and *Mr. G. A. H. Branson* for the Appellants.—The cause of action is the alleged death of the mother of the Plaintiffs-Respondents. Both Courts in India have held that this was not proved. The suit ought to have been dismissed for want of cause of action. Courts in India were wrong in making a declaratory decree. The declaration made is inconsistent with the relief sought in the suit. The plaint was never amended before judgment, under sec. 53 (*c*) of the Civil Procedure Code, the only section that deals with amendments of plaints. The amendment, again, if allowed, would have entirely altered the character of the suit. Such an amendment could not have been made under the above section. *Mussummat Doolhun Jankee Koer* v. *Lal Beharee Roy* (1). On failure of the right for possession the suit ought to have been dismissed. *Ranee Rajessurree Koonwar* v. *Maharanee Indurjeet Koonwar* (2).

The Respondents did not appear.

(1) 19 W. R. 33 (1872).
(2) 6 W. R. 1 (1866).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—Their Lordships are of opinion that this action ought to have been dismissed with costs, and therefore this appeal should be allowed.

The suit was one of the simplest and most plainsailing character, alike in the ground of action and the decree sought. The Plaintiffs (the present Respondents) claimed to have possession of their mother's property on the ground that she was dead. The Courts held that it was not proved that the lady had died (and indeed there was positive evidence that she was alive). The inevitable inference would seem to be that the suit should be dismissed. The Court which tried the case, however, had, very naturally, tried the whole case at once and had to deal with some questions as to the paternity of the Plaintiffs, and also as to the validity of certain gifts by the mother. These, however, were merely argumentative steps towards the only decree sought, *viz.*, possession; they were not presented by the Plaintiffs as separate and substantive questions affecting rights other than that of possession of their (alleged) deceased mother's estate. As regards one of those questions, it is plain that the validity of the gifts, the lady being alive, could only be determined with her as a party to the suit. Again, the Court might quite well have first tried the issue whether the mother was dead; and, reaching, as it did, the conclusion that this essential fact was not proved, it is impossible to suggest that it could then have gone on to take up and try the other questions. Yet the present is really the same question. It appears to

their Lordships that the circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. It is not surprising that no proposal was made in India to amend the record, and the record presents its original plain simplicity.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees in both Courts below ought to be discharged and that instead thereof the suit ought to be dismissed with costs in both Courts to be paid by the Respondents.

The Respondents will pay the costs of the appeal.

Solicitors: *Messrs. Watkins and Lempriere* for the Appellants.

The Respondents did not appear.

Appeal allowed.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD ROBERTSON.	MUSAMMAT SURAJMANI and others,
LORD COLLINS.	Appellants,
SIR ARTHUR WILSON.	*v.*
1907.	RABI NATH OJHA
5, December.	and another, Respondents.

*Hindu Law—Will—Gift of immoveable property to a Hindu widow—*Malik*—Absolute estate.*

When the question was whether a Hindu widow acquired a right to alienate the property (immoveable) in suit under a deed of gift or testamentary disposition of her late husband, wherein the word used was malik wa khud ikhtiyar, *their Lordships held that in order to cut down the full proprietary rights that the word* malik *imports, something must be found in the context to qualify it and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word* malik.

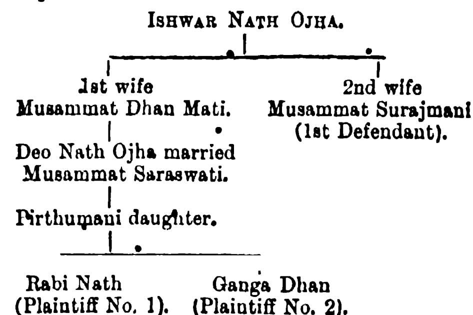
The donee in the case of LALIT MOHUN SINGH ROY *v.* CHUKKUN LAL ROY (4) *was a man but the principles of interpretation laid down in that case were of general application.*

KOLLANY KOOER *v.* LUCHMEE PERSHAD (2) *referred to.*

Appeal from a decree of the above-mentioned High Court, dated 2nd November 1903, affirming a decree of the Court of the Subordinate Judge of Gorakhpur, dated 11th March 1901.

The principal question raised on the present appeal was whether the first Appellant, Musammat Surajmani, had or had not the power of alienation in regard to the property in suit.

The following pedigree will help to explain the case:—



The property in suit belonged to Ishwar Nath Ojha, who, on 2nd April

(2) 24 W. R. 395 (1875).
(4) L. R. 24 I. A. 76: s. c. I. L. R. 24 Cal. 884 (1897).

MUSAMMAT SURAJMANI *v.* RABI NATH OJHA.

1877, executed a document purporting to be a deed of gift of certain immoveable property in favour of his two wives, Musammats Dhan Mati and Surajmani and of his daughter-in-law, Musammat Saraswati, to take effect after his death. The material part of this document is set out in their Lordships' judgment.

Ishwar Nath Ojha died in or about the year 1882, leaving him surviving all the persons whose names appear in the above pedigree except his son, Deo Nath Ojha. Musammat Surajmani, thereafter, took possession of the properties devised to her and on 19th March 1896 she executed a Will by which she devised it to her brother, Ram Narain Ojha, who d'.' prior to the institution of the present suit on 4th September 1900 by the Respondents, Rabi Nath, and Ganga Dhan, against Musammat Surajmani and the sons and heirs of Ram Narain Ojha as Defendants. The Respondents in their plaint after explaining their right to sue as heirs both of Ishwar Nath Ojha and his widow Musammat Surajmani (to whom, it was alleged, possession of the property in suit was given for life only) prayed that it might be declared that the Appellant, Musammat Surajmani, was incompetent to transfer the property in suit and that the Will, dated 19th March 1896, was invalid as against them.

Written statements, in reply to the plaint, were filed on behalf of the Appellants; and (*inter alia*) it was pleaded therein that the Respondents were not the heirs of Ishwar Nath Ojha, nor of his widow Musammat Surajmani, and that the Will of Ishwar Nath Ojha conferred upon Musammat Surajmani a heritable and alienable estate, which she was competent to transfer by her Will.

The Subordinate Judge fixed the following issues:—

1. Are the Plaintiffs heirs of Ishwar Nath and Surajmani?

2. Whether the Will of Ishwar Nath conferred on Surajmani only a limited widow's estate for life or a heritable and an alienable estate?

3. Can the Plaintiffs sue during the life of their mother and grandmother?

On 11th March 1901 the Subordinate Judge delivered his judgment deciding the three issues in favour of the Respondents and made a decree granting them the declaration prayed for. With reference to the second issue he held that, as the Will of Ishwar Nath Ojha conferred on his widow Musammat Surajmani only a limited widow's estate for life and not an alienable estate, she was not competent to transfer the property in suit, and that the Will, dated 19th March 1896 executed by her, was invalid as against the Respondents.

Against that decree the Appellants appealed to the High Court of Judicature for the North-Western Provinces, Allahabad, and on 3rd March 1903 the High Court delivered its judgment and decided that in the case of a gift of immoveable property by a husband to his wife the wife had no power of alienation unless conferred upon her in express terms. In the result a decree was made dismissing the appeal with costs.

The Appellants, thereupon, preferred the present appeal to His Majesty in Council.

Mr. DeGruyther for the Appellants.—The most important words in the deed of

MUSAMMAT SURAJMANI *v.* RABI NATH OJHA.

gift executed by Ishwar Nath Ojha are "that during my lifetime I shall remain in possession of the said property as heretofore—that after my death they (donees) shall . . .—remain in possession as owners with proprietary powers." The lower Courts have held that the devisee took in this case a life estate. Mr. Mayne in his Hindu Law and Usage (7th Ed.), p. 890, sec. 664, says "Immoveable property when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her *stridhan* so far that it passes to her heirs, not to his heirs." The learned Judges who decided the case of *Jeewun Punda* v. *Mussamat Sona* (5) laid down the law that "If a Hindu make a gift of land to his wife, without any express power of alienation it may be contended that he does so knowing, that under the law she takes no interest which she could alienate; if, on the other hand, he makes such a gift, accompanied with an express power, it may be contended with even greater reason that, knowing the disability which by law would attach to a simple gift, he desired to clothe her with larger powers than those to which she would by the operation of the law be entitled." That decision is not right and does not apply to this case. The lower Courts were wrong in following it. The law as stated by Mr. Mayne is right. The word used in making the gift is *malik*, which means proprietor and gives power of alienation. The Courts in India were wrong in holding that the deed here did not give the donees full rights of proprietorship including power of alienation. The donee was the proprietor with the power of alienation and he made a condition in the deed that he was to remain as such owner during his lifetime as heretofore and after his death he gave the donees exactly what he stipulated to retain for himself, that is, proprietorship or ownership with power to alienate. It has been held that the effect of the word *malik* in a testamentary gift is to confer upon the donee an heritable and alienable estate in the absence of a context which indicates a different meaning. *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4). There is nothing in the context here to indicate that the donees are to take any estate other than that conferred upon them by the use of the word *malik*. The donees in this case took an heritable and alienable estate. In a recent case when a Hindu governed by the Mitakshara Law devised immoveable property to his wife stating that she would be the *malik* of the property after his death, the very High Court, whose judgment is under appeal, held that the word *malik* imported an absolute proprietary interest, and that in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not thereby a life estate in the property devised. *Padam Lal* v. *Tek Singh* (1). In this case the question is the same and it is submitted that the decision under appeal is wrong and that the decision in *Padam Lal* v. *Tek Singh* (1) is right.

Mr. Ross for the Respondents.—The document in this case contains no words,

(5) 1 N.-W. P. H. C. R. 66 at p. 67 (1869).

(1) I. L. R. 29 All. 217 (1906).

(4) L. R. 24 I. A. 76 : s. c. I. L. R. 24 Cal. 834 (1897).

MUSAMMAT SURAJMANI *v.* RABI NATH OJHA.

such as heirs, issues, sons, or grandsons to show that an estate of inheritance was devised. Where an owner of immoveable property devised that "the wife of my son shall be regarded as owner after my death," it was held that the devisee must be taken to convey an estate for life only and not the absolute ownership: *Mathura Das* v. *Bhiklan Mal* (6). Again where a Hindu devised that "after my death my wife is to be the person in possession and ownership in place of me," it was held that the intention of the testator was to leave the property to his widow as her *stridhan*, to descend to her heirs: *Janki* v. *Bhairon* (7). Similarly the widow, the donee in this case, took only a limited estate, because the word *malik* means owner, and not absolute owner as contended, and *khud ikhtiyar* means independent with exclusive rights. The lower Courts were right in holding that the widow here took only a life estate. In case of immoveables bestowed on her by her husband, a woman has no power of alienation by gift or the like: Stoke's Hindu Law Books, the Dayabhaga, Ch. 4, sect. 1, placitum 23, p. 241. What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, may give it away, excepting immoveable properties: Stoke's Hindu Law Books, the Mitakshara, Ch. 1, sect. 1, placitum 20, p. 373. When a Hindu by his Will directed that after his death his wife was to take possession of and enjoy his property, and in another passage declared that "just as he was the owner so she was to be the owner," it was held that the wife took only a life interest in the property, and that the Courts have always leaned against such a construction of the Will of a Hindu testator as would give to the widow unqualified control over his property: *Harilal* v. *Bai Rewa* (8). Reference was made to Mayne on Hindu Law and Usage (7th Ed.), p. 527, sec. 397 and to *Moulvie Mahomed Shamsool Hooda* v. *Shewukram* (9), *Rajnarain Bhadury* v. *Ashutosh Chukerbutty* (10) and *Rajnarain Bhadury* v. *Katyayani Dabee* (11).

Mr. DeGruyther, in reply, referred to Mayne on Hindu Law and Usage (6th Ed.), p. 509 and to *Moulvie Mahomed Shamsool Hooda* v. *Shewukram* (9) and contended that the construction put on the word *malik* by Mitter, J., in *Mussammat Kollany Kooer* v. *Luchmee Pershad* (2) was the right construction. He asked their Lordships to decide that the decision in *Padam Lal* v. *Tek Singh* (1) was right.

Their LORDSHIPS' JUDGMENT was delivered by

LORD COLLINS.—This is an appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first Appellant, Musammat Surajmani, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband, Ishwar Nath Ojha. The material part of the document is as follows:—

"I now of my own free will and accord while

(1) I. L. R. 29 All. 217 (1906).
(2) 24 W. R. 395 (1875).
(6) I. L. R. 19 All. 17 (1896).
(7) I. L. R. 19 All. 133 (1896).
(8) I. L. R. 21 Bom. 376 (1895).
(9) L. R. 2 I. A. 7 at pp. 14 & 15 (1874).
(10) I. L. R. 27 Cal. 44 (1899).
(11) I. L. R. 27 Cal. 649 (1900).

MUSAMMAT SURAJMANI v. RABI NATH OJHA.

in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Naokar in tappa Asuari and half of the village Telpurwa in tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of Mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of Mauza Jamla Jot, *i.e.*, an eight anna share in it, in tappa Barikpar to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my lifetime I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original *malik wa khud ikhtiyar*. The Appellants contend that these words are amply sufficient to confer an alienable estate. The Respondents on the other hand contended, and the Courts below have held, that under these words the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by Will in favour of her brother, Ram Narain Ojha. The present suit is brought by the Plaintiffs (Respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said Will, and it is against the decision in their favour that this appeal is brought. The effect of the word *malik* in testamentary gifts has been often discussed in cases decided in the different Courts in India where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate, *Padam Lal* v. *Tek Singh* (1).

In the present case the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad* (2) decided in 1875, Mitter, J., in dealing with the case of a Will where the donees were the widow and daughter of the testator, and the word "*malik*" was used, thus expresses himself (at p. 396):—

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (maliks) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore* v *Ganendro Mohun Tagore* (3) the Judicial Committee say (at p. 365): 'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance.' In the testamentary instrument under our consideration, from the context it does not appear

(1) I. L. R. 29 All. 217 at pp. 221-2 (1906).
(2) 24 W. R. 395 (1875).
(3) 18 W. R. 359 (1872).

MUSAMMAT SURAJMANI v. RABI NATH OJHA.

that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore adopting the rule of construction above quoted we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindu law gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widows' estate' under the law of inheritance. I am not aware of any such provision in the Hindu law nor have we been referred to any authority in support of it."

The question as to the effect of the word *malik* came before this Board in 1897 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (4). The donee in that case was a man but the principles of interpretation laid down were of general application. Referring to the donee the testator said :—

"If no children are born to me . . . or if at the time of my death they are not alive, then . . . my nephew . . . . becoming on my death my sthalabhishikta and becoming owner *malik* of all my estates and properties, &c, shall, remaining my sthalabhishikta, obtaining the management of the Iswarshebas . . enjoy with son, grandson, and so on in succession the proceeds of my estate . . . The minor, on reaching majority, shall exercise ownership (malikatwa) over all the properties."

In delivering the judgment Lord Davey at p. 88 says :

"It was not disputed . . that the son of the testator if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate . . . Nor was it disputed that the words of gift to the Appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner *malik* of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word *malik* as was taken in the Calcutta case in the *Kollany Kooer* v. *Luchmee Perskad* (2) above cited, with the result that in order to cut down the full proprietary rights that the word imports something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the Respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last-mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word *malik*, the context does seem to strengthen the presumption that the intention was that *malik* should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned Counsel for the Respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the Respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both Courts below dis-

(4) L. R. 24 I. A. 76 : s. c. I. L. R. 24 Cal. 834 (1897).

(2) 24 W. R. 395 (1875).

charged and instead thereof the suit dismissed with costs in both Courts. The Respondents will pay to the Appellants the costs of this appeal.

Solicitors: *Messrs. Pyke, Parrott & Co.* for the Appellants.

Solicitors: *Messrs. Osborn Jenkyn & Son* for the Respondents.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

APPEAL No. 2 OF 1907.

MACLEAN, C. J.
HARINGTON, J.
FLETCHER, J.

1907.
Heard, 18, 19, 20 & 21, November.
Judgment, 6, December.

KSHITISH CHANDRA ACHARJYA CHOWDHURY
v.
RADHIKA MOHUN ROY.

Administrator pendente lite, *position of, after suit—Interference—Executor* de son tort *—Applicability of principle to Hindus.*

On the termination of the appointment of an administrator pendente lite *in respect of the property of a Hindu, if he continues to hold and deal with the property in the same way as he did prior to the date when his appointment came to an end he can be sued as a* quasi *executor* de son tort.

This was an appeal from the judgment (*vide* 10 C. W. N. 566) and decree of Bodilly, J., preferred by one Kshitish Chandra Acharjya Chowdhury who was substituted in the presence of the Plaintiff as Appellant by an order of the High Court.

The facts material to the report are as follows :—

One Dakshina Mohun Roy, who died on 6th June 1901, borrowed, not long before his death, from his brother Radhika, the Plaintiff in the present litigation, a sum of Rs. 10,000 After the death of Dakshina two Wills of the deceased were sought to be set up—one of 2nd May 1901, propounded by Radhika and the other of 31st May 1901, propounded by other two brothers—and suits were instituted. Radhika and Dakshina's widow entered caveats to the Will of 31st May and the brothers and Dakshina's widow entered caveats in respect of the Will of 2nd May. Mr. Beeby was on the 25th July 1901 appointed administrator of the property *pendente lite* and the suit respecting the Will of 31st May was determined on 10th March 1903, the Court finding it to be a forgery. On 21st May 1903 Mr. Beeby was appointed administrator *pendente lite* in respect of the suit regarding the Will propounded by the Plaintiff Radhika, and he continued in that appointment till 8th December 1903 when he was discharged and Mr. Shelly Bonnerjee was substituted in his place. This suit was settled on 22nd March 1904, Radhika receiving Rs. 50,000 from the widow to withdraw the Will, and an order to that effect was made in the action.

The present suit for the recovery of the above Rs. 10,000 was filed in the District Court of Alipore on 13th January 1904, and on the application made by the Defendant, Mr. Bonnerjee, on 19th December 1904, describing himself as administrator *pendente lite*, was removed to the High Court. An order for amendment of the plaint by adding an alternative claim against Mr. Bonnerjee as a *quasi* executor *de son tort* was obtained from the Court of first instance by the Plaintiff

KSHITISH CHANDRA ACHARJYA CHOWDHURY v. RADHIKA MOHUN ROY.

Radhika, but through some mistake the amendment did not appear on the record.

Messrs. Garth and *Chackravarti* for the Appellant.—Mr. Bonnerjee could not be sued as administrator *pendente lite*, his rights as such having come to an end with the end of the litigation in connection with the Will of 2nd May. If he continued to deal with the property after that, then the question is whether he could be sued as an executor *de son tort*. I submit he could not be sued as an executor *de son tort*. The principle of executor *de son tort* of the English law is not applicable to Hindus.

Messrs. S. P. Sinha and *C. R. Das* for the Respondent.—The decree was against the estate and so the administrator *pendente lite* came in. He was as a matter of fact an administrator *pendente lite* when this suit was filed. If he is not liable as administrator *pendente lite*, he is liable as executor of his own wrong. An administrator *pendente lite* may be in the same way as a General Administrator. A creditor can bring an action against an administrator *pendente lite* for a debt [*In re Toleman Westwood* v. *Booker* (3)]. A creditor cannot sue an executor named in the Will unless he has administered the estate or obtained probate. [*Mohamidu Mohideen Hadjiar* v. *Pitchey* (4)].

I can sue administrator *pendente lite* in possession apart from the question whether he was administrator *pendente lite* or not [*Magaluri Garudiah* v. *Narayana Rungiah* (2)].

Mr. Garth in reply.

C. A. V.

(2) I. L. R. 3 Mad. 395 (1881).
(3) [1897] 1 Ch. 866.
(4) [1894] A. C. 437.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a suit by one Radhika Mohun Roy to recover from the estate of his deceased brother, Dhakhina Mohun Roy, who died on the 6th June 1901, the sum of Rs. 13,000 and interest. The Defendant in the suit was Mr. Bonnerjee, who is a member of the Bar and the Official Receiver of this Court, and who was appointed administrator *pendente lite* to the estate of Dakshina.

The case of the Plaintiff is that on the 2nd of May 1901 Radhika lent his brother Dakshina, who was speculating at the time in Government paper a Government note for Rs. 10,000 his case being that Dakshina required this note in order that he might deposit it with his bankers as cover for any differences in his speculations in such paper. The rest of the claim is made up of the following alleged loans:—on the 15th of May 1901, Rs. 1,500; on the 19th of May 1901, Rs. 200; on the 5th of June, Rs. 1,000; on the 6th of June 1901, Rs. 200; and on the 8th of June 1901, Rs. 100. The Plaintiff says that Rs. 1,000 was advanced for the purpose of paying off the doctors who had attended Dakshina during his last illness.

The case of the Defendant is that at the time of the institution of the suit he was no longer administrator *pendente lite* and he, at the instance of the widow of Dakshina, submits as a matter of law whether the suit is maintainable as against him. It is, however, conceded that after Mr. Bonnerjee ceased to be administrator *pendente lite* he continued to hold and deal with the property precisely in the same way as he did prior

KSHITISH CHANDRA ACHARJYA CHOWDHURY *v.* RADHIKA MOHUN ROY.

to the date when his appointment as administrator *pendente lite* came to an end. Mr. Bonnerjee has not appealed but the appeal has been conducted by the person beneficially interested in the estate, who in the presence of the Plaintiff was substituted as Appellant by an order of this Court. His case on the merits is that, as this is a claim against a dead man's estate, it must be most strictly proved by the Plaintiff, and that, as the Plaintiff is apparently not a very reputable gentleman, the Court cannot act upon his story without adequate corroboration. It appears in these circumstances that an application was made to the Court of first instance to allow the plaint to be amended by adding an alternative claim against Mr. Bonnerjee as a *quasi* executor *de son tort*; and that application was granted by the Court of first instance. But so far as the record shows the amendment never seems to have been made. This would appear to indicate some carelessness on the part of those who were responsible in the matter.

It would be, perhaps, convenient before dealing with the merits, to deal with the question of whether Mr. Bonnerjee can be sued as a *quasi* executor *de son tort*.

The contention of the Appellants is that as the Indian Succession Act does not apply to Hindus, and the sections of that Act dealing with the question of an executor *de son tort* have not been incorporated into the Hindu Wills Act, the fact of their not having been so incorporated indicates that the principle was not to apply to the estate of Hindus: Mr. Justice Phear in *Jogender Narain* v. *Emily Temple* (1) held,—I need not repeat the passage cited by Mr. Justice Bodilly,—that a creditor here, as in England, might sue a person who is dealing with the assets of the deceased: and I find in the case of *Magaluri Garudiah* v. *Narayana Rungiah* (2) the following passage at page 363:—"The question as to whether or not there has been misjoinder depends on the answer to the question whether or not the Appellants have so conducted themselves in respect of the property of the deceased, that a creditor is entitled to sue them as *quasi* representatives of the deceased. It is a common feature of Hindu and English law that persons who take the property of the deceased person subject themselves to liability for the debts of the deceased. A person who intermeddles with the estate of a deceased person is known to English law as an executor *de son tort*, and in that character an action will lie against him for a debt due by the deceased, and where there are several co-obligors he may be sued as a co debtor." One of the Judges who was a party to that decision was a Hindu Judge of great experience, and he says:—"It is a common feature of Hindu and English law that persons who take the property of the deceased person subject themselves to liability for the debts of the deceased." That case was decided in the year 1881, and so far as I am aware the principle involved in that decision has not been subsequently challenged.

I, therefore, agree with the Judge in the Court of first instance that the suit can properly proceed against Mr. Bonnerjee.

(1) Ind. Jur. 2 N. S., p. 235 (1867).
(2) I. L. R. 3 Mad. 359 (1881).

KSHITISH CHANDRA ACHARJYA CHOWDHURY *v.* RADHIKA MOHUN ROY.

I now pass to the merits and I will deal with each item separately.

As regards the claim for Rs. 10,000, is there sufficient corroboration of the Plaintiff's story ? I agree with the Court of first instance that there is. Before the 2nd of May of 1901 there had been transactions between the brothers of a character practically similar to that now under discussion: and the story of the Plaintiff gains very substantial support from the Government promissory note itself. The promissory note shows that it was undoubtedly the property of Radhika, that it was endorsed over to his brother Dakshina; and the Bankers' Book shows that it was on the 2nd of May 1901 paid by Dakshina into his loan account at the Bank. Dakshina was only credited in that account with Rs. 1,000 in respect of the Rs. 10,000 Government note; the balance was apparently held by the Bank as cover for the speculation in Government paper in which Dakshina was then concerned. The suggestion that the transaction was an out and out sale by Radhika to Dakshina seems to me to be one that is not supported by the evidence in the case. We have further the feature that this claim was treated by the then administrator *pendente lite* as a debt due from the estate:—In annexure B. of Mr. Beeby's affidavit of valuation (he was then administrator *pendente lite*) Radhika appears as a creditor of the estate to that extent. Upon this question of fact I agree with the view taken by the Court of first instance that the Plaintiff has proved his case as regards the Rs. 10,000. I now pass to the other items.

I will deal first with the alleged loan of Rs. 1,000 on the 5th of June 1901. The Plaintiff's case is that this sum was advanced to pay the doctor's fees. It is a feature of this part of the case that presumably the doctors have been paid, for they have made no claim against this estate. The question then is who paid them? It seems pretty clear that at this time there was no money in Dakshina's house, and as the doctors appear to have been paid, if the Plaintiff did not advance the Rs. 1,000 to pay them, it is difficult to see where the money came from. We think there is sufficient corroboration of the Plaintiff's story in respect of this claim for Rs. 1,000; at any rate, there is not sufficient to warrant us in saying that the conclusion of the learned Judge was wrong on this point.

I now pass to the sum of Rs. 1,500 which is alleged to have been advanced on the 15th of May 1901. The evidence of corroboration does not appear to us to be sufficient. According to the Plaintiff he drew a cheque for this sum payable to one Sarat Chandra Bhattacherjee. The Plaintiff was asked why this cheque was not drawn in favour of his brother Dakshina. The suggestion is, as the Plaintiff says, "My brother wanted cash from me. He asked me to get it cashed." That cheque is not put in nor is Radhika's pass book: and, except the oral statements of the Plaintiff and one Annada Charan Shomaddar who was Dakshina's amlah, both of whom are witnesses who were discredited by the Court of first instance, there is nothing to shew that this money ever reached Dakshina. Reliance has been placed upon the evidence of Prosonna Coomar

KSHITISH CHANDRA ACHARJYA CHOWDHURY *v.* RADHIKA MOHUN ROY.

Roy. But his evidence comes to nothing more than this, that he heard a conversation at some Railway Station, between the two brothers in which Dakshina asked Radhika for a loan of Rs. 1,500. He says he did not see the money paid by Radhika, but that Dakshina told Annada to go and get it. I do not think that is a sufficient corroboration to substantiate the claim against a dead man's estate, the more so as the Court of first instance does not treat either the Plaintiff or Annada as reliable witnesses. We, therefore, think that the claim for this sum of Rs. 1,500 ought not to be allowed.

As regards the alleged loan of Rs. 200 on the 19th of May 1901, it is not suggested that there is any corroboration whatever. We, therefore, cannot allow it.

As regards the sums of Rs. 200 and Rs. 100 alleged to have been advanced on the 6th and 8th June 1901, for funeral expenses, except the fact that at the instance of the Plaintiff these sums were entered by Annada Shomoddar in the household books of Dakshina there is really no corroboration.

As the Judge in the Court of first instance says that he cannot act on the Plaintiff's evidence without corroboration and that Annada Shomoddar gave his evidence in a most unsatisfactory manner and as regards a portion of it was undoubtedly lying, I do not think that these claims should have been admitted. They must be disallowed.

There is only one other small point. It was suggested that as these monies, other than the Rs. 10,000 were advanc in Calcutta the Alipore Court had jurisdiction to deal with the case. I need not say anything about this as Mr. Garth in reply, conceded that there is nothing in it.

The appeal, therefore, fails as regards the claim for Rs. 10,000 and Rs, 1,000 and succeeds as regards the balance of Rs. 2,000. There will be, therefore, a decree for Rs. 11,000 with proportionate interest.

As each party has partially succeeded there will be proportionate costs of this appeal.

Messrs. B. N. Basu & Co., Attorneys for the Appellant.

Mr. M. N. Dutt, Attorney for the Respondent.

J. C. M.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2530 OF 1905.

HENDERSON, J.	THE ADMINISTRATOR-GENERAL OF BENGAL,
MITRA, J.	Petitioner,
1905.	*v.*
Heard, 2, August.	THE LAND ACQUISITION COLLECTOR, 24-Pergs.,
Judgment, 22, August.	Opposite Party.

Land Acquisition Act (I of 1894), sec. 18 (1)—Award—Application for reference to the Civil Court—Collector's order refusing—Judicial order—High Court's power to revise.

In rejecting an application made under sec. 18, cl. (1) of the Land Acquisition Act asking for a reference to the Civil Court, the Collector acts judicially, and his order is subject to revision by the High Court.

EZRA *v.* SECRETARY OF STATE (1) *referred to.*

(1) 9 C W. N. 454: S. C. I L R, 32 Cal. 605 (1905).

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* THE LAND ACQUISITION COLLECTOR.

This was a rule granted on the 17th of July 1905, against an order of Babu Bangsidhar Banerjee, Deputy Collector, under the Land Acquisition Act, for the 24-Pergunnahs, dated the 23rd of February 1905, refusing to refer the matter to the Civil Court under sec. 18 of the Act on the ground of limitation.

The facts of the case are as follows:—

It appears that under declaration 1621 L. R., dated 11th March 1902, the Seven Tanks Estate belonging to the late Nundo Lal Mullik was acquired by Government on payment of Rs. 1,35,000.

On the 4th December 1903 at the time of making over possession of the estate to the Commanding Royal Engineer, Ishapore Factory, it was found that outside the wall of the garden was tenanted land comprised in the Seven Tanks Estate, but to the tenants no compensation had been paid for their huts. In order to legalise the acquisition of this plot and to pay compensation to the tenants for their huts, etc., a separate declaration, dated 30th July 1904, was published.

Notices purporting to have been issued under secs. 9 and 10 of the Act were issued to the Administrator General as tenure-holder and Srimati Matangini Dasi, zemindar, requesting them to appear and file statements of claim on 16th September 1904. This notice was, however, actually served on the Administrator-General on the 9th September. The Administrator-General did not enter appearance and, after adjournment, award was made on the 26th September 1904, Rs. 46 being awarded to the zemindar, Srimati Matangini. No notice of the award, as required by sec. 2, sub-sec. (2) of the Act, was however given to the Administrator-General. Subsequently on the 16th October 1904 the Administrator-General having got information from other sources appeared and on his representation the Collector fixed the 1st of November within which to file his objections. The matter was heard by the Collector on the 17th November. On the 1st December the Collector endorsed an order on the back of the petition of the Administrator-General, rejecting it on the merits, and this order was communicated to the applicant on the 14th December. On 23rd February 1905, a petition was presented by the Administrator General praying for a copy of the award and of the order passed on the statement of claim of 1st November 1904 and that the matter might be referred to the Land Acquisition Judge and that 3 weeks time might be allowed within which to file objections to the award.

The Collector rejected the application for a reference on the ground that as it was presented after the lapse of six weeks from the date when the award of 26th September 1904 was communicated to the Administrator-General or even from the date when the order on his statement of claim of 1st November 1904 was communicated to him.

The Administrator-General thereupon presented this application for the revision of the Collector's order and obtained this rule.

Mr. Hill and *Babu Ganesh Chundra Chander* for the Petitioner.

Mr. O'Kinealy (Advocate-General) and *Babu Ram Charan Mitra* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The proceedings before the Collector in this matter were marked with the greatest irregularity. The declaration under sec. 6 of Act I of 1894 is dated the 30th July 1904 and it was for the acquisition of 9 bighas, 10 cottas and odd chittacks, more or less, of land within defined boundaries and not of the interest of any particular person or persons in occupation of it. A plan of the land had been made before the declaration. The Collector was bound to cause a public notice to be given under sec. 9, sub-sec. (1) of the Act, inviting claimants to compensations for *all interests* in the land, and under sub sec. (2) such notice should be published not earlier than 15 days before the date fixed for the persons interested to appear and claim compensation. The notice in the present case was not published before the 26th August 1904, though the first day fixed for the hearing of claims was the 8th September. The notice on the Administrator-General of Bengal was served on the 9th September, the date for presenting claims being the 16th September. The notice again was not such as is prescribed by sub-sec. (2) of sec. 9. It did not require the Administrator-General to state the nature of his interest in the land to be acquired and the amount and particulars of his claim to compensation but it expressly stated that the price of two of the plots had already been given and no further compensation was payable. The notices issued under sec. 9 were clearly bad and were not served in due time. On the 26th September 1904 the Collector made his award under sec. 11 of the Act. The Administrator-General was unrepresented on that day. But the award was not in accordance with the requirements of sec. 11. It contained no statement of the compensation which in the opinion of the Collector should be allowed for the land and there was no proper apportionment of such compensation. The case made for the Collector is that the Government had already acquired the right which the Administrator-General had in the entire land. The Administrator-General denies it. The proper award to make under sec. 11 would have been one which would contain a statement of the compensation for the lands and if the Administrator-General's interest had passed to the Government the amount payable, in the opinion of the Collector to the Administrator General on apportionment, should have been stated as payable to the Government. No notice of the award as required by sec. 12, sub-sec. (2) was given to the Administrator-General. The Administrator-General came subsequently to know of it on enquiry by him, *i.e.*, on the 11th October 1904.

Though the award was made on the 26th September and according to the contention before us the Collector's administrative functions under Part II of the Act, except as to taking of possession, ceased on that date, the Collector on the 11th October on the representation of the Administrator-General allowed time up to the 1st November following to file his statement of claim. The Collector had taken possession on the previous day. It is inconceivable how if his administrative functions had

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* THE LAND ACQUISITION COLLECTOR.

ceased the Collector could on the 11th October allow time up to the 1st November to file a statement of claim, having already made and filed his award under secs. 11 and 12 of the Act. The statement of claim was actually filed on the the 1st November, it was duly received and the 17th November was fixed for hearing. The matter was heard by the Collector on the 17th November but no order was made until the 1st December following when the Collector endorsed on the back of the petition of the 1st November his order apparently in the absence of the Administrator-General to the effect that the latter was not entitled to any compensation, his rights having already been acquired by the Government. The petition was rejected not on the ground of the absence of power of the Collector to re-open the proceedings, but on the merits of the Administrator-General's claim, the Collector coming to the finding that the land had already been acquired by the Government. The Administrator-General received notice of this order on the 14th December by the Collector's letter of that date. It is quite clear from the proceedings that the Collector did not think his award of the 26th September to be final. It had the character of finality on the 1st December when the Administrator-General's claim for compensation was refused on adjudication on the merits of his claim. It is also quite clear that there were grounds of dispute as to apportionment between the Government and the Administrator-General which might legitimately be the subject of adjudication by the Court under Part III of the Act.

Under sec. 18 of the Land Acquisition Act any person interested may require that the matters covered by the award be referred by the Collector for the determination of the Court provided that the application is made, if the person was present or represented before the Collector at the time when he made the award, within 6 weeks from the date of the Collector's award, or in other cases, within 6 weeks of the receipt of the notice under sec. 12, sub-sec. (2) or within 6 months from the date of the Collector's award, whichever period shall first expire.

No notice as required by sec. 12, cl. 2 of the Act in cases where the persons interested are not present personally or by their representatives when the award is made, was, as we have seen, served upon the Administrator-General.

On the 23rd February 1905, the Petitioner applied under sec. 18 (*1*) for a reference to the Civil Court but the Collector by his order of the same date refused to refer the matter on the ground that the application had been made more than 6 weeks after the date of the communication of the order of the 26th September to the Petitioner. Upon that a rule was issued to the Collector to show cause why the order of the 23rd February should not be set aside.

If the period allowed by the proviso to sec. 18 of the Act for presenting a petition for reference to the Court be calculated either from the 26th September or the 14th December allowing 6 months in the first case and 6 weeks in the second case, the application for reference was in time. Besides the delay, if any, in applying for a reference was

entirely due to the irregular mode in which the Collector conducted his proceedings.

But it seems to us that the Collector aving allowed his award of the 26th September to be re-opened, an award made in his administrative capacity, and notice of his final order having been given on the 14th December by a letter which should be taken to be a notice under sec. 12 of the Act, the Administrator-General was entitled to 6 weeks time from the latter date to file his application for reference.

Assuming, however, that the Collector's proceedings after the filing of the award on the 26th September were not warranted by the law, and that he was incompetent to re-open his original award, the Administrator-General could make his application for reference with 6 months of the date of the original award. In either view of the case the Collector was bound, as enjoined by sec. 18, to initiate the judicial proceedings contemplated by Part III of the Act.

The next question which arises is whether this Court has jurisdiction under sec. 622 of the Code of Civil Procedure or sec. 15 of 24 and 25 Victoria, C. 104 to interfere.

It is admitted that up to and including the time of making his award the Collector was in no sense a judicial officer and that the proceedings before him were not judicial proceedings [*Ezra* v. *Secretary of State* (1)] and however irregular his proceedings were, we cannot interfere with his award made under sec. 11 of the Act.

But when an application is made to the Collector requiring him to refer the matter to the Civil Court, the Collector may have to determine and, it seems to us, determine judicially whether the person making the application was represented or not when the award was made, or whether a notice had been served upon the applicant under sec. 12 (*2*) and what period of limitation applies and whether the application is under the circumstances made within time. The Collector's functions under Part III of the Act are clearly distinguishable from those under Part II. Part III of the Act relates to proceedings in Court. In our opinion the Collector in rejecting the application was a Court and acting judicially and his order is subject to revision by this Court. To hold otherwise would be to give finality to an award under sec. 11 even in cases in which the Collector acts irregularly and contrary to law and then refuses on insufficient grounds to make a reference under Part III of the Act. The party aggrieved may be left without remedy which is implied by a judicial trial before the Judge.

An attempt was made before us to show that the entire piece of land now acquired had already been acquired under a previous declaration by the local Government and the Administrator-General had received his share of the compensation. This however is a matter to be decided by the Judge on a reference and we cannot express any opinion on it.

We, therefore, make the rule absolute and set aside the Collector's order of the 23rd February 1905 and direct him to proceed according to law. The opposite party must pay the Petitioner's costs which we assess at 5 gold mohurs.

N. G. *Rule made absolute.*

(1) 9 C. W. N. 454 : s. c. I. L. R. 32 Cal 605 (1905).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1337 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
3, December.

LIAKAT HOSSEIN, Petitioner,
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 487—Applicability to Presidency Magistrates—Indian Penal Code (Act XLV of 1860), sec. 188—Retrial, High Court when to order.

Under sec. 487 of the Criminal Procedure Code the Chief Presidency Magistrate has no jurisdiction to try a person for an offence under sec. 188, I. P. C., for disobedience of his own order.

The terms of sec. 487, Cr. P. C., as contained in the Code of 1898, are wide enough to include Presidency Magistrates.

It is not ordinarily the duty of the High Court to order a retrial of a person whose conviction is set aside by the High Court on account of an illegality in his trial.

When the conviction and the sentence passed upon an accused is set aside by the High Court on the ground that the Magistrate who tried him had no jurisdiction to do so, the order of the High Court setting aside the conviction and sentence is no obstacle to the accused being retried on the same charge at the instance of the prosecution.

This was a rule granted on the 27th of November 1907, against an order of Mr. D. H. Kingsford, Chief Presidency Magistrate of Calcutta, dated the 4th of November 1907, convicting the Petitioner under sec. 188, I. P. C., and sentencing him to six months' rigorous imprisonment.

The facts of the case so far as they are material to the report are shortly these :—

On the 5th October 1907, the Deputy Commissioner of Police, Calcutta, applied for an order under sec. 144, Criminal Procedure Code, prohibiting the Petitioner, Liakat Hossein, from addressing public meetings or forming and leading processions in the town of Calcutta. The Chief Presidency Magistrate, Mr. Kingsford, issued a notice under sec. 144 directing the Petitioner to refrain from leading, or taking any part in, processions and from holding or addressing meetings in Calcutta.

On the 26th of October 1907, a Daroga of the Calcutta Police applied to the Chief Presidency Magistrate for sanction to prosecute the Petitioner under sec. 188, Indian Penal Code, for disobedience of the order issued under sec. 144, C. Cr. P., by leading a procession in Bechoo Chatterjee's Street, Calcutta, on the 25th October 1907. The prosecution was sanctioned by the Chief Presidency Magistrate with the result that the Petitioner was tried by the same Presidency Magistrate and convicted under sec. 188, I. P. C., and sentenced to six months' rigorous imprisonment. This rule was issued for setting aside the conviction and sentence.

Mr. A. Chaudhuri and *Babu Narendra Kumar Bose* for the Petitioner.

Mr. S. P. Sinha for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a rule calling upon the Chief Presidency Magistrate of Calcutta to show cause why his order, dated the 4th November 1907, convicting the Petitioner, Liakat Hossein, under sec. 188,

LIAKAT HOSSEIN *v.* THE EMPEROR.

I. P. C., and sentencing him to six months' rigorous imprisonment, should not be set aside, on the ground that he had no jurisdiction to deal with a case of disobedience of his own order, in contravention of the terms of sec. 487, C. Cr. P.

The facts of the case are these: The Petitioner has been tried, under sec. 188, I. P. C., for disobedience of the order of the Chief Presidency Magistrate, issued under sec. 144, C. Cr. P., directing him to refrain from leading, or taking part in, processions along the public streets of Calcutta and from holding and addressing meetings in Calcutta. This order was issued by Mr. Kingsford, the Chief Presidency Magistrate, and subsequently the Petitioner was charged with having disobeyed it, and, after being tried by the Chief Presidency Magistrate, he was sentenced to six months' rigorous imprisonment.

A rule was asked for by Mr. Chaudhuri on the following grounds, namely, *first*, that the order, under sec. 144, C. Cr. P., was passed *ex parte*, and did not purport to have been passed in an emergency; *secondly*, that the Petitioner was not allowed to show cause against the order; and, *thirdly*, that there is nothing on the record to prove that the disobedience of the order tended to cause a riot, or an affray, or danger to human safety.

We heard Mr. Chaudhuri in support of these pleas and considered the matter. But we did not think these pleas sufficient to justify us in issuing a rule. It is not necessary for us to give our reasons for rejecting the three pleas cited above, because we come to the conclusion, after examining the proceedings, that a rule should be issued on another ground, namely, that the order under sec. 144, C. Cr. P., having been issued by the Chief Presidency Magistrate, he had no jurisdiction to try the Petitioner for disobedience of it, and that, consequently, his order, being in contravention of sec. 487, C. Cr. P., is without jurisdiction.

Mr. Sinha appears before us to-day on behalf of the Crown and states that he has no cause to show against the rule being made absolute. But he prays that an order may be passed by us for the retrial of the Petitioner.

We think that the learned Standing Counsel has taken a proper view of the matter. It seems impossible to resist the conclusion that the Chief Presidency Magistrate had, under sec. 487, C. Cr. P., no authority to try a case of disobedience of his own order, because sec. 487 expressly lays down that no Magistrate can try a case of disobedience of his own order.

It appears to us that the terms of sec. 487, C. Cr. P., as contained in the Code of 1898, are wide enough to include Presidency Magistrates. The word in the section is "magistrate;" and that must include a Presidency Magistrate, unless the definition of Magistrate excludes Presidency Magistrate, which, it appears to us, it does not. No doubt, in the Code of 1882, the provisions of sec. 487 were different, and 487 of that Code gave express power to Presidency Magistrates to try cases of disobedience of their own order. That section was modified in the Code of 1898, and no such power is given in sec. 487 of the Code now in force. For these reasons we

LIAKAT HOSSEIN *v.* THE EMPEROR.

think that Mr. Kingsford's order is without jurisdiction.

We therefore make the rule absolute and direct that the Petitioner be set at liberty.

Mr. Sinha asks us to order the retrial of the accused. We do not, however, think it is ordinarily our duty to order the retrial of any person. But we will observe that the order we now pass setting aside the conviction and sentence is no obstacle, in our opinion, to the accused being retried, if the prosecution thinks it advisable to retry him.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1141 OF 1907.

CASPERSZ, J. CHITTY, J. 1907. 28, October.	RAJ KUMAR SINGHA, Petitioner, *v.* TINCOWRI MAZUMDAR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 195 (6), 421 and 440—Sanction to prosecute—Application for revocation—Summary rejection without hearing the applicant—Illegality.

An application under sec. 195 (6), Cr. P. C., for the revocation of a sanction for prosecution is made by way of appeal, and under sec. 421, Cr. P. C., such an application ought not to be summarily rejected without giving the applicant a reasonable opportunity of being heard in support of the same.

The provisions of sec. 440, Cr. P. C., do not apply to such a case.

This was a rule granted on the 24th of September 1907, against an order of S. K. Ghose, Sub-Deputy Magistrate of Barrackpur, dated the 16th of August 1907, granting sanction to the opposite party to prosecute the Petitioner under sec. $\frac{211}{193}$, I. P. C., an application for the revision of which order was rejected by Mr. J. G. Cumming, District Magistrate of the 24-Pergunnahs, on the 31st of August 1907.

The facts of the case material to the report are briefly these:—

The Petitioner, Raj Kumar Singha, brought a charge of assault against Tincowri Mazumdar, the opposite party, and another under sec. 323, I. P. C., which after a regular trial was declared to be intentionally false. Tincowri then applied for sanction to prosecute Raj Kumar under sec. 211, I. P. C. A notice was issued upon Raj Kumar and after hearing his pleader, sanction was granted for his prosecution under sec. $\frac{211}{193}$, I. P. C.

The Petitioner then applied to the District Magistrate for revocation of the sanction. This application according to a standing order of the District Magistrate was filed before the Joint Magistrate. Subsequently the District Magistrate without giving an opportunity to the Petitioner being heard in support of his application, summarily rejected the same by the following order:—"The application for the exercise of my power under sec. 195 *(6)*, Cr. P. C., of revoking the sanction given by the Sub-Deputy Magistrate is summarily rejected."

The Petitioner moved the High Court against this order of the District Magistrate and obtained this rule.

Mr. Chippendale (for *Babu Hemendra Nath Sen*) for the Petitioner.

No one for the Opposite Party.

THE
Calcutta Weekly Notes.

Vol. XII.] MONDAY, JANUARY 27, 1908. [No. 11

Contents.

NOTES

IT IS WITH PLEASURE THAT WE NOTE THAT MR. Lalmohan Das, a leading vakil of the Calcutta High Court, has been appointed to officiate on the Bench in the place of Mr. Justice Mookerjee during the period of the latter's deputation. Mr. Lalmohan Das has a good record behind him both at the University and as a vakil of the High Court. His Tagore Lectures on "Alluvian, Diluvian and Riparian Rights" have spread his fame as a learned lawyer beyond the Presidency of Bengal The work referred to is the standard Indian treatise on the subject. Mr. Das enjoyed a good practice and is a practical lawyer of mature experience. We are sure that the new Judge will be of valuable assistance to his colleagues in the interpretation of law. Qualities such as decision, judgment, fairness and firmness are as essential on the Bench as learning and experience. We feel confident that the Mr. Justice Das will prove equal to the responsible position to which he has been raised from the ranks of a profession which in the past has supplied judges who have uniformly upheld the best traditions of the Bench.

THE MADRAS PUBLIC MUST BE CONGRATULATED FOR the honour they have done to Sir Subramania Iyer to whom both as a judge and a man such honour is due. A public meeting in, which all sections of the community, both Indian and European, joined hands and the Governor of the Province took part, not merely in a private capacity but in his official capacity, is unique in itself. The occasion, moreover, is one of great public importance having regard to the fact that the executive head of the Government came to honour a retiring judge not for any subserviency but for independence and the other stirling qualities of the mind and character which are so essential in a judge. This is as it should be and it would be a happy day for India when other heads of administration would be as ready to honour a judge for his fearless devotion to duty as His Excellency the Governor of Madras. The qualities of Sir Subramania Iyer that had won for him such public and also official admiration are thus described by Sir Arthur Lawley. His Excellency said "It has been hard to know which of the qualities of Sir Subramania Iyer to admire most—the brilliancy of his intellect, the profundity of his knowledge, the fearlessness of his courage, or the independency of his judgment." That such a judge deserved a public memorial and special recognition by the State is beyond doubt. After the high public tribute paid to this great judge we have little to add We must, however, say that the appreciation of his career is not peculiar to Madras but is general throughout India

CURRENT INDIAN CASES.

EMPEROR *v* SIRANADU, I. L. R. 30 Mad. 469. *Criminal Procedure Code, sec. 307.*

A Sessions Judge has no power to question the jury to give the reasons of their verdict when there is no ambiguity as to the precise offence of which the accused are convicted.

DHUTTALOOR SUBBAYYA *v.* PADIGANTAM, I. L. R. 30 Mad. 470. *Civil Procedure Code, sec. 544.*

In an appeal by one of several Defendants whose case is common the whole decree can be set aside, although the latter are not parties to the appeal.

PINDIPROLU *v.* PINDIPROLU, I L. R. 30 Mad. 486. *Transfer of Property Act, sec. 6.*

The right of a presumptive reversionary heir is incapable of transfer.

CHINNAPPA *v.* ROBERT FISCHER, I. L. R. 30 Mad. 497. *Merger—Debt—Decree.*

Where a landlord obtains a decree for rent in a

civil suit the debt merges in the decree and further summary proceedings are illegal.

ENTHOLI v. VALLATH, I. L. R. 30 Mad. 500. *Mortgage—Sale.*

A purchaser of a property sold in execution of a decree upon a simple mortgage has no right to bring a suit for possession against the purchaser of the mortgaged property from the mortgagor (and who was not a party to the mortgage decree).

Review.

INSTITUTES OF MUSSALMAN LAW. A treatise on Personal Law according to the Hanafite School, with reference to Original Arabic Sources and decided Cases from 1795 to 1906. *By Nawab A. F. M. Abdur Rahman, Barrister-at-Law, and Judge, Presidency Court of Small Causes, Calcutta. Thacker, Spink & Co.*

The present work is founded on the *Droit Musulman* of Kadir Pacha, a work of high authority on Mahomedan law as it prevails in Egypt. This, it may be premised, is the Sunni-Hanafite law which is also the law governing the generality of Mahomedans in this country. The *Droit Musulman* purports to be a Code of Mahomedan law (in its Sunni-Hanafite branch) and was prepared under the auspices of the Egyptian Government by a Council of leading Ulemas of the University of Al Azhar in Cairo. The Code takes its name from the President of this Council, Kadir Pacha, who was a Judge of the mixed tribunal at Cairo. So far as we are aware this is the only Code of Mahomedan law prepared on modern lines, and it does not speak much for the enterprise of the legal profession of this country that no similar work has yet been undertaken in India. To the present author belongs the credit of doing the next best thing in the same line, *viz.*, introducing this work in India and adapting it to the requirements of the Courts and the profession in this country. To state more particularly, what the author has done in the present work is that he has not merely translated the Egyptian Code into English but under each proposition of law rendered into English he has noted the original Arabic sources from which it has been derived. The Arabic texts have been reproduced for purposes of reference in an appendix. Further, he has woven into the materials of the code the Indian case-law bearing on the subjects dealt with. He has also furnished references to the recognised English text-books in use in this country. Nothing has, in fact, been omitted to make it a most useful and exhaustive book of reference relating to all that concerns the Sunni-Hanafite law. The case-law bearing on the Shia system has also been noted to show in a general way the divergence between the two systems. The present volume does not exhaust the whole subject. It deals only with the law of marriage, dower, divorce, the law relating to children and the law of gifts, wills and executors. If the present volume is well received the author intends to deal with the rest of the subject. The work done by the author is very commendable and he deserves every encouragement for continuing it.

Notes of Cases.

ENGLISH LAW COURTS.

HOUSE OF LORDS.—*West Leigh Colliery Company (Ld.)* v. *Tunnicliffe and Hampson (Ld).* Before LORD LOREBURN, L. C., and LORDS ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD and ATKINSON. 2nd December 1907.

Damages for actual subsidence—Depreciation in value of site, no cause of action.

In this action brought by the Respondents, owners of cotton mills, against the Appellants, Colliery Company, for damages for subsidence caused by the mining operations carried on by the latter, the Court of Appeal had held reversing a judgment of Mr. Justice Swinfen Eady, that the damages ought to include compensation for the depreciation of the selling value of the property of the Respondents.

LORD MACNAGHTEN in allowing the appeal observed that the case was concluded by authority (*Backhouse* v. *Bonomi*, 9 H. L. C. 503 and *Darby Main Colliery Co.* v. *Mitchell*, 11 App. Cas. 127). "The surface owner has no cause of action against the owner of a subjacent stratum until and unless actual damage results from the removal of minerals. The Statute of Limitations is no bar however long it may be since the removal was completed, nor, is it any answer to a surface owner's claim to say that he has already brought one or more actions and obtained compensation once and again for other damage resulting from the same excavation. The depreciation in the value of the surface owner's property brought about by the apprehension of future damage gives no cause of action by itself."

LORD ASHBOURNE added "the owner can bring fresh action for damage caused by each fresh subsidence, but he cannot recover anything for the risk of future damage."

Mr. C. A. Russell, K. C., Mr. Jessel, K. C., and *Mr. Leslie Scott* for the Appellants.

Mr. Cripps, K. C, Mr. Langdon, K. C., and *Mr. F. L. Wright* for the Respondents.

Appeal allowed.

COURT OF APPEAL.—*Dibden* v. *Skirrow.* Before LORDS JUSTICES COZENS HARDY, M. R. FLETCHER MOULTON and FARWELL. 5th November 1907.

Ferry, interference with—Building bridge across stream.

In the suit out of which this appeal arose, Plaintiff alleged *inter alia* that he and his predecessors-

in-title had enjoyed and maintained from time immemorial a ferry for foot-passengers across the river Wye at Brockwier in Glouscestershire and that the Defendants by building a bridge across the river, about 60 yards below the ferry was interfering with and injuring the said ferry and the Plaintiff sought to restrain them from constructing the bridge. The appeal was against the decision of Neville, J., dismissing the claim.

The Court of Appeal relying on *Hopkins* v. *Great Northern Ry Co.*, 2 Q. B. D. 224, decided that the grant of a ferry did not carry with it the exclusive right of carrying passengers and goods across the stream by any means whatever but only by means of the ferry. Relief could be granted only when the ferry rights were interfered with by a passage of the river in boats. There was no such interference in this case.

Mr. Bailhache for the Plaintiff.

Mr. Upjohn, K. C., and *Mr. F. Thompson* for the Defendants were not called upon.

Appeal dismissed.

PRIVY COUNCIL.

[APPEAL FROM MADRAS]

LORD HALSBURY. LORD MACNAGHTEN. LORD ATKINSON. LORD COLLINS. SIR ARTHUR WILSON. 1907. 10th December.	KOCHERIAKOTA VENKATA KRISHNA RAO and others, Petitioners, Appellants, *v.* KANDIMALLA SETHARAMIAH GARU and others, Respondents

Leave to appeal—" Substantial question of law" —Date on which the period of limitation commences to run

This was an application for special leave to appeal under the following circumstances:—

The estate of Gopalapur originally belonged to Raja Venkatarayanam Garu, who died in the year 1832 and was succeeded by his posthumous son Sreewarthu Venkataraju Garu. On his death in 1833 his mother, Lakshmidavamma Garu, succeeded him. On 17th and 18th December 1836 that lady entered into a transaction of mortgage with Kandimalla Narayya Garu and three others. The form the transaction took was that on 17th December 1836 that lady presented a petition to the Collector of the District stating that she had sold ⅘ths share in the estate to those four persons for the sum of Rs. 20,000; while on 18th December 1836 the mortgagees executed an agreement reciting the presentation of the said petition, and containing the following stipulations:—

"1 Whenever you may pay us in full the said Rs. 20,000 and the interest thereon at Re. 1 (one rupee) per Rs. 100 per month by the 18th December 1841, we shall then transfer our shares in Gopalapur Mutta to you or any one else you desire.

"2. For the five years (*i.e.*, the period) up to the 18th December 1841 the due date for your paying us the money and getting a re-transfer to your name of our four-fifths in the said Mutta it is settled that you shall yourself be liable for the profits or losses in respect of our four-fifths share of villages, so you shall yourself manage the business of the entire Mutta after paying the said charges, and the sirkar kists as well as the interest accrued at the end of every year on the Rs. 20,000 paid by us, any money that may be left shall be taken by you.

"3. If within the 18th December 1841, the Mutta collections are not realised owing to acts of God or of the State, or owing to excess or want of rain, and if therefore any portion of the sirkar kists remain due till the 30th Vysakha Bahula of the respective Faslis, or if any portion of the interest for any Fasli on the said Rs. 20,000 lent by us remain due not being paid in full till 11th July the end of that Fasli, that money shall be separately sent for and paid by you. In default of such payment we shall without any concern for the stipulated period of 5 years till the 18th December 1841, consider this as a sale from the date of either of the said two defaults that may happen and shall enjoy our ⅘ths in the said Mutta villages as a permanent zemindari.

"It is settled that if you act according to terms within the period mentioned in this kararnama and pay us Rs. 20,000 (twenty thousand rupees) and the interest thereon in the order of the dates of payment our ⅘ths of the villages of the said Mutta shall be retransferred to you."

The said lady did not pay the principal of the mortgage money prior to 18th December 1841, and in consequence the mortgagees took possession of the mortgaged estate.

The said lady died in the year 1883, and the Petitioners on her death succeeded to the estate as the next reversioners of her son, the last male-holder, and on 18th December 1901 they instituted in the Court of the District Judge of Godavari to redeem the said mortgage, alleging also that the said lady did not execute the same for necessity under the Hindu law.

Of the 15 Defendants Nos. 1 to 13 represented the original mortgagees and did not contest the claim. Defendants Nos. 14 and 15 pleaded that the transaction in question was not a mortgage but a sale, that they had acquired title by purchase at a sale for arrears of revenue, and that the suit was barred by limitation. They also denied the pedigree put forward by the Petitioners.

On 12th September 1903 the District Judge delivered his judgment. He decided that the pedigree was proved, that the transaction was a mortgage, that the Defendants Nos. 14 and 15 had acquired a good title by the revenue sale, and that the purchase was not *benami* for the mortgagees. He was of opinion that the mortgage was one by conditional sale, and that on the expiry of the term fixed no

equity of redemption was left outstanding and that the suit was barred by limitation under Act XV of 1877, Sch. II, Art. 144. A decree was accordingly made dismissing the suit with costs.

Against that decree the Petitioners appealed to the High Court of Judicature at Madras. On 27th September 1906 that Court made a decree dismissing the appeal. The High Court decided only one point, *viz.*, that the suit was barred under Art. 158 of the Limitation Act being of opinion that the cause of action to redeem in accordance with the provisions of the said deed of mortgage accrued on any day after the execution of the instrument.

On 15th July 1907 the High Court refused the Petitioners' application for leave to appeal against its decree to His Majesty in Council by an order in terms following:—

"Our decision cofirmed the decision of the lower Court and we think there is no substantial question of law which would justify us in certifying."

Mr. DeGruyther for the Petitioners.—The Petitioners are entitled to appeal as of right under sec. 596 of the Code of Civil Procedure, because the subject-matter of the suit and of the appeal to His Majesty in Council exceeds in value the sum of Rs. 10,000 and because the suit involves substantial questions of law, *viz.*, *firstly* whether the suit is barred under Act XV of 1877, Sch. II, Art. 148; *secondly*, whether on the true construction of the said deed of mortgage the right to redeem did not accrue on 18th December 1841; *thirdly*, whether a receipt for interest due on the said mortgage, dated 5th December 1841, signed by the mortgagees and registered by their pleader on 5th March 1842, did not operate to give a new period of limitation under secs. 19 and 20 of Act XV of 1877. (The High Court held that *primâ facie* the pleader had no authority except to register the instrument.) From what date the period of limitation started to run is a substantial question of law. If a point is arguable, which is submitted is the case here, the Petitioners ought to have leave.

Application refused.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER NO. 2116 OF 1907. OMAR ALI MAJHI, Appellant *v.* BASIRUDDI AHMED, Respondent. Heard, 2nd and 3rd January 1908. Judgment, 3rd January 1908.

Occupancy holding, purchaser of a portion of—Civil Procedure Code (XIV of 1882), secs. 244, 310A—Deposit.

The Appellant was a purchaser of a portion of an occupancy holding. Whether it was transferable or not was immaterial. The holding was sold for it own arrears. He put in the amount of the decree with the usual costs under sec. 310A of the Code of Civil Procedure. An objection was raised that he had no *locus standi*. He was the purchaser of a portion of the holding and, as against the judgment-debtors, the original tenants, he had a subsisting interest and he was in possession. The Munsif allowed the deposit to be made and set aside the sale.

The lower Appellate Court came to a different conclusion. It decided that the evidence was insufficient for a finding of transferability of the occupancy holding according to custom; and, having come to that conclusion, he held that, notwithstanding that the Appellant was a purchaser of a portion of the occupancy holding, he had no *locus standi*.

On appeal to the High Court

Held—That as the question between the parties was one that came under cl. (c) of sec. 244 of the Code, an appeal and a second appeal lay.

Phul Chand Ram v. *Nursing Pershad* (I. L. R. 28 Cal. 73) and *Ashgar Ali* v. *Asabuddin Kazi* (9 C. W. N. 113) followed.

The purchaser of a portion of an occupancy holding, whether it was transferable by custom or not, was entitled to make a deposit under sec. 310A, C. P. C. *Benodini Dasi* v. *Peary Mohun Halder* (8 C. W. N. 55) and *Kunj Behari Mandol* v. *Sambhu Chunder Roy* (8 C. W. N. 232) followed.

Babu Dhirendra Lal Kastgir for the Appellant.

Moulvi Nuruddin Ahmed for the Respondent.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER NO. 432 OF 1906. BAYANULLAH, Appellant *v.* NAYEB-ULLAH AKANDA AND OTHERS, Respondents. 3rd January 1908.

Remand—Entire evidence to be gone into—Parties, adding of—Mistake.

After remand by the lower Appellate Court, B and G were added as Defendants in the suit and the plaint was accordingly amended. On appeal to the High Court it was contended that the order of remand was erroneous inasmuch as there was no authority in the Code for such a remand, and that as B and G were known to the Plaintiff to have been in possession of the property they ought to have been made parties in the suit as originally framed.

Held—That as the entire evidence had to be gone into in the presence of B and G, the lower Appellate Court had no alternative but to remand the whole case.

The Court should allow persons to be added who were by mistake not made parties.

Babu Joy Gopal Ghosha for the Appellant.

Babu Mohini Mohun Chuckerbutty for the Respondents.

A. T. M. *Appeal dismissed.*

RAJ KUMAR SINGHA v. TINCOWRI MAZUMDAR.

The JUDGMENT OF THE COURT was as follows:—

We think the learned District Magistrate was in error in not hearing the pleader in the matter of the application by way of appeal preferred by the Petitioner under sec. 195 (6) of the Code of Criminal Procedure. The principle laid down in the second paragraph of sec. 421 of the Code appears to be a salutory principle in a case like this, and we do not think that sec. 440 of the Code is one on which reliance can be placed. It is obvious that an order of rejection should not have been passed without hearing the pleader, who might have placed matters before the learned District Magistrate and explained them to him in a way which he may not have considered before the order of rejection was passed; and we think that the Petitioner was entitled, as of right, to be heard through his pleader.

We, accordingly, set aside the order of the District Magistrate, dated the 31st August 1907, and direct that he do restore the case to his file and dispose of the same in accordance with law after hearing the Petitioner's pleader on a date to be fixed by the District Magistrate.

The rule is made absolute.

B. C. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ROBERTSON. LORD COLLINS. SIR ARTHUR WILSON. 1907. 11, December.	RAJA PRAMADA NATH ROY, Appellant, v. RAJA RAMANI KANTA ROY and ors., Respondents.

Co-sharer landlords—Separate collection—Right of sharer to sue for whole rent making co-sharers Defendants—Bengal Tenancy Act (VIII of 1885), sec. 188—"Required or authorised to do" under the Act—Filing of suit—General principles of legal procedure.

Agreement either expressly proved or implied by the conduct of the parties may establish the right of co-sharer landlords to sue separately for the shares of rent receivable by them. But such an arrangement merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding. The right to bring the tenure to sale for arrears of rent remains intact, as also the right of one sharer to sue, making his co-sharers Defendants when they will not join as Plaintiffs.

The filing of a suit is not a thing which the landlord is, under the Bengal Tenancy Act, required or authorised to do: and sec. 188 of the Bengal Tenancy Act is no bar to a sharer suing (under the general rules of legal procedure) for the whole rent of the tenure making his co-sharers who refuse to join as Plaintiffs, Defendants in the suit

Appeal from a decree of the above-mentioned High Court, dated the 3rd of June 1904, affirming a decree of the Court of the Subordinate Judge of Rajshahye, dated the 17th of December 1900.

The principal question involved in the appeal was whether the Appellant as one of the co-sharers in the zemindari interest in an estate known as Dihi Haloti was entitled to sue for the whole rent due from the putnidars of that estate, making his co-sharers in the zemindari interest parties to the suit as Defendants.

In the year 1837 one Raja Ram Chan-

dra Bahadur was the sole owner of a separate 8 annas share in the above-mentioned estate. On 23rd April 1857 he made a putni settlement of his 8 anna share with one C. I. Abbott on a yearly rental of Rs. 6,349-6-10.

That 8 anna share of the zemindari interest was subsequently split up. In April 1895 the Plaintiff-Appellant purchased a 2 anna share, which had passed into the ownership of Brojo Nath Roy and Krishna Lal Roy, and in June of the same year he purchased a 4 anna share from Rani Mina Kumari. Of the remaining 2 anna share, 1 anna share was purchased by Jadab Chandra Bagchi, the father of the Defendants Nos. 18 and 19 (Respondents Nos. 14 and 15), and the other 1 anna share, which had become the property of Uma Sankar Sen and Rajoni Kant Sen, passed to the ownership of the Defendants Nos. 20, 21 and 22 (Respondents Nos. 2, 3 and 16), Bhuban Mohan Moitra, Sarada Mohan Moitra and Kali Mohan Moitra. Thus at the time of the intstitution of the suit the zemindari interest was held as follows :—

The Appellant ...	...	6 annas.
Respondents Nos 14 & 15 ...		1 anna.
Respondents Nos. 2, 3 & 16...		1 anna

The putni interest of Mr. Abbott passed into the hands of one Nur Mahomed Khan Chaudhuri and at the time of the present suit was in the ownership of the various Defendants numbered 1 to 16 inclusive. The Defendant No. 17 (Respondent No. 1), Raja Ramani Kanta Roy, had purchased on 15th April 1898 the interest of the Defendants Nos. 1 to 8. The Defendant No. 22 (Respondent No. 16), Kali Mohan Moitra, who as aforesaid was the owner of a share in the zemindari right, had purchased the interest of the Defendants Nos. 12, 13 and 16 in the putni tenure.

In the year 1891 Rai Dhanpat Singh Bahadur, the husband of the above-mentioned Rani Mina Kumari (the predecessor-in-title of the Appellant), had brought a rent suit (No. 171 of 1891) for the balance of rent due in respect of a 4 anna share of the putni tenure against the then putnidar the above-mentioned Nur Mahomed Khan Chaudhuri, whose predecessor, it was alleged, "took settlement of a 4 anna share of Dihi Haloti under kabuliyat." On 25th July 1891 an *ex parte* decree had been made in favour of the Plaintiff in that suit.

In the year 1893 the above mentioned Uma Sankar Sen and Rajoni Kant Sen had sued (Suit No. 2 of 1893) the putnidar Nur Mahomed Khan Chaudhuri for his 1 anna share of the rent due and had obtained an *ex parte* decree in their favour.

In the year 1896 the Appellant and his vendor, the above-mentioned Rani Mina Kumari, had brought a rent suit (No. 7 of 1396) against the putnidars and co sharer zemindars as Defendants. The claim was for the recovery of the entire rent due in respect of the whole putni tenure for the years 1299 to 1302, B. S. (April 1892 to April 1895) as well as for a declaration of their right to separately recover rent for the 6 anna share they owned. The suit as far as the rent of the whole putni tenure was concerned was dismissed, but a decree was made for the 6 anna share of the rent.

RAJA PRAMADA NATH ROY *v.* RAJA RAMANI KANTA ROY.

To the Respondent zemindars the putnidars paid nearly the whole of the portion of the rent they were entitled to. To the Appellant they paid no rent at all. He gave notice to the other zemindars asking them to join him in a suit for the arrears of rent due, and on their failure to do so, he instituted the present suit on 17th April 1900 in the Court of the Subordinate Judge of Rajshahye making all the putnidars and the co-sharer zemindars Defendants thereto, and claiming a decree for the whole rent due on the putni amounting to Rs. 27,324-3-9½. The plaint stated *inter alia* "that the Plaintiff is entitled to realise separately his share of the money; but under the terms of the putni kabuliyat and according to the provisions of Act VIII of 1885 he is, according to law, entitled to bring suit together with the co-sharer Defendants for the whole of the rent and road-cess, &c., as mentioned in the putni kabuliyat. On account of his realizing the amounts in proportion to his share no departure has been made from the terms of the original kabuliyat." The Appellant prayed in the alternative "that if for any valid reason a decree for the whole of the arrears of rent, &c., due to the Plaintiff and the co-sharer *pro formâ* Defendants could not be passed, then, a decree may be passed for Rs. 27,139-0-8½ due to the Plaintiff's share with costs, &c."

Respondents Nos. 1 and 4 filed written statements in answer to the suit and pleaded *inter alia* that "as the respective predecessors of the Plaintiff and of the *pro formâ* Defendants brought separate suits for arrears of rent, and acquired decrees on account of their respective shares and also amicably realized the same by separately granting dakhilas in respect of the putni described in the plaint, the suit for arrears of rent brought by the Plaintiff in its present form cannot proceed."

Of the issues fixed the following portion of the first issue is alone material for the purpose of this report:—"Is the Plaintiff, who has hitherto received the rents in proportion to his share, competent to bring a suit for the whole rent which is due to all the shareholders?"

On 17th December 1900 the Subordinate Judge delivered his judgment and made a decree in favour of the Appellant for his share of the arrears of rent due. On the issue set out above his decision was as follows:—

"It appears from the decrees put in evidence by the Defendants that the collection of the Plaintiff's share is separate. This separated collection therefore gives rises to the presumption that by some arrangement which has been consented to by the co-sharers and the tenants, separate payment of a particular share of the rent has hitherto been made to the Plaintiff. That being so, so long as the agreement continues, the Plaintiff is not competent to sue for the whole rent, even though the co-sharers are made parties to the suit. It is not the Plaintiff's case that the arrangement has been put an end to by the consent of all the parties who originally concurred in it. Until this is done, the Plaintiff is not entitled to bring a suit for the whole rent. The suit is not bad for misjoinder of parties, because the original contract in respect to the

entire rent has not been put an end to. The Plaintiff is, however, entitled to have a 6 anna share of the rent which he is in the habit of collecting separately from the tenant Defendants."

Against that decree the Appellant appealed to the High Court of Judicature at Fort William in Bengal. The appeal was heard by Ghose and Geidt, JJ. On 28th April 1904, Ghose, J, delivered his judgment affirming the decree of the Subordinate Judge, while Geidt, J., delivered judgment reversing that decree. He was of opinion that the Appellant was entitled to a decree in a suit properly framed for the whole rent due as the only method by which he could enforce the statutory right conferred by the Bengal Tenancy Act of bringing the tenure itself to sale for the recovery of the arrears of rent due therefor. In consequence of the difference of opinion the appeal was sent to Brett, J, for final disposal. On 3rd June 1904 he delivered judgment, and agreed with the judgment of Ghose, J. A decree was accordingly made dismissing the appeal with costs.

For the full text of the judgments, see 9 C. W. N. 34.

The Appellant, thereupon, appealed to His Majesty in Council.

Mr. Atkin, K. C., and *Mr. DeGruyther* for the Appellant.—Under sec. 65 of the Bengal Tenancy Act (VIII of 1885) the landlord has no right to eject his tenant for arrears of rent, but the tenant's tenure or holding is liable to sale in execution of a decree for rent thereof and the rent is made a first charge on the tenure or holding. Why should one co-sharer landlord abandon this statutory right of his? Here there is no dispute as to the fact of the rent being in arrears. Sec. 170 (1) of that Act enacts that secs. 278 to 285 (both inclusive) of the Civil Procedure Code shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereon. Chap. XIV of the Bengal Tenancy Act (sec. 159 and the following sections) provides a method by which landlords after obtaining a decree for the rent can bring the tenure itself to sale in satisfaction of their decree, but in order to bring the tenure itself to sale all the landlords must be parties to the suit and that the rent sued for must be the rent due in respect of the entire tenure and not in respect of a portion due to any particular shareholder. Both these conditions have been fulfilled here. But it is contended by the other side that the suit would have been perfectly in order were it not for the subsisting arrangement between the tenants and the landlords whereby the tenants have been paying rents to the landlords in proportion to the latter's share in the property.

[LORD ROBERTSON.—The Subordinate Judge infers from various suits that there was an arrangement, but there is nothing in evidence to show what that arrangement is.]

Mr. Atkins.—That is so, my Lord. If this contention were to prevail and the decision upheld, the arrangement would defeat the statutory right, because in execution of a decree obtained by a fractional co-sharer for his share of the rent, only the right, title and interest of the tenant can be sold. But there is really no evidence of the terms of this arrange-

RAJA PRAMADA NATH ROY *v.* RAJA RAMANI KANTA ROY.

ment. Its existence has been merely inferred from the decrees showing that rent had been from time to time recovered separately. The arrangement, if any, only means that the tenants have agreed to pay separately to the various landlords the fractions of the rent proportioned to their respective interests in the property and that the landlords have agreed to accept the rent paid in this manner. It does not amount to anything more. It refers to the method of payment only and does affect the rights and liabilities arising out of the kabuliyat under which the tenants hold their tenure. The cancellation and determination of the original lease ought not to be presumed from the mere fact of a separate payment of rent to one or more of the co-sharers: *Guni Mahomed* v. *Moran* (1). It is conceded by the learned Judges below that if all the landlords concurred in bringing the suit, the Appellant could sue for the whole rent in respect of the tenure in spite of the arrangement. That shows that the arrangement does not interfere with the principle of the Bengal Tenancy Act and the Appellant's right thereunder. Then, the question is 'can the arrangement prevent the Appellant from suing when the other landlords do not consent.' It is submitted not. It is a general rule of the law of procedure that one co-sharer can bring his co-sharers in the suit as Defendants upon their refusal to join him as co-Plaintiffs. Here the co-sharers refused to join the Appellant and consequently he has joined them as Defendants. Reference was also made to *Ramcoomar Ghose* v. *Kali Krishna Tagore* (2); Landlord and Tenant Procedure Act (VIII of 1869), B. C., secs. 22, 59 and 14; Bengal Tenancy Act (VIII of 1885), sec. 188 Zemindari Revenue Sale Law (Bengal Act XI of 1859), secs. 6, 10 and 11; and Arrears of Revenue Act (Bengal Act VII of 1868), secs. 9, 11 and 13.

Mr. Arathoon for the contesting Respondents.—I do not disagree with much of what the other side said. But the question, which is a much narrower one, is that so long as the agreement exists, the Appellant could not sue in the present form, because until it is rescinded he is legally bound by it. It is true that the agreement does not get rid of the tenure, but the question is 'can the landlord enforce his rights under the Bengal Tenancy Act while the arrangement exists?' It is submitted that he could not. There is no question of harassing the tenant with several suits, as under the arrangement there could only be one suit, while under the Bengal Tenancy Act there would be several suits. So long as the arrangement is in existence, the landlord could not come down suddenly upon the tenant and sue him for the whole rent of the tenure. The evidence shows that two different landlords sued two different tenants under two different arrangements for their separate shares of rents and obtained decrees. One of the suits was brought against the predecessor of the contending Respondent, Raja Ramani Kanta Roy, and the claim, which was successful, was made under a kabuliyat, which means a written agreement. Again the evidence shows that the Appellant had already brought in 1896 a suit for arrears of rent claiming that the putni tenure was

(1) I. L. R. 4 Cal. 96 (1878).

(2) L. R. 13 I. A. 116 (1886).

liable for it. A decree was passed in it for the rent due to the Appellant's share and the Court held that the putni tenure could not be held liable for the Appellant's claim for rent, and that the Appellant had no power to bring any suit for the rent due in the 8 anna share. The present suit really raises the same question over again. It is submitted that the decision in that suit and also the decisions of the lower Courts in this suit are right. The decree in *Sheikh Naimuddin* v. *Srimanta Ghose* (3) was considered only a money decree.

[SIR ARTHUR WILSON.—Because other landlords were not parties to the suit.]

If the appeal were allowed, the result would be that the landlord would have two concurrent rights, which the legislature never intended at any time to give to the landlord. Is there any provision under the Bengal Tenancy Act, which gives the landlord the right claimed in spite of the arrangement without giving to the tenant any notice to rescind the arrangement? It is submitted that there is no such provision in that Act. Reference was also made to : *Raj Narain Mitter* v. *Ekadashi Bag* (4), *Beni Madhub Roy* v. *Jaod Ali Sircar* (5) and *Gopal Chunder Das* v. *Umesh Narain Chowdhry* (6).

Mr. Atkin replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—This appeal raises a question upon the construction and effect of the Bengal Tenancy Act, a short question, but one which may be of considerable importance wherever that Act applies.

The facts of the case are not in dispute, and are simple. In the year 1837 the then owner of the zemindari interest in an 8 annas share in Dihi Haloti created a putni tenure in those 8 annas in favour of one Abbott, at a rent reserved. The zemindari and the putni interests both underwent subsequent devolutions, and at the time which is now material, the present Plaintiff (Appellant) held 6 annas of the zemindari interest, Respondents 14 and 15 held 1 anna, and Respondents 2, 3 and 16 one anna. The putni interest was held by the remaining Respondents, and also by Respondent 16. The last-mentioned, therefore, was interested both in the zemindari and in the putni. The putni rent fell into arrear so far as the share which should have come to the Appellant was concerned.

The Appellant thereupon brought the present suit on the 17th April 1900 in the Court of the Subordinate Judge of Rajshahye. He made the putnidars Defendants, and he joined as co-Defendants his co-sharers in the zemindari on the ground that they refused to join him as Plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. But the plaint asked in the alternative for a decree for the Plaintiff's share of the rent.

The Subordinate Judge refused to make a decree under the Bengal Tenancy Act for the whole putni rent, and gave

(3) 6 C. W. N. 124 (1901)
(4) 4 C. W. N. 494 : s. c. I. L. R. 27 Cal. 479 (1899).
(5) I. L. R. 17 Cal. 390 (F. B.) (1890).
(6) I. L. R. 17 Cal. 695 (1890).

RAJA PRAMADA NATH ROY v. RAJA RAMANI KANTA ROY.

a decree only for the Plaintiff's share of the rent. On appeal, the case came before two Judges of the High Court, Ghose and Geidt, JJ., who differed in opinion, Ghose, J., holding that the view of the Subordinate Judge was correct, Geidt, J., being of the contrary opinion. In consequence of this difference the case was referred to a third Judge, Brett, J., who agreed with Ghose, J., with the result that the appeal was dismissed. Against that decision the present appeal has been brought, and it lies upon their Lordships to determine which of the views taken by the learned Judges ought to prevail.

Sec. 65 of the Bengal Tenancy Act enacts that:—

"Where a tenant is a permanent tenure holder . . . he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the the rent thereof, and the rent shall be a first charge thereon."

Sec. 159 and the following sections provide the means and procedure for so bringing the tenure to sale, and for the cancellation of incumbrances thereupon. The only other section which it is necessary to refer to is sec. 188, which says that:—

"Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them."

By the express terms of the Bengal Tenancy Act, in the event of rent being unpaid, the owners of the zemindari interest are entitled, by suit under that Act to bring a putni to sale, with the consequences prescribed by the Act. And it is a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as Plaintiffs, can bring them into the suit as Defendants, and sue for the whole rent of the tenure. This must apparently be the law applicable to the present case, unless there be something to exclude the case from the operation of these general rules.

For the purpose of this exclusion, what was relied on was this: it was said that, by express or implied agreement between the zemindars and the putnidars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were, in fact, paid separately; and it was contended that that agreement, on the one hand, entitled the separate zemindars to sue for their separate shares, and to bring to sale the right, title and interest of the putnidars, but, on the other hand, either precluded the zemindars altogether from obtaining a decree under the Bengal Tenancy Act for the rent as a whole, or at any rate prevented one of the zemindars from doing so by making his co-sharers Defendants.

This was the contention which prevailed with the Subordinate Judge and with two out of the three Judges in the High Court.

The evidence of the alleged agreement consisted of certain decrees, which seemed to show that the shares of the rent had been from time to time separately recovered. It has long been held in Bengal that agreement, either expressly proved or implied by the con-

RAJA PRAMADA NATH ROY v. RAJA RAMANI KANTA ROY.

duct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate share-holders; and their Lordships have no inclination to question that course of rulings.

But it has been equally clearly laid down in Bengal that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships think that this is clearly a sound view of the law. And it appears to their Lordships to be sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring the tenure to sale for arrears of rent remains intact, and also the right of one sharer to sue, making his co-sharers Defendants when they will not join as Plaintiffs.

It only remains to notice sec. 188 cited above. It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure, unless all those entitled to share in the rent join as Plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the Plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be discharged, and that instead thereof it ought to be declared that the Appellant is competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit, that the case ought to be remitted to the High Court to take the necessary steps for the disposal thereof on the footing of the above declaration, and that the Respondents who defended the appeal to the High Court ought to pay the costs thereof, and that the costs in the Court of the Subordinate Judge ought to be dealt with by that Judge on the above footing.

The Respondents who defended this appeal will pay the costs of it.

Solicitors: *Messrs. Downer and Johnson* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents Nos. 1, 2, 3 and 16.

Other Respondents did not appear.

Appeal allowed:
Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 369 OF 1906.

BRETT, J. HOLMWOOD, J. 1907. Heard, 20 & 21, November. Judgment, 11, December.	BHAWAL SAHU and ors., Plaintiffs, Appellants, v. BAIJ NATH PERTAB NARAIN SINGH, Defendant, Respondent.

Guardian and minor—Bond by guardian—Liability of minor—Necessaries—Bond to keep alive debt due for necessaries, when binds minor's estate—Limitation—Personal liability.

The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the

BHAWAL SAHU *v.* BAIJ NATH PERTAB NARAIN SINGH.

promise will not bind the minor unless it has been made merely to keep alive a debt for which the ward's property was liable.

SUBRAMANIA AYYAR *v.* ARUMUGA CHETTI (7) *referred to.*

Where the promise is to pay money which has been expended for necessaries the estate of the minor may be liable not on the promise but because the money has been supplied.

SUNDARARAJA AYYANGAR *v.* PATTANTHUSAMI TEVER (9) *referred to.*

It is established law that a guardian cannot bind his ward's estate except by a document purporting to bind it.

MOHARANA SHRI RANMAL SINGJI *v.* VADILAL VAKHAT CHAND (3) *referred to.*

When a third person enters into dealings with the guardian of a minor and advances money for necessaries for the minor or for the benefit of his estate and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt.

This was an appeal preferred on the 15th of March 1906, against the decree of E. P. Chapman, Esq., District Judge of Zillah Mozufferpur, dated the 12th of January 1906, reversing that of Babu Nalini Nath Mitra, Subordinate Judge, first Court of that district, dated the 31st of July 1905.

The facts of the case material to this report will appear from the judgment.

(3) I. L. R. 20 Bom. 61 (1894).
(7) I. L. R. 26 Mad. 330 (1902).
(9) I. L. R. 17 Mad. 306 (1894).

Dr. Rash Behari Ghose and *Babu Shyama Prosanna Mazumdar* for the Appellants.

The Advocate-General and *Babu Lakshmi Narain Singh* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff-Appellant brought an action to recover a sum of money due on a bond executed in his favour by the Defendant No. 2 as mother and guardian of Defendant No. 1. The bond was executed on the 24th March 1901 and renewed a previous bond executed on the 24th August 1894. Defendant No. 1 came of age on the 29th May 1901 and the suit was instituted on the 1st October 1904 to recover the money due on the bond out of the estate of the Defendant No. 1, or for a joint decree against both Defendants.

The Court of first instance held that the money due on the bond had been borrowed by Defendant No. 2 as his guardian for the benefit of the estate of Defendant No. 1, and gave the Plaintiff a decree for the amount claimed, to be realised out of the estate of the Defendant No. 1, at the same time declaring that Defendant No. 1 was not personally liable for the debt due under the decree.

On appeal the District Judge has reversed the judgment and decree of the Court of first instance and has dimissed the Plaintiff's suit in its entirety. The Judge agreed with the Subordinate Judge in holding that the bond in suit was duly executed by the Defendant No. 2 for consideration and that it was valid and genuine. He also held that it was executed by the Defendant No. 2 in her

BHAWAL SAHU *v.* BAIJ NATH PERTAB NARAIN SINGH.

capacity as guardian and on behalf of Defendant No. 1 who was at the time of its execution a minor. He dismissed the suit, however, disagreeing with the Subordinate Judge on the following grounds:—He held that as it is settled law that a guardian cannot bind a minor by a personal covenant therefore the suit on the contract must fail, and in support of this view relied on several rulings which he mentions in his judgment. He further held that though the Plaintiffs might have succeeded in a suit upon the ground of necessaries supplied, or benefits rendered, there was no evidence except as to the sum of Rs. 1,000, that any portion of the money was borrowed by Defendant No. 2 for either of these purposes, and that as regards the sum of Rs. 1,000 which was borrowed on the registered bond of the 24th August 1894 the claim was barred by limitation as the guardian Defendant No. 2 had not done any act within 3 or 6 years from the date of that bond to extend the period of limitation so as to bind the Defendant No. 1.

The Plaintiffs have appealed.

In support of the appeal it has been argued that the authorities on which the District Judge has relied do not go so far as to support the general proposition which he appears to lay down that under no circumstances whatever can a guardian bind a minor's estate by a contract entered into on his behalf. The learned pleader for the Appellant points out that in the plaint no relief was sought against the Defendant No. 1 personally, but only against his estate, and that the decree given by the Subordinate Judge was against the estate of the nor and expressly relieved him from personal liability. He further argues that in this country where the pleadings are not artistically drawn a liberal construction should be given to them and that they should be construed as a whole and not piecemeal. He contends that from the plaint thus construed the preceding paragraphs being read in connection with paragraph 8, and from the written statement filed by the Defendant No. 1, who alone contested the suit, it is clear that the Plaintiff based his claim on the bond against the estate of Defendant No. 1 on the ground that the money due under the bond had been borrowed by the Defendant No. 2 as guardian of Defendant No. 1 for necessaries and for the benefit of the estate of the latter: and that being so the rulings relied on by the District Judge do not support his general conclusion that under no circumstances could the guardian by a contract entered into on behalf of the minor bind the estate of the latter. Dealing *seriatim* with the rulings referred to by the District Judge he points out that the case of *Waghela Rajsanji* v. *Sheikh Masludin* (1) does not support the conclusion. In the case of *Indur Chunder* v. *Radha Kishore* (2) their Lordships of the Privy Council did not go further than to say that the contract, which in that case was a lease with onerous covenants, could not bind the minor personally, and that there was no claim against the minor's estate. In the case of *Moharana Shri Ranmal* v. *Vadi Lal* (3) the Judges of the Bombay High Court express at page

(1) I. L. R. 11 Bom. 551 (1887).
(2) I. L. R. 19 Cal. 507 (see p. 511) (1892).
(3) I. L. R. 20 Bom. 61 (1894).

BHAWAL SAHU *v.* BAIJ NATH PERTAB NARAIN SINGH.

70 opinions which go far from supporting the general proposition laid down by the District Judge. They say "while holding however that a minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate we do not think that he is necessarily free from liability. *Marlow* v. *Pitfield* (4) If the debts were incurred for necessaries he would, we believe, be bound to pay them on the general principle embodied in sec. 68 of the Contract Act (IV of 1872) as his liability would not probably be affected by the fact that the loans were advanced at the instance of the guardian. See *Juggessur* v. *Nilambar* (5). Her contract on his behalf might be ineffectual like one entered into by himself but the liability to discharge debts incurred for necessaries would remain. See *Walter* v. *Edward* (6). The necessity for them would determine whether he was bound to repay them, and not, we think, the reasonable belief of the borrower that they were for necessary purposes." In the case of *Subramania Ayyar* v. *Arumuga Chetti* (7) the Judges of the Madras High Court held that in a case where a mother of a minor had executed as his guardian a promissory note in respect of a debt for which the son's share in an ancestral estate was liable at the time the minor was liable on the note to the extent of his ancestral estate, and that the guardian had authority to acknowledge the liability provided it was not barred by limitation. In the case of *Annapagauda* v. *Sangadi Gyapa* (8), it was held by a Full Bench of the Bombay High Court that a guardian appointed under the Guardian and Wards Act (VII of 1890) can sign an acknowledgment of liability in respect of, or pay part of the principal of, a debt so as to extend the period of limitation against the ward in accordance with secs. 19 and and 20 of the Limitation Act, XV of 1877, provided it be shown in each case that the guardian's act was for the protection or benefit of the minor's property, and the learned Chief Justice in delivering judgment remarked (see page 232) "It is no objection, I think, to the view, that a guardian cannot impose a personal liability on a ward by contract, for an acknowledgment under a statute is fundamentally distinct from a fresh contract, though it may in some respects have similar results." In *Sundararaja* v. *Pattanthusami* (9), it was simply held that there was no necessity proved for the promissory note executed on behalf of a minor by his guardian in favour of a vakil for past professional services.

The learned pleader, therefore, contends that the first ground on which the District Judge dismissed the Plaintiff's claim is not good in law.

Dealing with the second ground on which the District Judge has dismissed the claim of the Plaintiff the learned pleader contends that the whole basis of the suit in which the Plaintiff sought to recover the money due on the bond from the estate of the Plaintiff, was that the money was borrowed by the guardian for the minor for necessaries and for the

(4) 1 P. Wons. 558 (1719).
(5) 3 W. R. 217 (1865).
(6) L. R. (1891) 2 Q. B. 369.
(7) I. L. R. 26 Mad. 330 (1902)

(8) I. L. R. 26 Bom. 221 (1901).
(9) I. L. R. 17 Mad. 306 (1894).

BHAWAL SAHU v. BAIJ NATH PERTAB NARAIN SINGH.

benefit of the minor's estate. That this was recognised in the defence set up by the Defendant No. 1, who alone contested the suit, in his written statement, and was the matter on contest in the Court of 1st instance, and the Subordinate Judge arived at distinct findings on the points and that those findings have not been displaced by the District Judge. The learned pleader, therefore, contends that the case should be remanded to the District Judge for distinct findings on the evidence on the issue whether any and how much of the money claimed under the bond was borrowed by the guardian for the minor for necessaries or for the benefit of his estate, so as to make the estate liable for the debt.

Further he contends that the District Judge erred in law in holding that the claim to the Rs. 1,000 was barred by limitation. The due date for the bond of the 24th May 1894 was the 9th May 1895 and the bond of the 24th March 1901 was executed within 6 years from that date, and he argues that there is nothing under the law to prevent a guardian from borrowing money on credit for a minor. Next he contends that a guardian is an agent of the minor within the meaning of secs. 19 and 20 of the Limitation Act. He points out that the decision of the Bombay and Madras High Courts in the cases of *Annapagauda* v. *Sangadi Gyapa* (8) and of *Subhanadri* v. *Sriramulu* (10) and the decision of this Court in the case of *Narendra Nath Sarkar* v. *Rai Charan Haldar* (11) are authority for the contention that a guardian can make an acknowledgment of a debt on behalf of a ward so as to give a creditor a fresh start for the period of limitation if the act of the guardian be for the protection and benefit of the minor's property, the case of *Wajibun* v. *Kadir Buksh* (12) which lays down the contrary view being dissented from in those decisions and not having been followed. He argues that it is clear from the recitals in the second bond that it was executed in acknowledgment of the previous debt to save the minor's estate from loss by litigation or sale, and therefore that it bound the minor's estate.

The learned pleader has also argued that under the doctrine of subrogation the Plaintiffs have a right to claim against the estate of the minor any indemnity which the guardian could claim against it, and in support of this contention he relies on the case of *Madden* v. *Bridge* (13) and *Raybould* v. *Turner* (14).

For the Respondent the learned Counsel has argued that the view taken by the District Judge is correct so far as the personal liability of the minor is concerned. He does not dispute that the guardian could bind the estate of the minor for a debt incurred for necessaries or for its benefit, or that the guardian could create a statutory liability binding on the ward by an acknowledgment of a debt contracted for necessaries supplied for the benefit of the ward's estate. See *Mohon Bibi* v. *Dharmadas* (15). But he contends that, in the present suit, before the estate of the

(8) I. L. R. 26 Bom. 221 (1901).
(10) I. L. R 17 Mad. 221 (1893).
(11) I. L. R. 29 Cal. 647 (1902).
(12) I. L. R. 13 Cal. 292 (1886).
(13) 9 C. W. N. 9: s. c. I. L. R. Cal. 1084 (1904).
(14) (1900) 1 Ch. 197.
(15) I. L. R. 30 Cal. 539 (1903).

minor can be held to be liable for any portion of the debt claimed, it must be found (1) that the money was borrowed for the supply of necessaries for the infant or for the benefit of his estate and (2) that it was borrowed within the period of limitation. He argues that the District Judge has found that the Plaintiffs have failed to prove that any part of the Rs. 1,000 borrowed on the bond of the 24th August 1894 was taken for necessaries supplied to the minor, that under the provisions of Arts. 61 and 120 of the Limitation Act the liability was barred before the execution of the second bond and at the time when the suit was instituted. He points out that the second bond was executed on the 24th March 1901, two months only before the minor attained majority on the 29th May 1901. He contends that the statement made in the recitals of the bonds cannot bind the minor in the absence of evidence *aliunde*, and that a bond which extended the period of limitation by which it was agreed to pay interest at 13¼ per cent. on unpaid interest could not be regarded as one executed for the interest of the minor. Further he argues that under the bond itself it was not intended to bind any one but the Defendant No. 2, that the frame of the plaint supports that view, there being no allegation in it that the debt was incurred for necessaries, and that the bond does not purport to create any charge on the estate of the ward or to provide that the debt was payable out of the estate. The guardian cannot bind his ward's estate except by a document purporting to bind it, and he argues that the law as to powers of guardians is correctly laid down by Trevelyan in his edition of the Law Relating to Minors (page 199, 3rd Edn.).

He contends that in this case the Plaintiff cannot claim the right of subrogation, as the whole foundation on which the right could be based is wanting. He refers to the case of *Strickland* v. *Symons* (16) as laying down the circumstances under which such a right could be claimed, and points out that the doctrine as thus laid down was explained by this Court in the case of *In the matter of Shard* (17) and was followed in the case of *Madden* v. *Bridge* (13) on which the pleader for the Appellant relies. In the present case it would have to be proved that the guardian was entitled to indemnity against the estate of the infant for the whole of the transactions of her guardianship.

In determining the present appeal we have to decide not merely what was the intention of the Plaintiff in bringing the suit but also whether on the suit as framed and on the bond which forms the basis of the suit the Plaintiffs are in law entitled to relief against the estate of Defendant No. 1. In dealing with the pleadings we have no doubt to follow the rule laid down by their Lordships of the Privy Council in the case of *Indur Chunder Singh* v. *Radha Kishore Ghose* (2) that while a liberal costruction should be given to pleadings so as to give effect to the meaning to be collected from the whole tenour they ought to be expressed with sufficient definiteness to enable the opposite party to understand the case he

(2) I. L. R. 19 Cal. 507 at p. 512 (1892).
(13) 9 C. W. N. 9: s. c. I. L. R. 31 Cal. 1084 (1904).
(16) 26 Ch. D. 245 (1884).
(17) I. L. R. 28 Cal. 574 (1901).

BHAWAL SAHU *v.* BAIJ NATH PERTAB NARAIN SINGH.

is called on to meet. Applying that rule we think that the argument advanced by the learned pleader for the Appellant is sound, that in fact the suit was intended to be a suit to recover the sum due under the bond from the estate of Defendant No. 1 on the ground that the debt recoverable under the bond had been incurred by the Defendant No. 2 as mother and guardian of Defendant No. 1 for necessaries and for the benefit of the estate. This seems to us to be clear from paragraph 8 of the plaint read with the preceding paragraph and from the nature of the relief claimed. Moreover it seems to us also clear from the written statement filed by Defendant No. 1 that he fully understood that such was the nature of the case which he had to meet. The judgment of the Judge of the Court of first instance leaves no doubt that the main contest before him was whether the debt covered by the bond was incurred by the guardian for necessaries supplied to the minor or for the benefit of his estate. The learned District Judge has agreed with the Judge of the Court of first instance in holding that the bonds were actually signed by the mother in her capacity as guardian and on behalf of the minor, but he is of opinion that the suit on the bond must fail because the guardian could not bind her ward by a personal covenant.

The learned pleader for the Appellant is no doubt correct in his argument that if the amount claimed by the Plaintiff be found to be a debt incurred for necessaries for which the estate of the minor would be liable the District Judge erred in the broad conclusion at which he arrived that the suit must be dismissed simply because a guardian cannot bind his ward by a personal covenant. The rulings relied on by the District Judge lay down that a guardian cannot bind his ward personally by a simple contract debt, by a covenant, or by any promise to pay money or damages, but this broad proposition is subject to the modification that the promise will not bind the minor unless it has been made merely to keep alive a debt for which the ward's property was liable [*Subramania Ayyar* v. *Arumuga Chetti* (7)]. Where the promise is to pay money which has been expended for necessaries the estate of the minor may be liable not on the promise but because the money has been supplied [*Sundararaja Ayyangar* v. *Pattanthusami Tever* (9) and Act IX of 1872, sec. 68].

In the present case, therefore, the learned pleader is right in contending that if the District Judge held that the debt claimed was one incurred for necessaries and if we should hold that as it was a debt which was recoverable out of the estate of the minor it was necessary for the Judge to come to distinct findings how much of the debt was incurred for necessaries or for the benefit of the estate of the minor.

The most important point in the case then remain for our determination and that is whether under the first bond of the 24th August 1894 and under the later bond of the 24th March 1901, which in fact renewed the former bond, the guardian bound the estate of the ward. It is established law that a guardian cannot bind his ward's estate except

(7) I. L. R. 26 Mad. 330 (1902).
(9) I. L. R. 17 Mad. 306 (1894).

BHAWAL SAHU v. BAIJ NATH PERTAB NARAIN SINGH.

by a document purporting to bind it [*Moharana Shri Ranmal Singji* v. *Vadilal Vakhat Chand* (3)] and we have to decide whether these two bonds purport to bind the estate of the minor. The bonds have been translated and placed before us. It is true that at the head of each bond the mother, Defendant No. 2, is described as the mother guardian and next friend of Defendant No. 1 but in neither of the two bonds is it distinctly stated, or are words used from which it could be possible to draw only the one inference that the debts were incurred for the benefit of the estate of the minor. So far as the sum of Rs. 1,000 is concerned which no doubt is said to have been borrowed under urgent necessity for looking after the case brought by Tej Narain Singh there is no distinct recital that the estate of the minor was in such a state as to be in need of the money. It is merely stated that the executrix was personally under the necessity of borrowing the money. The promise to repay the money in each bond is a personal promise and there is nothing in either of the bonds to indicate that in the event of her failure the estate of the minor would be liable, or that by the bond she purported to bind the minor's estate. It is not open to us in this case to go beyond the terms of the bonds themselves for the purpose of construing them. In these circumstances we are unable to hold that the bond, on which the present suit is brought, purported to bind the estate of the minor so as to entitle the Plaintiff to relief against that estate. In our opinion when a third person enters into dealings with the guardian of a minor, and advances money for necessaries for the minor or for the benefit of the estate and takes a bond for the debt from the guardian the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. In the present case the Plaintiffs have failed to take this necessary precaution and their suit to recover the money due on the bond must fail on the ground that the terms of the bond fail to disclose that it purported to bind the estate of the minor.

The claim on the bond failing, the District Judge is right in holding that the Plaintiffs are barred by limitation from recovering otherwise the sums, if any, which they may have paid to the guardian for necessaries or for the benefit of the minor's estate.

On these grounds we are of opinion that the appeal fails and must be dismissed with a costs.

Appeal dismissed.

(3) I. L. R. 20 Bom. 61 (1894

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 40 OF 1906.

RAMPINI, C. J.
SHARFUDDIN, J.
1907.
16, August.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 1st Party, Appellant,
v.
GOBIND LAL BYSAK and another, Claimants, Respondents.

Land Acquisition Act (I of 1894), secs. 9, 25 (2)—Jurisdiction—Compensation—Award.

Where no claim pursuant to a notice under sec. 9 of the Land Acquisition Act

was made by a party interested to make a claim,

Held—*That the Land Acquisition Judge under sec. 25, sub-sec. (2) had no power to make an award for an amount exceeding that awarded by the Collector, unless the claimant satisfied him that he had sufficient reason for refraining from making his claim in due time.*

The Judge should state his reasons for allowing such a person to prefer his claim.

This was an appeal preferred on the 13th of February 1906, against the decree of Babu Hari Nath Roy, Subordinate Judge, 2nd Court of Zilla Dacca, dated the 26th of September 1906.

The facts of the case appear from the judgment.

Mr. Upton and *Babu Ram Charan Mitra* for the Appellant.

Babus Harendra Narain Mitra and *Sarat Chandra Basak* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against a decision of the Subordinate Judge, second Court, Dacca, dated the 26th September 1905, in a land acquisition case.

The facts are as follows : There is a plot of land, the area of which is 4 cottahs, 12 dhurs, which the Government has acquired, under the Land Acquisition Act, in Tantibazar in Dacca. The persons interested are two in number, Gobind Lal Basak and Keshab Lal Basak. The Collector took proceedings under the Land Acquisition Act and issued notices with reference to the said plot, under sec. 9 of the Act, on the 23rd March 1903. Neither of the persons interested appeared before him in accordance with the terms of the notices under sec. 9, or preferred any claim for compensation. The Collector thereupon made his award on the 24th April 1903, giving compensation at the rate of Rs. 1,500 per bigha for the land acquired. As neither of the parties interested had appeared before him, he gave them notice of the award on the 9th May 1903. Then one of the persons interested Gobind Lal Basak, applied to the Collector on the 16th June 1903. He objected to the rate awarded and claimed compensation at the rate of not less than Rs. 4,500 per bigha: and he prayed that the case might be sent to the Court of the District Judge. The Collector made the reference to the District Judge on the 3rd July 1903, under sec. 18 of the Act. Up to this time Keshab Lal Basak, the other person interested, had not appeared. But while the reference was pending before the District Judge he on the date fixed for hearing, namely, the 12th September 1903, applied to be made a party. On the 16th July 1904, the Subordinate Judge affirmed the award of the Collector. He subsequently granted a review; and finally on the 26th September 1905 he awarded compensation to the claimants at the rate of Rs. 5,000 per bigha.

The Secretary of State now appeals and on his behalf two grounds of appeal have been urged, *first*, that as no claim pursuant to the notices under sec. 9 of the Land Acquisition Act was made by either of the opposite parties, the lower Court under sec. 25, sub-sec. (2), had no power to make an award for an

amount exceeding that awarded by the Collector, and, *secondly*, that there was no sufficient reason for the claimants not having made any claim before the Collector and therefore the lower Court had no right to make the award which it has done.

We think that these pleas must prevail.

It is clear that the first claimant, Gobind Lal Basak, made no claim pursuant to the notice issued to him, under sec. 9 of the Land Acquisition Act, because he did not make any claim for compensation within the time specified in the notice. We do not know exactly what the period specified in the notice was. But the period allowed could not have been less than 15 days from the issue of the notice and it must have expired some day previous to the award, which was made on the 24th April 1903. Hence the claim which Gobind Lal Basak made on the 16th June 1903 cannot be regarded as a claim made pursuant to the notice under sec. 9 of the Act.

As for the other claimant, Keshab Lal Basak, he made no claim at all, either before the Collector, or before the District Judge.

In these circumstances it is clear that the Subordinate Judge was debarred by the terms of sec. 25, sub-sec. (2) of the Land Acquisition Act from awarding to the claimants an amount exceeding that which was awarded by the Collector, unless the claimants satisfied him that they had sufficient reason for refraining from making their claim in due time. Now, the learned Subordinate Judge has not said a word on this point. He has not alluded to this matter at all. He has not explained why he has allowed the claimants to make a claim before him which they did not make pursuant to the notices under sec. 9 of the Act; and, therefore, it appears to us that he was not justified in making the award which he has made exceeding that of the Collector. It will be observed that under sec. 25, sub-sec. (2) it is necessary, if the Judge allows a claimant, who has not made a claim pursuant to the notice under sec. 9, to make a claim before him, that he should expressly allow him to do so; and we understand that this implies that he must expressly allow him and must state his reasons for so allowing to make a claim. That has not been done in this case; and no explanation has been offered to us of the Gobind Lal Basak's making a claim till the 16th June 1903, and of Keshab Lal's making no claim at all. We, therefore, do not think that the award made by the Subordinate Judge can be sustained.

The pleader for the Respondents argues that the case is covered by the provisions of sec. 578 of the Code of Civil Procedure. But we do not consider that this is so, because the points now raised before us relate both to the merits of the case as well as to the jurisdiction of the Court.

This appeal is accordingly decreed with costs of both Courts. We assess the hearing fee at five gold mohurs.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2272 OF 1905.

MACLEAN, C. J.
HOLMWOOD, J.
1907.
23, May.

JADU NATH SARKAR and others, Plaintiffs, Appellants,
v.
MAHENDRA NATH RAI CHOWDHURY and others, Defendants, Respondents.

Evidence Act (I of 1872), sec 21, cls. (1) and (3), sec. 32 (5) and sec. 157—Admission by Plaintiff when admissible in his favour—Statement in previous deposition.

When the Plaintiffs sought to establish their relation by proving inter alia *that A and B were brothers,*

Held—*That a statement to that effect made by one of the Plaintiffs in a deposition given long before the controversy in suit arose was admissible in evidence.*

This was an appeal preferred on the 25th of November 1905, against the decision of R. R. Pope, Esq., Additional District Judge of 24 Pergunnahs, dated the 14th of August 1905, reversing the decision of Babu Amrita Lal Mukherjee, Munsif of Basirhat, dated the 26th of September 1904.

The appeal arose out of a suit by the Plaintiffs who claimed as the reversionary heirs of one Nabadwip Chandra Sircar upon the death of his widow Bindu Basini, for the recovery of possession of certain immoveable properties from the Defendants who were alleged to be in possession under a collurable and fraudulent purchase from the said Bindu Basini. The Plaintiffs' case on the question of their relationship to Nabadwip was that Nabadwip was the son of one Shyam Kishore and that the present Plaintiffs are descended from Jugul Kishore the brother of Shyam Kishore.

The Munsif found that Jugul Kishore and Shyam Kishore were uterine brothers and in arriving at this conclusion he relied *inter alia* on Ex 7 which was a deposition of Plaintiff No. 2, given in a Land Registration case in 1878 in which Plaintiff No. 2 made a statement to the effect that Jugul Kishore and Shyam Kishore were uterine brothers. The Munsif held this statement to be admissible in evidence under sec. 21, sub secs. (1) and (3), sec. 32, cl (5) and sec. 157 of the Indian Evidence Act. He observed that at the time these statements were made, Plaintiff No. 2 "had no selfish motive to give such a description." Hence I hold that this document strongly corroborates the present evidence on the Plaintiffs' side. He doubted whether the *potta* and *kobala* executed by Bindu Basini in favour of the Defendants were executed for valuable consideration; and was of opinion that in any event there was no legal necessity for them. He accordingly decreed the suit.

On appeal, the District Judge held that the evidence was insufficient to establish the alleged relationship of the Plaintiffs with Nabadwip. As regards the deposition, Ex. 7, in particular, he observed that he did not see how an admission made by a Plaintiff in his own favour could be used as evidence on his own behalf. He accordingly reversed the judgment and decree of the Munsif and dismissed the suit.

The Plaintiffs preferred this second appeal.

Babu Sarat Chandra Roy Chowdhury for the Appellants.

JADU NATH SARKAR *v.* MAHENDRA NATH RAI CHOWDHURY.

Babus Lal Mohan Das and *Biraj Mohan Majumdar* for the Respondents.

THE JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The only question on this appeal is whether the District Judge was right in rejecting Ex. 7, which was a statement made by Plaintiff No. 2 in a case in 1878 in which he stated that Jugul Kishore and Shyam Kishore were brothers. Whether they were brothers or not is, as I understand, the real issue in this case. The learned Munsif admitted that statement in evidence having regard to sec. 21, sub sec. (1), sec. 32, sub-sec. (5) and sec. 157 of the Indian Evidence Act. The District Judge refused to accept it as any evidence. We think this statement was admissible, but what weight can properly be attached to it we cannot say—that is a matter for the Judge trying the case. We think, therefore, that there must be a remand and the case must be dealt with in accordance with this intimation of our opinion as to the admissibility of the statement.

The cost of this appeal will abide the result.

N. G. *Case remanded.*

CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1264 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
16, December

KAMINI KUMAR BISWAS, Petitioner,
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 133—Bonâ fide *claim of right—Competency of the Magistrate to decide whether the claim is barred by limitation.*

In a proceeding under sec. 133, Cr. P. C., the Petitioner raised a claim of proprietary right to the land in dispute and the Magistrate came to the conclusion that if the Petitioner had any right it was barred by limitation. He however stayed the passing of final order for one month in order to allow the Petitioner an opportunity of establishing his right by a civil suit and subsequently more than two months after the expiration of that period, made his order absolute.

Held—*That the order of the Magistrate under sec. 133, Cr. P. C., was bad in law. The Magistrate should have refrained from exercising jurisdiction when a* bonâ fide *claim to the land was raised and he was not competent to decide whether the claim was barred by limitation.*

This was a rule granted on the 1st of November 1907, against an order of the Sub-Divisional Magistrate of Habigunj, dated the 10th of September 1907, making absolute his order under sec. 133, Cr. P. C.

The facts of the case appear from the judgment of the lower Court which was as follows :—

"This is an application under sec. 133, Cr. P. C., for restraining the Defendants from cultivating and obstructing with fences certain land known as Dewalkuri which is alleged to be commonly used by the villagers as a place for the burning and burial of dead. Defendants Kamini Kumar Biswas and Raman Biswas claim proprietary rights over the land. They have filed documents purporting to show that out of 2 taluks within which the nd is admittedly situated, they own th

KAMINI KUMAR BISWAS *v.* THE EMPEROR.

whole of one and half of the other. I understand that the first party alleges that some of the land appertains to other taluks also. I have not, however, gone into this question nor into the puestion whether the Defendants are entitled to cultivate the lands appertaining to the taluk of which they own only a half share. Good evidence has been adduced before me by the first party, proving that the land has from time immemorial been used for the purpose of burying and burning dead. It is admitted by the Defendants that the land has been waste until quite recently. It is therefore a ground left unoccupied for sanitary purposes and a public place within the meaning of sec. 133, Cr. P. C. The fact that it is not the only such ground appertaining to the village, does not, I think, matter. Relying on the opinion of the Honourable Judges of the High Court recorded in *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (1), I do not also think that it matters that it is the alleged rights of the villagers and not of the general public which are at stake.

"Defendants urge that as they have set up a *bonâ fide* claim of title to the land, this Court has no jurisdiction to proceed under sec. 133, Cr. P. C. I am a little bit doubtful whether their claim so far as it may be *bonâ fide* extends to the whole of the land in question but I do not wish to emphasise this doubt now. I only record my opinion that, in view of the proved facts of immemorial usage of the land by the villagers for sanitary purposes, the Defendants claim is as far as I can judge barred by limitation. A claim which is barred by limitation may yet I suppose, possibly be regarded as *bonâ fide*, I cannot however think that it can be regarded by any Court as well-founded.

"Relying, therefore, on the last part of the ruling cited on *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (1), I suspend this proceeding for one month from to-day, to allow the Defendants an opportunity of establishing their claims in the Civil Court."

Subsequently on the 10th of September 1907, the Sub-Divisional Magistrate made his order absolute after serving a a notice on the Petitioners. The Petitioners appeared and asked for a postponement, on the ground that they had not witnesses present, which was refused.

Babu Dasarathi Sanyal for the Petitioner urged that on the findings of the lower Court the order under sec. 133, Cr. P. C., was unjustifiable and that the case did not come within the purview of sec. 133 does not contemplate the use or closing of a burial or burning ground. Vide *Sheo Saran Lal* v. *Lal Mohamad Lal* (2).

Babu Sarat Chandra Roy Chowdhury for the Opposite Party.—The case in *Sheo Saran Lal* v. *Lal Mohamad Lal* (2) can have no application to the present case in which no order is passed prohibiting the use of a burning ground. As to *bonâ fide* claim he referred to *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee* (1) and *Belat Ali* v. *Abdur Rahim* (3).

(1) I. L. R. 15 Cal 564 (1888).

(1) I. L. R. 15 Cal. 564 (1888).
(2) 12 C. W. N. 70 (1907)
(3) 8 C. W. N. 143 (1903).

KAMINI KUMAR BISWAS *v.* THE EMPEROR.

As the Petitioner was given a month's time to establish his title by a suit and the Magistrate made his order absolute on the expiry of that period, he acted strictly in accordance with the rulings in these two cases.

THE JUDGMENT OF THE COURT was as follows :—

This is a rule, calling upon the District Magistrate of Sylhet to show cause why the order of the Sub-Divisional Magistrate of Habigunj, dated the 10th September last, making absolute his order, under sec. 133, Cr. P. C., should not be set aside, on the grounds (1) that sec. 133, I. P. C., does not apply to burial or burning grounds, and (2) that the Sub-Divisional Magistrate has not decided the question of *bonâ fides* raised by the Petitioner.

It is unnecessary for us to enter into the first of these grounds.

As regards the second ground, we think that the learned Sub-Divisional Magistrate has not come to a proper finding as to the question of *bonâ fides.* It is clear to us that, as admitted by the Sub-Divisional Magistrate, the Petitioner raised a claim of right to the land. He said he had a proprietary right in it ; and the Sub-Divisional Magistrate has come to the conclusion that if he has any right it is barred by limitation, so far as he is able to judge. And he adds :—"a claim which is barred by limitation may yet I suppose possibly be regarded as *bonâ fide.* I cannot, however, think that it can be regarded by any Court as well-founded."

We find it difficult to understand the meaning of the above two sentences. It appears to us that if the Petitioner has a claim to the land (and he seems to have one) there is no reason to suppose that it is not a *bonâ fide* one. We cannot tell whether it is barred by limitation or not ; and the Sub-Divisional Magistrate was not, we think, competent to decide this question and has not decided it to our satisfaction. We do not feel certain from the observations made by the Magistrate, that the Petitioner's claim is barred ; and we therefore do not see why he should not have a *bonâ fide* claim to the land. In these circumstances the Sub-Divisional Magistrate should have refrained from exercising jurisdiction.

We therefore make the rule absolute and set aside the order complained of.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO 968 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
27, November 1907.

SOITA BISWAL AND ORS., Petitioners,
v.
DOCHHI STRI, Opposite Party.

Trespass—Civil not Criminal—Indian Penal Code (Act XLV of 1860), sec. 448—Criminal Procedure Code (Act V of 1898), sec. 522, applicability of.

When during the absence of the complainant, the accused took possession of the house in her occupation and established there a boy alleged to be the adopted son of the complainant's father,

Held—*That the accused could not be convicted of an offence under sec. 448, I. P. C., as the house trespass which they committed was not a criminal, but a civil trespass ;*

SOITA BISWAL v. DOCHHI STRI.

Held also—*That no order could be passed by the trying Magistrate under sec. 522, C. Cr. P., for the delivery of possession of the house to the complainant as the accused had not been convicted by the Magistrate of any offence attended by criminal force and that the house should be restored to the accused who were found in possession of it.*

This was a rule issued on the 15th of August 1907, calling on the District Magistrate, Puri, as well as on the complainant to show cause why the order passed by Mr. D. N. De, Deputy Magistrate of Puri, on the 21st day of June 1907, convicting the said Petitioners under sec. 448 of the I. P. C., and sentencing them each to pay a fine of Rs. 50 or in default to undergo one month's rigorous imprisonment, and directing delivery of possession of the house and property to the opposite party should not be set aside.

Babus Dasarathi Sanyal and *Tara Prosonna Chatterjee* for the Petitioners.

No one appeared for the Opposite party.

THE JUDGMENT OF THE COURT was as follows :—

This is a rule calling upon the District Magistrate of Puri as also upon the complainant to show cause why the conviction of and sentences passed on the Petitioners as well as the order complained of by them should not be set aside.

The Petitioners have been convicted under sec. 448, I. P. C., and each sentenced to pay a fine of Rs. 50. The Deputy Magistrate has also ordered delivery of possession of the house in dispute as also of certain property recovered t be made over to the complainant.

The facts of the case are these :—The complainant is a woman of the name of Dochhi. She went off to Puri on a visit and in her absence certain persons took possession of the house and established there a boy, alleged to be the adopted son of the father of the complainant. Dochhi complained to the Deputy Magistrate of house trespass and theft and the Deputy Magistrate convicted the Petitioners of house trespass and sentenced them as mentioned above. It is clear that the case is one, not of criminal but of civil trespass. The Petitioners took possession of the house for the alleged adopted son and are now in possession. The complainant says that certain articles of her property were removed. But the accused have not been convicted of theft. On the contrary, the Deputy Magistrate says the things carried off are not identifiable and he has abstained from convicting them of theft. He says the things recovered could not be satisfactorily identified. Notwithstanding this, he has ordered possession to be given to the complainant, although he records in his proceeding that the accused have all claimed the things found in their possession as their own. Now, it is extraordinary that the Deputy Magistrate who says that the things cannot be identified, should have ordered them to be delivered to the complainant. Finally, he has ordered possession of the house to be made over to the complainant. We suppose he has passed the order under sec. 522, C. Cr. P. But the provisions of that section do not warrant his doing so, because the Petitioners

SOITA BISWAL v. DOCHHI STRI.

have not been convicted of any offence attended by criminal force.

We set aside the conviction and sentence and direct that the fines, if paid, be refunded.

The property in possession of the Petitioners must be returned to them and possession of the house restored to the persons found in possession of it.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1347 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
Heard, 17 and 18, December.
Judgment, 20, December.

SRIMATIY SUSARMOYEE DEBI, Petitioner,
v.
THE CORPORATION OF CALCUTTA, Opposite Party.

Calcutta Municipal Act (III, B. C. of 1899), secs. 372, 383 and 449 (1)—Demolition of a building erected without sanction—Notice under sec. 383, whether condition precedent to the passing of order for demolition.

No notice under sec. 383 of the Calcutta Municipal Act (III, B. C. of 1899) is necessary before an order under sec. 449 (1) of the Act directing the demolition of a building erected without sanction in contravention of sec. 372, can be passed.

CORPORATION OF CALCUTTA v. AMRITA LAL MUKERJEE (1) *followed.*

This was a rule granted on the 28th of November 1907, against an order of Babu Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated the 5th of August 1907, directing under sec. 449 (1) of Act III (B. C.) of 1899 demolition of a corrugated iron shed within a month from the date of the order.

(1) 7 C. W. N. 554 (1903).

The facts material to the case as they appear from the judgment of the Municipal Magistrate are as follows:—

The General Committee of the Calcutta Corporation applied to the Municipal Magistrate under secs. 449 and 450 of the Municipal Act for an order upon the Petitioner to demolish a corrugated iron shed with mat-walls which the Petitioner had erected without the sanction of the Corporation. The Petitioner appeared before the Magistrate, admitted the erection of the building but urged that as it was erected long ago and it did not cause inconvenience to the public, the Magistrate should not order its demolition. On behalf of the Corporation it was proved that a notice under sec. 383 of the Act was served upon the Petitioner, but it was not replied to. On behalf of the Petitioner it was shown that the notice was replied to and acknowledgment of the receipt of the reply admittedly signed by a clerk in the office was filed.

The Magistrate found after a local inquiry that the building caused inconvenience to the public and as to the delay of the Corporation in taking action, he observed that as the matter related to a public place of worship, it was discussed at great length by the Corporation before the application for demolition was made. The Magistrate held that the building contravened the provisions of sec. 368 inasmuch as its external walls were made of mats and directed its demolition under sec. 449 (1) of the Calcutta Municipal Act. Against this order of the Magistrate the present rule was issued.

Babus Dasarathi Sanyal and *Monmatha Nath Mukherjee* for the Petitioner.

SRIMATTY SUSARMOYEE DEBI *v.* THE CORPORATION CALCUTTA.

Babu Debendra Chandra Mullick for the Oppsite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why an order of the Municipal Magistrate, directing the demolition of a shed erected by the Petitioner without the sanction of the Corporation should not be set aside.

The General Committee appears to have applied to the Municipal Magistrate under sec. 449 (1) for an order for the demolition of the shed, which comes within the definition of "building." The Magistrate has found that it was erected without sanction, which is indeed admitted by the Petitioner. He has therefore passed the order complained of.

We can see no reason why the Magistrate's order is illegal. It seems to be in accordance with the provisions of secs. 372 and 449 (1) of the Calcutta Municipal Act.

The learned pleader for the Petitioner contends that the Corporation issued a notice to his client under sec. 383, that the Petitioner replied to this notice and was not given an opportunity of showing cause or of appealing to the General Committee. The learned pleader who appears for the Corporation urges that even if this be so, this would only invalidate an order directing the building to be constructed of non-inflammable materials and that no such order has been passed. He further argues that no notice under sec. 383 is necessary before an order under sec. 449 (1) directing the demolition of the building can be passed. This would appear to be the case.

Nothing in the Municipal Act has been pointed out to us which prohibits the passing of an order under sec. 449 (1) for the demolition of a building erected without sanction in contravention of the provisions of sec. 372 without the precedent issue of a notice under sec. 383 and it has been expressly held in *Corporation of Calcutta v. Amrita Lal Mukherjee* (1) that the issue of a notice under sec. 383 is not a condition precedent to a proceeding under sec. 449 (1).

The rule is accordingly discharged.

B. C. *Rule discharged.*

[CRIMINAL REVISIONAL JURISDICITON.]

REV. No. 1254 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
17, December.

PROBHAT CHANDRA CHOWDHURY, Petitioner,
v.
THE EMPEROR, Opposite Party.

Arms Act (XI of 1878), secs. 19 (f), 14—Possession of a gun, meaning of—Interpretation of sec. 19 (f).

The provisions of sec. 19 (f) of the Arms Act do not make the mere possession of a gun punishable; they make possession contrary to the provisions of sec. 14 of that Act punishable.

The snatching up of a gun which was in the hand of another and firing it at a mad dog do not constitute the possession contemplated by sec. 14 of the Arms Act.

This was a rule granted on the 18th of November 1907, against an order of Babu Harendra Nath Ghose, Sub-Divisional Magistrate of Goalpara, dated the 12th of August 1907.

(1) 7 C. W. N. 554 (1903).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, FEBRUARY 3. 1908. [No. 12

Contents.

NOTES

IN THE CASE OF *Raja Pramada Nath Roy* v. *Raja Ramani Kant Roy* (12 C. W. N. 249) their Lordships of the Judicial Committee overruling the judgment of the Calcutta High Court (9 C. W. N. 34) have held that although co-sharer landlords may be in the habit of collecting their shares of the rent separately and that they may have a right to do so, yet any one of them may recover a decree for the entire rent by making the other co-sharers parties Defendants and the tenure may be sold in execution of such a decree. The reason is obvious; for, separate collection of rent does not create distinct tenancies, or as their Lordships say "that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding." This decision will be greatly appreciated by the landholders. Before this decision co-sharer landlords in separate receipt of rent had no means of bringing a defaulting tenure to sale. In fact a co-sharer landlord of a non-transferable raiyati holding was practically without any means of realizing his rent by suit.

WE INVITE ATTENTION TO THE CASE OF *Pindi Prolu Soorapara ju* v *Pindi Prolu Veera Bhadrudu*, reported at p. 486, I. L. R. 30 Madras. The facts were briefly these:—Three brothers S. R. and K. and their father made an arrangement which amounted to a division of the family properties. The father and R and K, continued to live together and S, separated from them. The father died and then R, died leaving him surviving a widow and a daughter. These two females did not claim R.'s share but were content with maintenance. But it appears that the widow did not surrender her rights to the property of R. The two surviving brothers S. and K. entered into an agreement between themselves to the effect that K. should enjoy R.'s share and maintain the widow and daughter of R, and that after the widow's death S. would get half of R.'s share. After the agreement the daughter died unmarried and then S. and after his death the widow died in 1891. In 1901 the son of S. brought a suit to recover half of R.'s share by virtue of the agreement which his father S. entered with his uncle K.

THERE WAS A DIFFERENCE OF OPINION BETWEEN White, C. J., and Willis, J., as to the maintainability of the suit. The Chief Justice held that the agreement was in effect to divide the reversion when it should fall in and as the rights of presumptive reversionary heirs could not be transferred, the agreement did not operate to vest any property in S, therefore the son of S. could not maintain the suit. Willis, J., held that the widow not having claimed her husband's share and having contented herself with maintenance, S. and K. were not actually in the position of expectant heirs, so the agreement operated to give S. a vested interest in a half share of R.'s property to take effect in possession on the widow's death and the suit was therefore maintainable. The case being referred to a third

Judge, it was decided by him that the agreement only gave a right to claim specific performance thereof when the reversion fell in but that right was barred by limitation. According to the view of this learned Judge the agreement was not void *ab initio* but it was not enforceable until the reversion in.

IT MIGHT BE URGED WHETHER THE MERE CHANCE OF a reversioner to succeed to a property on the death of a widow could in any way be bound by an agreement. According to the observations of the Privy Council in the case of *Sham Sunder Lal* v. *Achan Kunwar*, 2 C. W. N. 729, the reversioner could not "by Hindu law make a disposition of or bind their expectant interests." So it would seem to follow that such an agreement was incapable of specific performance even when the reversion fell in. If the expectant interests were not in any way bound by the agreement at the time when it was made, how could the same agreement be operative after the reversion had fallen in. We may also in this connection refer to the case reported in I. L. R. 31 Bom. 165 which also lends support to the view that such an agreement is void of any effect.

IT IS HOWEVER WORTHY OF CONSIDERATION WHETHER, under the circumstances of the case, the right of S. and K. to the property left by R during the lifetime of R's widow was really that of expectant heirs or something more. On the death of R., his widow might have claimed his share, but she did not do so. She remained content with maintenance given her by K. who in his turn enjoyed the share of R. So when the agreement was entered into between K. and his brother S., K. was actually in possession of the share of R. Of course his possession might have been put an end to by the widow's refusing to take the maintenance and claiming the share of her husband. But until that was done the share of R. which K. enjoyed might be regarded as property in the possession of K. which was capable of transfer. If that was so, the agreement between K. and S. did operate to give S. a vested interest in a half share of the lands left by R. to take effect in possession on the widow's death.

IN ANOTHER COLUMN WE REPRODUCE FROM THE *Harvard Law Review* for January, an interesting discussion on the question of the propriety of joining in one suit a number of distinct claims by or against different individuals with a view to avoid a multiplicity of suits. Such a question recently arose in *Aldridge* v. *Barrow* (11 C. W. N. 680) and may arise again. Such cases when they arise here have to be decided on general principles as they do not seem to be covered by the provisions of the Code. The extract shows how the question is viewed by American lawyers.

JURISDICTION OF EQUITY TO AVOID A MULTIPLICITY OF SUITS WHEN ONE IS ARRAYED AGAINST MANY.

Recently there came before the Wisconsin court an interesting case involving equity's jurisdiction to avoid a multiplicity of suits. *Illinois Steel Co.* v. *Schroeder*, 113 N. W. 51. Eighty-four squatters claimed titled to the Plaintiff's land through their adverse possession tacked to that of M, under whom each claimed. The Plaintiff denied M's possession, and had recovered in ejectment against one holding under the same claim. To avoid having to bring eighty-four identical suits, he sought to join all the Defendants in one equitable suit and to have the matter set at rest. The Defendants interposed a demurrer, which was sustained. First it must be noticed that the Plaintiff had no other ground for getting into equity, so that there was a problem apart from joinder of parties in equity,—a distinction frequently overlooked in judicial discussions. The initial difficulty of the Court was the lack of privity among the Defendants; that is, they had no common title or community of interest in the subject-matter. Some courts have insisted strenuously on this requirement, but the weight of authority is now clearly the other way. *Carlton* v. *Newman*, 77 Me. 408; *Hale* v. *Allinson*, 188 U. S. 56, 77. *Tribette* v. *Illinois Central R. R*, 70 Miss. 182, the leading case *contra*, no longer represents Mississippi law. *Crawford* v. *Mobile*, etc., R. R., 83 Miss 708, 117. The basis of the bill is to afford the Plaintiff a more nearly adequate remedy than he has at law, and to promote the convenience of the public and of the court by the having one suit instead of many. *Smith* v. *Bank of New England*, 69 N. H. 254. Privity seems entirely foreign to these conceptions, and to require it would considerably narrow a beneficent relief which Kent called a favourite one with equity. *Brinkerhoff* v. *Brown*, 6 Johns. Ch. (N. Y.) 139, 151. In the following discussion it will be assumed that lack of privity is not an objection.

Suppose the bill asked only for a declaration as to M's possession. It would raise a question of law and fact common to all Defendants. Such a declaration would make this question *res adjudicata* in subsequent ejectment suits by the Plaintiff, thus saving for the courts much time, and for the Plaintiff the burden of repeated proof. The bill, however, would be professedly not to prevent a multitude of suits, but to aid the Plaintiff in bringing them. Equity has not reached the point of allowing such bills. Such a bill was allowed in a recent case without any discussion or reasoning. *Blumer* v. *Ulmer*, 44 So. 161 (Miss.). Next, suppose each of many persons claimed under a statute part of a tract of land possessed by A, and started individual ejectment suits. A would come to equity to show all his opponents' claims to be groundless by proving the statute unconstitutional, and to have them accordingly enjoined. The bill, if proved would prevent

many suits, while if not proved, would cause a saving in future legal suits. Equity would allow such a bill. *Sheffield Waterworks* v. *Yeomans*, I. R. 2 Ch. 8; *Albert Lea* v. *Nielsen*, 83 Minn. 346. Thirdly, suppose A brings separate ejectment suits against several parties in possession, who seek to enjoin him because of the unconstitutionality of the statute under which he claims. Here each Plaintiff would have only one suit to fight at law, but the element of saving the court's time would still be present, and the bill would be allowed. *Chicago* v. *Collins*, 175 Ill. 445. But see *Turner* v. *Mobile*, 135 Ala. 73. 125. Fourthly, suppose many passengers were injured in a collision caused by the negligence of a railroad company, and they come into equity for damages. There would be the common question of the company's negligence, but another element would enter. The ascertainment of the relief to be given would raise a question concerning each Plaintiff, and the result would be a number of issues, each involving only one party. Equity would draw the line here, and refuse damages whether sought alone or with other relief. *Tompkins* v. *Craig*, 93 Fed. 885; *Smith* v. *Bivens*, 56 Fed. 352; *Foreman* v. *Boyle*, 88 Cal. 290; *State* v. *Sunapee Dam Co.*, 72 N. H. 114, 143. The result would be the same if one sought damages from many. *Tompkins* v. *Craig*, 93 Fed. 885; *Smith* v. *Bivens*, 56 Fed. 352; *Foreman* v. *Boyle*, 88 Cal. 290; *State* v. *Sunapee Dam Co.*, 72 N. H. 114, 143. But when the damages are liquidated, so that the ascertainment of relief as to each party is a negligible consideration, the reason fails and the relief is given. *German, etc., Co.* v. *Van Cleave*, 191 Ill. 410; *Smith* v. *Bank of New England*, supra. Similarly in the case before the Wisconsin court the ascertainment of the affirmative legal relief against each Defendant would be a negligible consideration, since it would be only a decree to surrender up possession. There is a common question here, for if the Plaintiff can eliminate M's possession, the claims of all Defendants must fail. All the elements in previous case in which the bill was allowed are present; there is the saving to both the court and the Plaintiff; and it would seem that the demurrer should have been overruled. The bill may be demurrable because the Plaintiff also asked for damages, which would be unliquidated; but this point was untouched by the court. See *Foreman* v. *Boyle*, supra.—(*Harvard Law Review*).

CURRENT INDIAN CASES.

EMPEROR *v.* PASCAL SHIMAN, I. L. R. 31 Bom. 523. *Cantonments Act (XIII of 1889)—Supply of liquor.*

Where a soldier ordered his servant to buy liquor from a shop and bring it to him and the servant did it, *held* that the conviction of the servant under sec. 13 of the Cantonments Act is bad.

RUKMINI BAI *v.* SUBRAYA PAI, I. L. R. 31 Bom. 527. *Civil Procedure Code, secs. 13, 42—Mortgage.*

Where a usufructuary mortgagee's tender of the mortgage debt being refused a decree for possession was obtained, *held* that a subsequent suit by the mortgagee for mesne profits was barred either by sec. 13 or sec. 43, C. P. C.

BHAGABAI *v.* NARAYAN GOHAL, I. L. R. 31 Bom. 552.. *Mortgage—Civil Procedure Code, sec. 257A.*

Where a part of the consideration of a mortgage was a decretal debt and the decree did not allow any interest but the mortgage stipulated for payment of interest, *held* that having regard to sec. 257A, C. P. C., the provision relating to the decretal debt was void, but the other portions of the mortgage bond were enforceable at law.

HARI *v.* VITAI, I. L. R. 31 Bom. 560. *Hindu law —Widow's estate.*

It is the right of each of two or more co-widows to partition their husband's estate; it is a necessary corollary from that that she can assign it to any one she chooses. On her death her interest in the property ceases and the share goes to the surviving co-widow or co-widows, as the case may be. But it is good as long she lives.

Reviews.

THE LAW OF MARRIED WOMEN'S CONTRACTS. *By Mr. R. Emanuel, M. A., B. C. L., of the Inner Temple, Barrister-at-Law, London. Butterworth & Co., 11 and 12 Bell Yard, Temple Bar W. C. Law Publishers. 1907.*

The complexities of the law of married women's contracts in England have not been reduced, if they have not actually been made more complicated, by the Married Women's Property Acts. In such circumstance, a hand-book in which all that has been laid down either by the Legislature or by the law Courts relating to contracts of married women, have been collected and arranged in a manner most suitable for use by practitioners cannot but be useful. In enunciating the principles laid down by the Courts, the author has taken care, whereever possible, to do so in the language of the Judges themselves. He has also drawn on the general principles of the law of agency where no reported cases bearing on the relation of husband and wife have been available. In an appendix are given the Married Women's Property Acts of 1882 and 1893.

THE INDIAN PENAL CODE, Act XLV of 1860, (with all amendments up to date) and Notes, Analyses and Commentaries thereon. *By Reginald A. Nelson, M. A., LL.M., of the Inner Temple, Barrister-at-Law,*

Principal of the Madras Law College and Advocate of the High Court of Madras. Fourth Edition. Madras Srinivasa Varadachari & Co. London, Sweet and Maxwell, Ld. 1908.

Mr. Nelson is the author of several works on Indian law which are intended to serve the double purpose of text-books for students and hand-books for practitioners. His annotations have the advantage over the ordinary case noted codes inasmuch as they embody in brief a commentary on the sections which will help both the student and the lawyer in the proper comprehension of their scope. References to case law are also up-to-date. The only defect we have noticed is that references to the recent Indian decisions are not to the original reports but to compilations which are not available to everybody. To make the book more useful to practitioners, this defect ought to be remedied. If it is not too late we would suggest the issue of a revised table of cases giving references to the original reports.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Emanuel and others* v. *Symon.* Before LORD CHIEF JUSTICE ALVERSTONE, LORDS JUSTICES BUCKLEY and KENNEDY. 15th November 1907.

Foreign judgment—Jurisdiction of Court over foreigner—Entering into partnership or holding real property if gives jurisdiction.

In 1895 the Defendant verbally entered into partnership with certain persons to work a gold mine in West Australia, all parties being then resident in that Colony. In 1901, the Plaintiffs as representing the interest of the other partners instituted a suit in the Colony for dissolution and account. The Defendant had left the Colony in 1899 and had ceased to reside and carry on business in the Colony and had taken up residence in England when the action was commenced and the writ was served on him in England, but he did not appear or take part in the proceedings. This action was brought to recover from the Defendant the sum of £1,281 4*s.* 11*d.* on the judgment obtained in the Supreme Court of West Australia, or in the alternative on accounts taken on the dissolution of partnership. Channell, J., held, "that the Defendant by joining the partnership for the working of the mine in West Australia must be taken to have contracted that all partnership disputes, if any, should be determined by the Courts of that county and thereby subjected himseif to the jurisdiction of those Court."

The Court of Appeal in allowing the appeal referred to *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* (1894) A. C. 670, and held that the above proposition of Channell, J., was too wide and contrary to the decisions of some eminent judges. The fact that the Defendant had been the owner of real property in West Australia did not also give the Courts in Australia a general jurisdiction over the owner of the property, though it could not be disputed that possession of real property did in certain cases subject a person to the jurisdiction of a foreign Court.

Mr. McCall, K. C., and *Mr. A. W. Groser* for the Defendant, Appellant.

Mr. Holman Gregory for the Plaintiff, Respondent.

COURT OF APPEAL.—*Corsellis and others* v. *London County Council.* Before LORDS JUSTICES COZENS HARDY, M. R., FLETCHER MOULTON and FARWELL. 11th November 1907.

Dedication to public use—Right of lessee for term.

The Plaintiff, Corsellis, took a lease for a term of 82 years of a piece of land fronting York Road in the borough of Wandsworth. On part of this land one Lewry, under a building agreement with Corsellis, built 15 houses with shops, leaving a strip of land 3 ft. wide immediately in front of them Lewry after submitting his plan to the Wandsworth Board of Works had written to the surveyor of the Board "I shall feel greatly obliged if you can arrange for the paving to be done in front of my shops close up to the building line, as I think it would make the appearance of the street much better." Upon that the Board passed a resolution that "upon the ground separating the new shops in York Road from the public way, being given up to form part of such public way, the foot-way be paved, &c." Notice to this effect was sent to Lewry but he did not reply. The Board thereafter had the paving done up to the foot of the buildings. Upon the completion of the buildings, Corsellis granted Lewry separate underleases of each building with the strip in front. The present Plaintiffs other than Corsellis became entitled to the several under-leases by purchase. In this suit the Plaintiffs sought *inter alia* for a declaration of their title to the 3 feet strip to which the Defendants set up title under the above arrangement with Lewry.

The Court of Appeal now affirmed the judgment Neville, J., that the evidence was not sufficient to establish dedication and that there was no such thing known to law as a dedication of a way for a term, it being necessary that a dedication should be in perpetuity. The Court of Appeal observed that it may be that as against Mr. Lewry the local authority might have been in a position to insist that the strip should be given up to the use of the public during his term either on the ground of estoppel or actual contract. But even if this were so it could not avail against the Plaintiffs who were *bonâ fide* purchasers of the legal interests which belong to them without notice of the claim of the local authority.

The judgment of Neville, J., affirmed on this part of the case, but set aside as regards another portion not material to this report.

Mr. Jenkins, K. C., and *Mr. J. Tanner* for the Appellants, County Council.

Mr. Peterson, K. C., and *Mr. C. E. Allan* for the Plaintiffs, Respondents.

KING'S BENCH.—*Mansell* v. *Griffin*. Before JUSTICES PHILLIMORE and WALTON. 9th November 1907.

Master and pupil—Infliction of corporeal punishment—Privilege.

This case came on appeal by the Defendant from an order of the County Court Judge sitting at Gloucester directing a new trial, on the grounds, (1) that the verdict of the jury upon which a judgment had been entered in favour of the Defendant was against the weight of evidence, and (2) that the Plaintiff had not had a fair trial owing to the bias of the jury and the undue influence brought to bear upon them. The action was brought by a scholar in one of the local schools against an assistant schoolmistress for an alleged assault. The allegation was that the child had been struck on the arm with the edge of a boxwood ruler. The jury's answer to the questions left to them were (1) that the punishment inflicted was in the circumstances of a case moderate. (2) The instrument used was an improper one having regard to the rules made by the city of Gloucester Education Committee that only the birch or cane should be used, but that the instrument used was not as hurtful as the birch or cane, (3) but the fact that the child was suffering from cartilagenous tumours was not known to the Defendant; (4) that the Defendant had exceeded her authority under the above-mentioned regulations by striking the child without the authority of the head mistress; and (5) that the school regulations had not been brought to the Defendant's knowledge.

Their Lordships held that it was no doubt true that as a matter of the internal government of the school, the teacher, though she did not know it, was prohibited, not from ordering but from administering corporal punishment, and it was also true that the only weapon authorised to be used was a cane or birch. It did not therefore necessarily follow that when it became a question of an action brought for assault, or of an indictment for assault she was without defence. Considering the general relation of pupil and teacher, the teacher of the class was entitled to use ordinary means of preserving discipline; and as between the parent of the child and the teacher—the question being one of delegation of authority by a parent to those who stood in *loco parentis*—it was enough for the teacher to say that the punishment administered was moderate, was not dictated by a bad motive and was such as is usually administered in schools and such as the parents might expect a child to receive. The authority extends not to the head teacher only but to the responsible teachers who have charge of a class.

Mr. Hugh Sturges for the Plaintiff.

Mr. Lynn for the Defendant.

Appeal allowed.

CHANCERY DIVISION.—*Mayor &c. of Tenby* v. *Mason*. Before MR. JUSTICE KEKEWICH. 22nd November 1907.

Borough Council—Right of public to attend at its meetings.

The Defendant was proprietor of the *Tenby observer* and claimed a right to be present at the meetings of the Council other than Committee Meetings, of the borough of Tenby (1) as a ratepayer, (2) as a reporter of the *Tenby Observer*, (3) or as a member of the public. The Council from time to time permitted newspaper representatives to be present at the meetings, but in consequence of a report which appeared of one of their meetings in his paper passed a resolution that he would not be permitted to attend personally as reporter to his own paper until he should prove himself to the satisfaction of the Council to be an efficient shorthand writer. The Defendant in assertion of his alleged right attended a Council meeting on 4th March 1907. The Council of the borough of Tenby now sought for a declaration that it had a right to exclude all persons not members of the Council from its meetings and also an injunction to restrain Defendent from entering the Council Chamber without the Council's permission.

Held—That the Council was entitled to the declaration and injunction.

Mr. P. O. Lawrence, K. C., and *Mr. A. A. Bethune* for the Plaintiffs.

Mr. Jessel, K. C., and *Mr. Ellis Griffith* for the Defendant.

CHANCERY DIVISION.—*Lord Chesterfield* v. *Harris*. Before MR JUSTICE NEVILLE. 19th November 1907.

Prescription—Grant—Right of free-holders of manor to take fish for sale from nontidal river.

The oral evidence in this case showed *inter alia* that the Defendants and others have openly fished in the waters of the Wye (a non-tidal river) opposite the banks of the river owned by the Plaintiffs under claim of right as free-holders within the manor of Wormelow without interruption for a period of upwards of 100 years. The fish was taken for purposes of sale.

His Lordship observed that if the evidence rested here, he would have thought that the enjoyment of the right had been exercised so long and pointed

so strongly to the existence of a legal right, that he would be bound to attribute to it a legal origin, if indeed, it be a right which could be legally created. Moreover, taking the documentary evidence as a whole, he found nothing inconsistent with the right set up by the Defendants. It rather confirmed the view that the modern user was in accordance with an ancient right. He was of opinion that a grant of a right to fish in common with the other freeholders within the manor would be a good grant to an individual and might properly be presumed to have accompanied each original grant of a freehold.

Mr. Warmington, K. C., Mr. T. T. Method and *Mr. H. S. Moore* for the Plaintiffs.

Mr. Micklem, K. C., and *Mr. Ellis Griffith* for the Defendants.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.—*E.* v. *E.* Before JUSTICE BARGRAVE DEAN. 9th November 1907.

Suit for divorce—Interrogatories.

In this suit by the wife seeking for divorce on the ground of cruelty and adultery a summons was taken out by the wife that the Respondent should show cause why he should not answer the following interrogatories:

"(1) Were you in some and what period of the years 1903 and 1904, suffering from any and what form of venereal disease; (2) Did you not consult Dr. H—— of Paris or any other, or what doctor, in relation to such disease and were you not under his care and treatment in relation thereto for any and what periods during the said years 1903 and 1904." The cruelty alleged consisted of wilful communication of venereal disease in 1903 and the adultery alleged was of the same date with a woman unknown from which he contracted the disease.

His Lordship held that the interrogatories were not admissible.

Mr. Bayford for the Petitioner.

Mr. Murphy for the Respondent.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 30 OF 1908. PARBUTTY CHURAN RAY AND ORS, 2nd Party, Petitioners *v.* SUJJAD ALI AHMAD CHOWDHURY, 1st Party, Opposite Party 29th January 1908

Review of judgment—Power of the Criminal Court to grant—Criminal Procedure Code, sec. 145.

A proceeding under sec. 145, Cr. P. C., was instituted by the Sub-Divisional Magistrate of Jangipur, and the 19th of December 1907 was fixed for hearing the case. On that date the case was called out at 11 A. M., 12 o'clock, and 1 P. M., successively; but no one on behalf of the 1st party appeared; and the Sub-Divisional Magistrate having examined a witness on behalf of the 2nd party delivered a judgment declaring the 2nd party to be retained in possession until evicted in due course of law. Subsequently on the 21st December, the 1st party put in a petition for review of the judgment, whereupon the Sub-Divisional Officer issued a notice on the 2nd party to shew cause on the 3rd January 1908, why the review should not be granted. On the said date the Sub-Divisional Magistrate made the following order:—"I have heard both the parties. It appears that an order under sec. 145, Cr. P. C., is not a judgment within the meaning of sec. 369, Cr. P. C., and so I hold that it can be reviewed. I therefore review the case and direct both parties to put in fresh written statements on 10th January 1908. In the meantime Receiver will retain possession. This order is to be communicated to the Receiver and the Police by a special messenger today."

(Sd.) A. ISLAM.

Against this order the Petitioners moved the High Court and obtained the present rule to set it aside.

Their Lordships held:—That a Criminal Court has no power to review its own judgment, and that the final order under sec. 145, Cr. P. C., cannot be set aside on review by the Magistrate, who passed that order. The order of the Magistrate of 3rd January 1908, by which his previous order, declaring the possession of the 2nd party, was reviewed and set aside, is without jurisdiction.

Mr. P. L. Roy, Babus Satish Chandra Ghose and *Anilendra Nath Roy Chowdhury* for the Petitioners.

Babus Dasarathi Sanyal and *Abani Bhushan Mukherjee* for the Opposite Party.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J., and COXE, J. APPEAL FROM APPELLATE ORDER NO. 478 OF 1906 HAFEZUDDIN MONDOL AND ANOTHER, Defendants, Appellants *v.* JODU NATH SAHA AND OTHERS, executors to the estate of the late KALI KRISTO CHOWDHRY, Plaintiffs, Respondents. 17th January 1908.

Account, suit for—Relief claimed—Properties mortgaged—Limitation Act (XV of 1877), Sch. II, Arts. 89, 132.

This was a suit for accounts by the executors of the estate of a deceased principal against his *gomasta* who was Defendant No. 1 and his surety, Defendant

No. 2. The Plaintiff asked for an account simply upon the footing of principal and agent. Both Defendants Nos. 1 and 2 hypothecated certain properties, to secure the moneys due from the agent, by two documents, a security *kabuliyat* and a *saminnama*, and charged those properties with the payment of what might be found due on taking such accounts; and by the third prayer of his plaint, the Plaintiff asked that if in the event of Defendants Nos. 1 and 2 failing to pay within the time fixed by Court, any money be found due to the Plaintiff at the time of *nikas* (that is, the accounts) an order might be passed directing recovery thereof from the property pledged by them and on its proving insufficient from the person and other properties of Defendants Nos. 1 and 2.

The Subordinate Judge dismissed the suit on the ground that it was barred by limitation, holding that Art. 89 of the Sch. II to the Limitation Act applied. The District Judge reversed that decision, holding that the case fell within Art. 116. The Defendants appealed to the High Court.

Held—That had the suit been simply by the principal against the agent Art. 89 of the Sch. II to the Limitation Act would have applied.

Asghar Alikhan v. *Khursud Alikhan* (I. L. R. 27 Mad. 27), *Jogendra Nath Roy* v. *Deb Nath Chatterji* (8 C. W. N. 113), *Madhub Chunder Roy Chuckerbutty* v. *Debendra Nath Dey* (1 C. L. J 147) and *Shib Chunder Roy* v. *Chunder Narain Mukerji* (1 C. L J. 232) referred to.

Moti Lal Bose v. *Amin Chand Chattapadhya* (1 C. L. J. 211) dissented from.

To ascertain which article of the schedule to the Limitation Act applies, it is to be seen what is the relief which the Plaintiff claimed.

The case falls within Art. 132 of the Sch. II to the Limitation Act.

Babu Ram Chandra Mozumdar for the Appellants.
Babu Taruk Chunder Chuckerbutty for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. CIVIL RULE No. 2751 OF 1907. NADIAR CHAND SHAHA, Plaintiff, Petitioner *v.* MR WOOD, Defendant, Opposite Party. 28th November 1907.

Indian Railways Act (IX of 1890), secs. 77, 140—Notice, service of—"May."

A suit was instituted in the Court of Small Causes by the Plaintiff for recovery of damages from the Assam Bengal Railway Company for short delivery on different dates of goods carried by the Railway Company under risk notes.

The Defendant who was the agent of the Assam Bengal Railway Company denied the receipt of proper notices and also denied the liability of the company even if the notices were duly served.

The Small Cause Court Judge came to the conclusion that the alleged notices of claim were insufficient, they admittedly having been served on the Traffic Manager and not on the Agent of the Railway Company.

The Plaintiff moved the High Court and contended that the notice to the Traffic Manager was a sufficient compliance with the provisions of secs. 77 and 140 of the Indian Railways Act (IX of 1890).

Held—That the services of notice under sec. 77 of the Indian Railways Act must, in order to be effective, be served in the form and manner indicated in sec. 140.

The word "may" in sec. 140 must be construed as meaning must, and that if a Plaintiff is desirous of serving an effective notice of claim the notice must be directed to the Manager or Agent as the case may be.

Secretary of State for India in Council v. *Dip Chand Poddar* (I. L R. 24 Cal. 306) and *Great Indian Peninsular Railway* v. *Chandra Bai* (I. L. R. 28 All. 552) referred to.

Decision of Tyabji, J, in *East Indian Railway Company* v. *Jethmull Ramanund* (I. L. R. 26 Bom. 669) and *Periamman Chetti* v *The South Indian Railway Company* (I. L. R. 22 Mad. 137) dissented from.

Babu Sarat Chunder Basak for the Petitioner.
Mr. Garth and *Babu Joy Gopal Ghosh* for the Opposite Party.

A. T. M. *Rule discharged.*

CIVIL APPELLATE JURITDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORDER No. 405 OF 1905 MOULVI ABDUL KASEM, Appellant *v.* BENODE LAL DHONE AND ANOTHER, Respondents. Heard, 21st November 1907 and 6th January 1908. Judgment, 6th January 1908.

Civil Procedure Code (Act XIV of 1882), secs. 274, 289—Sale proclamation—Separate process for different portions, if necessary.

Certain properties belonging to the judgment-debtor were sold in execution of a decree obtained by one of the Respondents. The properties were described as lot Mirzapore, a two storied house and lot Laskardighi. The judgment-debtor applied to have the sale set aside under the provisions of sec. 311, C. P. C. The application was opposed; but the lower Court held that the sale of the properties Nos. 1 and 2 should be set aside and passed an order accordingly; it confirmed the sale of lot Laskardighi. The purchaser appealed to the High Court. His appeal was confined to lot Mirzapore only.

Lot Mirzapore was a putni taluk owned by the judgment-debtor. Five of the villages were let out in *dur-putni*, whereas the sixth village Dhoba

was held in *dur-putni* by another person. Dhoba was on the other side of the river and was at a little distance from the other five villages. The contention, therefore, was raised that the sale proclamation ought to have been served separately on each of the villages. The Court below came to the conclusion that the non-publication of the sale proclamation in each of the villages was an irregularity.

Held—The word "property" in sec. 274, C. P. C, refers to each lot to be sold separately from the rest. It cannot refer to different parts of property which is advertised for sale. If the separate villages constituting a property be so far distant from each other that there is no likelihood of knowledge of the sale proclamation being carried on from one village to another, it would be more judicious to have the sale proclamation served in each of the villages.

Tripura Sundari v. *Durga Charan Pal* (I. L. R. 11 cal. 74) referred to.

There was no infringement of the provisions of the sec. 289, C. P. C., on account of the mere fact that separate processes were not served on each portion of the property advertised for sale.

Mr. C. C. Ghose and *Moulvis Syed Shamsul Huda* and *Nuruddin Ahmed* for the Appellant.

Babus Nil Madhab Bose and *Narendra Chunder Bose* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. MACLEAN, C. J, and COXE, J. APPEAL FROM APPELLATE ORDER NO 275 OF 1907. JOGENDRA NATH SIRKAR AND OTHERS, Judgment-debtors, Appellants *v.* GOBINDA CHANDRA DUTT, Decree-holder, Respondent. Heard, 9th January 1908. Judgment, 24th January 1908.

Civil Procedure Code (XIV of 1882), secs. 244, 278—Personal decree against shebait—*Claim on behalf of Thakur—Party to the suit.*

A decree was passed against the Appellants personally. In execution of that decree attachment was issued. The Appellants contended that the property did not belong to them, but that it belonged to them as *shebaits* of an idol, and as such was not liable to attachment. The made two applications, one under sec. 244, the other under sec 278. Both were dismissed. The judgment debtors appealed to the High Court.

Held—That as the Appellants were parties to the suit the case fell within sec. 244, C. P. C.

Punchanan Bandopadhya v. *Rabia Bibi* (I. L. R. 17 Cal. 711) referred to.

Held further—That the Appellants had not lost any rights *qua* their application under sec. 244 because they made a mistake in applying under sec. 278.

Babus Mahendra Nath Roy and *Krishna Prosad Sarbadhikary* for the Appellants.

Babu Brojo Lal Chuckerbutty for the Respondent.

Appeal allowed:
A. T. M. *Case sent back.*

CIVIL APPELLATE JURISDIDTOIN. MACLEAN, C. J., and COXE, J. APPEAL FROM APPELLATE DECREE NO. 203 OF 1905. HIRAMOTI DASSYA, Defendant No. 6, Appellant *v.* ANNADA PROSAD GHOSH AND ANOTHER, Plaintiffs, Respondents. Heard, 10th January 1908. Judgment, 24th January 1908.

Possession, suit for—Tenure-holder—Onus—Non-permanent tenure—Transferibility.

The suit was for *khas* possession. The Plaintiffs were the owners of the disputed land. The Appellant claimed to be a tenure-holder of the land under them. The land was the *jama* of one B who sold it to the Appellant. The Plaintiffs stated that B was only an occupancy raiyat and had no transferable right. The Appellant said he was a permanent tenure-holder, and that the tenure was transferable. Both Courts found, under the statutory presumption of the Bengal Tenancy Act, the land being over 100 bighas in extent, that the tenancy was a tenure and not an occupancy holding. The lower Appellate Court, however, held that it was not a permanent tenure, and so not transferable, and consequently gave the Plaintiff a decree for *khas* possession.

The Defendant appealed to the High Court.

Held—That it lay on the Appellant, when the Plaintiffs satisfactorily proved that they were the owners of the land, to show that she was entitled to remain there, in other words to make out her alleged title as a tenure holder.

Held further—The tenure being created in 1864, the right to transfer a non-permanent tenure was not created by the Transfer of Property Act.

Hari Nath Karmokar v. *Raj Chunder Karmokar* (2 C W. N. 122) referred to.

Sec. 11 of the Bengal Tenancy Act seems to import that non-permanent tenures were not to be regarded as transferable.

The Advocate-General (Mr. O'Kinealy) and *Mr. Norton* and *Babus Lal Mohun Das* and *Jnanendra Nath Bose* for the Appellant.

Mr. Hill and *Dr. Ras Behary Ghose* and *Babus Joges Chunder Roy, Rajendra Chunder Guha* and *Ratan Chand Boral* for the Respondents.

A. T. M. *Appeal dismissed.*

PROBHAT CHANDRA CHOWDHURY v. THE EMPEROR.

The facts material to the report appear from the judgment.

Mr. P. L. Roy and *Babu Baikuntha Nath Das* for the Petitioner.

No one appeared for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a rule calling upon the Deputy Commissioner of Goalpara to show cause why the conviction of and sentence passed on the Petitioner should not be set aside, on the ground that he was not in possession of the gun within the meaning of the Arms Act.

The Petitioner has been convicted under sec. 19 (*f*) of the Arms Act (XI of 1878) and sentenced to a fine of Rs. 5.

The facts are these: The gun used by the Petitioner belongs to a gentleman named Rajendra Narain Chowdry, who has been exempted from the operation of the Arms Act. This gentleman is now in England. His gun seems to have been left by him with his brother, Jotindra Narain Chowdry. The Petitioner is a cousin of these two gentlemen. On the 30th March last a mad dog entered the compound of the *bari* of the Petitioner; and he seized the gun, which was in the hands of one Rajeswar, a servant, and fired at the dog. Unfortunately he missed the animal, but a shot from the gun wounded a man named Thanda Rajbunsi. For this he was convicted, under sec. 304A, I. P. C., and sentenced to a fine of Rs. 300 and to detention in Court for one day. The Sessions Judge, on appeal, reduced the fine to Rs. 100.

Now the Petitioner has been again prosecuted under sec. 19 (*f*) of Act XI of 1878. As regards this second prosecution we think, in the first place, that it was unnecessary and, in the next place, that the Petitioner is not liable under the provisions of sec. 19 (*f*) of the Act. The provisions of sec. 19 (*f*) do not make the mere possession of a gun punishable; they make possession, contrary to the provisions of sec. 14 of that Act, punishable; and we agree with the learned Counsel who appears for the Petitioner that the temporary possession which the Petitioner had of the gun when he snatched it up and fired it was not the possession contemplated by sec. 14.

We accordingly make the rule absolute and set aside the conviction and sentence.

The fine, if paid, must be refunded.

B. C. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 164 OF 1906.

MOOKERJEE, J.
CASPERSZ, J.
1907.
Heard, 23, & 26, August.
Judgment, 29, August.

MIRZA SHAMSHER BAHADUR and ors., Defendants, Appellants,
v.
MUNSHI KUNJ BEHARI LAL and others, Respondents.

Possession, suit for—Onus of proof—Nature of evidence to be adduced by either party—Title, proof of, effect of—Presumption of possession—Constructive possession—Survey map, value of, as evidence.

In respect of jungle and hilly land possession must be presumed to be with the rightful owner.

Plaintiff in an action for ejectment must not only prove his title but also his possession, actual or constructive, within 12 years of suit. When Plaintiff has

MIRZA SHAMSHER BAHADUR *v.* MUNSHI KUNJ BEHARI LAL.

established his title it is not necessary for the Defendant to prove a better title or establish that he has acquired a good title by adverse possession which has extinguished the title of the Plaintiff but Plaintiff must prove his possession also within 12 years.

Nature of evidence required in such cases discussed.

Revenue Survey Maps are evidence of title and possession. They are not conclusive and may be shewn to be wrong but in the absence of evidence to the contrary they may be properly and judicially received in evidence as correct when made.

The doctrine of constructive possession applies only in favour of the rightful owner and must not, as a rule, be extended to the wrong-doer whose possession must be confined to land of which he is actually in possession.

This was an appeal preferred on the 10th of February 1906, against the decree of C. E. Pittar, Esq., District Judge of Zillah Gya, dated the 9th of November 1905, modifying the decree of Babu Annada Prosad Bagchi, Subordinate Judge of Gya, 1st Court, dated the 23rd of January 1905.

The facts of the case appear from the judgment.

Mr. Caspersz, Babus Umakali Mukherjee and *Kulwant Sahay* for the Appellants.

Mr. O'Kinealy (Advocate-General), Babus Lal Mohan Das, Ram Charan Mitra, Chandra Sekhar Pershad Singh and *Prokash Chandra Sircar* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The subject-matter of the litigation giving rise to this appeal consists of three large tracts of lands in the kitas called Bharkalwar, Bhaya Bigha and Gordag, which are claimed by the Plaintiffs-Respondents as included within their Mouzah Ballari. 1345 bighas out of the disputed lands are said to be covered by hills and jungle and the remainder, about 200 bighas, are under cultivation. Out of the latter area, 138 bighas are situated in Bharkalwar and 62 bighas in Gordag.

The Plaintiffs alleged that at the time of the settlement proceedings, the Defendants claimed possession of all these lands under a deed of gift executed in their favour, on the 28th April 1875, by the Maharaja of Deo, a neighbouring zemindar now represented by the 5th and 6th Defendants to this suit. The Settlement Officer held that although according to the Revenue Survey Maps, the lands of Bharkalwar and Gordag were included in Mouzah Ballari, they were in the actual occupation of the Defendants. The Plaintiffs contend that the effect of this decision of the Settlement Officer was practically to place them out of possession. They consequently commenced this action for declaration of title and for recovery of possession. The claim was resisted on various grounds amongst which it is sufficient to mention the pleas of limitation and denial of the title of the Plaintiffs. The Court of first instance came to the conclusion that the whole of the disputed area was situated within the zemindari of the Plaintiffs. Upon the question of limitation that Court held that as regards the lands covered by hills and jungles the Plaintiffs were in possession, actual or constructive, within 12 years of

the suit. As regards the cultivated lands, the Subordinate Judge held that the Plaintiffs were in possession of the 62 bighas in Gordag within the statutory period, and that the cultivation by the Defendants of these lands commenced about six years before the suit. As regards the 138 bighas in Bharkalwar however the Subordinate Judge found that the Plaintiffs had failed to prove their possession within 12 years and that the undisputed documentary evidence justified the conclusion that these lands had been under cultivation from a period antecedent to 12 years before the suit. In this view of the matter the Subordinate Judge made a decree in favour of the Plaintiffs for the jungle and hilly lands of Bhaya Bigha and the cultivated lands of Gordag but dismissed the suit in respect of the cultivated lands of Bharkalwar.

The Plaintiffs as well as the Defendants appealed against this decree, the former in respect of the lands the claim to which had been dismissed, and the latter in respect of the lands for which the claim had been allowed. The whole question of title and possession therefore was re-opened in the appeal. At the hearing before the District Judge it was admitted on behalf of the Defendants that in default of other evidence of title the Revenue Survey Maps must be accepted as evidence of title and possession, and that according to these maps the lands in dispute appertained to Mouzah Ballari which was admittedly the property of the Plaintiffs. The District Judge therefore held that the conclusion of the Subordinate Judge upon the question of title to all the disputed lands must be affirmed. Upon the question of possession the District Judge held that in respect of the jungle and hilly lands the possession must be presumed to be with the original owner, especially as the evidence of the Defendants was inadequate to prove any actual possession over such lands. In respect of the cultivated lands of Gordag the District Judge held that the Defendants were in possession for about 6 or 7 years, and that the Plaintiffs had been previously in possession thereof. As regards the cultivated lands of Bharkalwar the District Judge held that the onus was upon the Defendants to prove adverse possession for more than 12 years, and, as they had failed to do so, and as the possession of the Plaintiffs must be presumed to have continued until the Defendants came into occupation, the title of the Plaintiffs to these lands could not be taken to have been extinguished. In this view of the matter the District Judge allowed the appeal of the Plaintiffs and dismissed the appeal of the Defendants. The result was that the entire claim of the Plaintiffs was allowed.

Against this decree the Defendants have appealed to this Court. On their behalf the decision of the District Judge has been assailed substantially on two grounds, namely, *first*, that the question of title has not been properly investigated inasmuch as the District Judge misunderstood the legal effect of the admission which was made before him, and, *secondly*, that upon the question of limitation he ought not to have thrown the burden of proof upon the Defendants in respect of any portion of the claim.

In support of his first contention,

MIRZA SHAMSHER BAHADUR *v.* MUNSHI KUNJ BEHARI LAL.

learned Counsel for the Appellants has contended that there was no intention on the part of the Defendants to abandon the question of title and that the District Judge ought to have determined that point upon the whole of the evidence in the record. It is clear however on the judgment of the District Judge that the Defendants admitted that in default of other evidence of title, the Revenue Survey Map of 1843 must be accepted as evidence of title and possession, and that according to these maps, the lands in dispute appertained to the zemindari of the Plaintiffs. As to *factum* of the admission it is not open to the Defendants to challenge the accuracy of the statement contained in the judgment of the District Judge. If the admission was not as a matter of fact made, or if it was substantially different from what it was taken by the District Judge to be, the proper course for the Defendants was to apply for a review of judgment because the District Judge and he alone was competent to state with any approach to accuracy, what was the precise admission which had been made before him.

We must therefore proceed on the assumption that the admission stated in the judgment of the District Judge was as a matter of fact made. This admission, it will be observed, is divisible into two parts. The first branch of the admission is that in default of other evidence of title the Revenue Survey Maps must be accepted as evidence of title and possession. This admission is in accordance with what must now be taken to be the settled law as pointed out by their Lordships of the Judicial Committee in the case of *Moharaj Jagadindra* v. *The Secretary of State* (1) where their Lordships affirmed the view taken by this Court in the case of *Satcowri Ghosh* v. *The Secretary of State* (2) that Revenue Survey Maps are admissible as evidence of possession and consequently of title. The Privy Council state that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons as to be admissible and valuable evidence of the state of things *at the time they are made*. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made. When therefore in the Court below it was admitted on behalf of the Defendants that the Revenue Survey Maps must be accepted as evidence of title and possession, the admission was in accordance with settled law. Even if such admission had not been made, the District Judge would have been perfectly justified in his conclusion that the Revenue Survey maps are evidence of title and possession, and that till that evidence was rebutted by other evidence of title, effect must be given to the state of things as indicated by the Revenue Survey Maps.

The second branch of the admission was that the lands in dispute are shown by the Revenue Survey Map of 1843 to appertain to Mouzah Ballari. This was

(1) L. R. 30 I. A. 44 (53): s. c. I. L. R. 30 Cal. 291 (1902).

(2) I. L. R. 22 Cal. 252 at p. 257 (1894).

an admission upon a question of fact. It has not been suggested before this Court that the Revenue Survey Map of 1843 does not bear out this statement. We must take it therefore that the admission upon this part of the case was correct and that the Revenue Survey Map of 1843 does show that the disputed lands were at the time found to appertain to the zemindari of the Plaintiffs. The conclusion therefore seems to us to be irresistible that the finding of the District Judge upon the question of title cannot be assailed, and we must proceed on the assumption that the Plaintiffs have established their title to the whole of the lands in controversy.

The second ground urged on behalf of the Appellants relates to the question of limitation. So far as this question touches the jungle and hilly lands of Bhaya Bigha and the cultivated lands of Gordag, we are of opinion that the judgment of the District Judge cannot be successfully assailed. In respect of the jungle and hilly lands, possession must be presumed to be with the rightful owner, that is, with the Plaintiffs in this case. This view is supported by the decision of this Court in the case of *Mahamad Ali Khan* v. *Khaja Abdul Gunny* (3) and by the decision of their Lordships of the Judicial Committee in *Raj Kumar Roy* v. *Gobind Chunder* (4). As regards the cultivated lands of Gordag, the District Judge has found that the evidence of the Defendants themselves establishes that they had no possession of these lands at a period earlier than 6 or 7 years before the institution of this suit. The Plaintiffs therefore have not lost possession of the cultivated lands in Gordag for more than 6 or 7 years. There is consequently no bar to their recovery of possession so far as these lands are concerned.

As regards the cultivated lands of Bharkalwar, however, the position is different. The District Judge holds that in respect of these lands the Defendants are bound to prove adverse possession for more than 12 years, because the plea that the title of the Plaintiffs has been extinguished by adverse possession, is taken by the Defendants and it is for them to establish it. In our opinion, this view cannot be sustained. It is now firmly settled, beyond all possibility of controversy, that the Plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit. This is clear from the cases of *Saheb Pershad Sein* v. *Rajendra Krishore Singh* (5) and *Nitrasur Singh* v. *Nund Loll Singh* (6). The same view was subsequently affirmed by a Full Bench of this Court in the case of *Mahamad Ali Khan* v. *Khaja Abdul Gunny* (3). Subsequent to the decision of the Full Bench, the same view has been reaffirmed by their Lordships of the Judicial Committee in the cases of *Mohima Chandra Mazumdar* v. *Mohesh Chandra Neoghi* (7) and *Nawab Mahammud Amanulla Khan* v. *Budan Singh* (8).

It was argued however by the learned Advocate-General on behalf of the Respondents that the decisions of the Judi-

(3) I. L. R. 9 Cal. 744 (1883).
(4) I. L. R. 19 Cal. 660 (1891-92).
(5) 12 M. I. A. 337 (1869).
(6) 8 M. I A. 199 (1860).
(7) I. L. R. 16 Cal. 473 ; s. c. 16 I. A. 26 (1888).
(8) I. L. R. 17 Cal. 137 (1889).

MIRZA SHAMSHER BAHADUR *v.* MUNSHI KUNJ BEHARI LAL.

cial Committee in the cases to which reference has been made do not lay down any general rule of law and must be restricted in their application to the particular circumstances of the case then before the Court. He further suggested that as a matter of principle, a Plaintiff who has established his title ought to succeed unless the Defendant can prove a better title or establish that he has acquired a good title by adverse possession which has extinguished the title of the Plaintiff. We are unable to accept either branch of this contention. There can be no question that the rule laid down by their Lordships of the Judicial Committee is of general applicability and in our opinion there is good reason for it. The Plaintiff who brings an action for ejectment has to establish, not merely that he had title at some remote period antecedent to the suit. In order to entitle him to succeed, he must establish that he had a valid subsisting title at the date of the institution of the suit, in other words he has to prove not only that he has title but also that he has been in possession within 12 years before the suit.

This view may at first sight seem to be not quite consistent with what is implied in the decision of their Lordships of the Judicial Committee in *Innasimuttu Udayan* v. *Upakarath Udayan* (9). In that case, the Plaintiff who sued to eject the Defendant admitted the possession of the latter for seven years next before the suit and the Defendant produced documentary evidence of possession during the preceding five years, which was exactly similar in kind to the evidence which accompanied his possession during the seven years. In these circumstances, Counsel of the Defendant before the Judicial Committee, appears to have taken upon himself to prove that there was *primâ facie* evidence of the possession of the Defendant for 12 years, and to have contended that this shifted the onus upon the Plaintiff to show that possession of the Defendant began within 12 years of the suit. It was in these circumstances, that the Judicial Committee held that the documentary evidence of possession exactly similar in character to what accompanied the admitted possession went back far behind the 12 years in question, and that this was sufficient to throw on the Plaintiff the burden of rebutting the inference arising from the fact of possession accompanied by these documents. Their Lordships held upon an estimate of the conflicting evidence that this burden had not been sustained by the Plaintiff. In fact, the case for the Defendant was so strong that it was not necessary for him to contend that the fact of the admitted possession of the Defendant for 7 years was sufficient to throw the burden upon the Plaintiff to prove that he had been in possession within 12 years of the suit. This decision of the Judicial Committee cannot, consequently, be taken, to weaken, in any way the effect of the earlier decisions to which we have already referred. We hold, therefore, that in an action for ejectment, the onus is on the Plaintiff to prove his title, and to show that he was in possession and was dispossessed of the disputed property within 12 years before the date when he filed the suit.

(9) L. R. 26 I. A. 210; S. C. I. L. R. 2 Mad. 10 (1899).

MIRZA SHAMSHER BAHADUR *v.* MUNSHI KUNJ BEHARI LAL.

The question may, however, and does in fact frequently, arise as to what is necessary for the Plaintiff to prove, in order to establish his possession within 12 years of the suit. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests, all these matters greatly varying, as they must, under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession. For instance, where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual mode at such a time and under such circumstances that that state naturally would, and probably did, continue until 12 years before the suit, it may properly be presumed that it did so continue, and that the Plaintiffs' possession continued also until the contrary is shown. See *Mahamad Ali Khan* v. *Khaja Abdul Gunny* (3). In substance, therefore, we have arrived at the conclusion that the Plaintiff in an action for ejectment must prove possession actual or constructive, within 12 years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that legal possession continued with the rightful owner, and it is sufficient for the Plaintiff to prove either that the property continued in such state within 12 years of the suit, or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of the property was similar up to a date within 12 years of the suit. If this is established by the Plaintiff, the presumption would be that the possession of the Plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable and the Defendant may show that he has been in actual occupation of the property or of any portion thereof, for more than 12 years before suit. If the presumption is thus rebutted and the adverse possession of the Defendant is proved in respect of any portion of the property, the suit of the Plaintiff must fail to that extent.

Now in the case before us, the District Judge has not found what was the condition of the land in Bharkalwar at a period about 12 years before the date of the institution of the suit. All that he has found, is that the Survey Map of 1843 shows that at the time of the survey the lands were jungle. This however does not necessarily lead to the presumption that the lands continued to be jungle up to the 11th April 1892, within 12 years of which date the present action was commenced. We start with the possession of the Plaintiffs over jungle lands in 1843 but there is no finding as to the subsequent condition of the property.

In these circumstances, it is impossible to support the decision of the District Judge upon this part of the case. The presumption which he raised in favour of the Plaintiff would be available, only so long as the lands continued to be jungle. The presumption, however, would cease to be operative after the land was cleared of jungle, and was brought under cultivation. This part of the case, therefore, must be retried.

(3) I. L. R. 9 Cal. 744 (1883).

The District Judge must in the first instance direct his attention to the condition of the land at a period 12 years antecedent to the suit. If he finds that the land at that time was covered with jungle or that at a period not very remote from that time, the land was jungle so as to justify the inference that the same condition continued at a time just within 12 years of the suit the Plaintiffs are entitled to the benefit of the presumption that they had constructive possession as rightful owners. When the District Judge deals with this part of the case, he may, if the state of the evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in *Ranjit Ram Pandey* v. *Goberdhan Ram Pandey* (10), namely, where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner. If the District Judge comes to the conclusion that the Plaintiff has made out a *primâ facie* case and is therefore entitled to the benefit of the presumption, he will next consider whether the Defendants have been able to rebut that case by their evidence. When he deals with this part of the case, regard must be had to the principle of law that a trespasser is not entitled to the benefit of constructive possession. It was ruled by this Court in the case of *Mohini Mohan Roy* v. *Promoda Nath Roy* (11), that the doctrine of constructive possession applies only in favour of the rightful owner, and must not, as a rule, be extended to the wrong-doer, whose possession must be confined to land of which he is actually in possession.

This rule is substantially identical with the principle enunciated by their Lordships of the Judicial Committee in the case of *Clark* v. *Elphinstone* (12), *Agency Company* v. *Short* (13) and *Secretary of State* v. *Krishnamoni Gupta* (14). In the first of these cases it was held that as against the rightful owner, the possession of a trespasser is available only when there is actual possession of the disputed land or overt, or physical act of ownership done upon it. The true owner is not affected by *ideal* possession of the land or possession which exists only in the imagination of the parties. In the second case, the Judicial Committee held that when an intruder has relinquished possession, the possession so abandoned, leaves the original owner in the same position in all respects as he was before the intrusion took place. In the third case the Judicial Committee held that when land in the possession of a trespasser is submerged the possession reverts in the eye of law, to the original owner.

The principle upon which this rule of law is based, was elaborately examined by Mr. Justice Storey in *Clarke* v. *Courteney* (15) in which that eminent Judge observed that the reason for the rule is plain. Both parties cannot be seised at the same time of the same land under different titles, and the law therefore adjudges the seisin of all which is not in the actual occupancy of the

(10) 20 W. R. 25 (1873).
(11) I. L. R. 24 Cal. 256 (1896).
(12) 6 App. Cas. 164 (1880).
(13) 13 App. Cas. 793 (1888).
(14) I. L. R. 29 Cal. 518 (1902).
(15) 5 Peters 319.

adverse party, to him who has the better title. If a man enters into land having title, his seisin is not bounded by his occupancy but is held to be co-extensive with his title; but if a man enters without title his seisin is confined to his possession by metes and bounds. Where two persons are in possession of land at the same time under different titles, the law adjudges him to have the seisin of the estate who has a better title. Both cannot be seised. Their seisin follows the title. If therefore a mere trespasser without any claim or pretence of title, enters into the land and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter, but in such cases the possession of the trespasser is bounded by his actual occupancy, and consequently the true owner is not disseised except as to the portion so occupied. It follows consequently that if the true owner be in possession of a part of the land, claiming title to the whole, then his seisin extends by construction of law to all land which is not in the actual possession or occupancy by enclosure or otherwise of the party claiming adversely as a trespasser, or under a defective deed or title. This principle has been repeatedly affirmed, see *Hunny Cutt* v. *Peyton* (16), *De Burton* v. *Young* (17) and *Smith* v. *Gale* (18). It follows consequently that if a Plaintiff establishes by evidence, direct or presumptive, his possession actual or constructive, of the disputed land in Bharkalwar within 12 years of the suit, and if the Defendants are called upon to prove their case of adverse possession for over 12 years, in respect of any portion of those lands, the evidence as to their possession must be carefully scrutinized. It must be found in respect of each parcel of land whether the possession of the Defendants has extended over 12 years, and such possession, if any, must be actual occupation.

The result therefore is that this appeal must be allowed in part, and the decree of the District Judge modified. So far as the 1345 *bighas* of jungle and *bill* lands and 62 *bighas* of cultivated lands in Gordag are concerned, the appeal must be dismissed, and the decree of the District Judge affirmed. So far as the 138 *bighas* of cultivated lands in Bharkalwar are concerned, the appeal must be allowed and the decree of the District Judge reversed. The case in so far as it relates to these 138 *bighas*, will be remanded to the District Judge in order that he may rehear the appeal in accordance with the observations contained in this judgment.

As regards the cost of this appeal, the Respondents have succeeded to a substantial extent. They will therefore have half the cost of this appeal the other half of the costs of this appeal will abide the ultimate result.

Let the records be sent down at once.

S. C. S. *Case remanded.*

---

(16) 102 U S. 333.
(17) 134 U. S. 255.
(18) 144 U. S. 526.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 89 OF 1907.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard, 3, January.
Judgment, 13, January.

HARISH CHANDRA MONDOL, Opposite Party, Appellant,
v.
JAGABANDHU DUTTA and another, Petitioners, Respondents.

Transfer of Property Act (IV of 1882), secs. 89, 104—Mortgage decree—Execution—Adjustment—Power of Executing Court to enforce—Civil Procedure Code (Act XIV of 1882), secs. 244, 258.

After the order absolute for sale was passed the mortgagee agreed upon receipt of certain sums of money to give up his claim for compound interest and to allow a certain remission,

Held—*That the Court executing the decree was competent to give effect to the adjustment.*

BIBIJAN BIBEE *v.* SACHI BEWA (1) *applied.*

Quære—*Whether sec. 258 of the Civil Procedure Code applies to proceedings in execution of a mortgage decree.*

DAKSHINA MOHAN *v.* BASUMATI DEBI (5) and HATEM ALI *v.* ABDUL GAFFUR KHAN (6) *referred to.*

This was an appeal preferred on the 11th of March 1907, against an order of A. Goodeve, Esqr, District Judge of Zillah Birbhum, dated the 7th of January 1907, affirming that of Babu Durga Das Chakrabutti, Munsif, 2nd Court at Rampur Hat, dated the 4th of September 1906.

(1) 8 C. W. N. 684: s. c. I L. R. 31 Cal. 863 (1904).
(5) 4 C. W. N. 474 (1900).
(6) 8 C. W. N. 102 (1903).

The appeal arose out of an application purporting to be made under secs. 244 and 258, C. P. C. The Petitioners borrowed Rs. 149 from the opposite party in Assar 1304 and executed a mortgage-bond agreeing to pay interest and compound interest upon it as stipulated. A suit was brought on the basis of the bond and the opposite party got a decree for Rs. 313 and costs. The mortgaged property was then advertised for sale and 19th June 1906 was fixed for the sale to take place. On that date, the Petitioners paid Rs. 39 to the opposite party and sale was postponed till 19th July with his consent. On the 20th July (the case having been put up for other urgent matters) the opposite party filed a petition stating receipt of Rs. 136 from Petitioners in the meantime, and sale was postponed till 20th August. On the 21st Petitioners filed the present petition claiming part satisfaction of the decree, their case being that they had requested the opposite party to grant them instalments but he had refused but said that if they could pay Rs. 136 to him on 10th Assar he would give up the amount decreed for compound interest and Rs. 80 in addition, and the said amount of Rs. 136 was accordingly paid.

Both the lower Courts found that the adjustment alleged by the Petitioners had in fact taken place, and an order was made directing execution for the balance of the decretal amount left after such adjustment.

The decree-holder preferred this second appeal.

Babu Nalini Ranjan Chatterjee for the Appellant.

Babu Siba Prosunno Bhuttacharjee for the Respondents.

HARISH CHANDRA MONDOL v. JAGABANDHU DUTTA.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—This is an appeal against the dismissal by the District Judge of Birbhoom of an appeal against an order by a Munsif ordering an adjustment under secs. 244, 258 of the Code of Civil Procedure. The facts are simple. The Appellant before us was decree-holder in a mortgage suit brought against the Respondent who was mortgagor. The suit had proceeded as far as the making an order absolute for sale under sec. 89 of the Transfer of Property Act, but no sale had actually been made, when the decree-holder accepted two sums of Rs. 39 and Rs. 136 from the mortgagor on the terms he would give up his claim for compound interest and a sum of Rs. 80 in addition. The only point raised in the Court below was that no order could be made under those portions of the Civil Procedure Code that are not embodied in the Transfer of Property Act by means of rules under sec. 104.

In this Court the Appellant contends that the decree having been made absolute under sec. 89 of the Transfer of Property Act the only way in which a legal effect could be given to the payment of money in respect of debt on which the decree was founded was by a certified payment or adjustment under sec. 258 of the Code, and that the authorities show that this section does not apply to such a decree.

The first part of this contention seems to me unsound. It has been laid down by a Full Bench of this Court in *Bibijan Bibee* v. *Sachi Bewa* (1) that a mortgagor does not lose his right to redeem when an order for sale is made absolute under sec. 89, Transfer of Property Act, but retains it till the sale has actually taken place. If he can redeem in full, there seems to be no reason why he should not redeem in part. It may be that the account taken under sec. 86 cannot be reopened; but there is nothing in the Act to prevent the exercise of the Court's equitable powers to make allowance on the basis of the account for any payment made by the mortgagee while it is still open to him to make such a payment. If this is so, the Munsif had power to make the order in this case irrespectively of secs. 244 and 258 of the Code; and it becomes unnecessary for me to consider the question whether the present order can be supported under these sections which are not embodied in the rules made under sec. 104, Transfer of Property Act. I need not, therefore, discuss the authorities that have been quoted before us to show the effect to be given to the provision of the Code in the application of the Act. Though the order in the Court below is correct it must not be taken that I approve of the reasons there given. The appeal is dismissed with costs.

We assess the hearing-fee at three gold mohurs.

MOOKERJEE, J.—This is an appeal from an order made in the course of a proceeding for the enforcement of a mortgage decree. The question in controversy between the parties was as to the amount for the realization of which the decree-holder was entitled to take out execution. It was alleged on behalf of the judgment-debtors that in the course of a previous

(1) 8 C. W. N. 684 : S. C. I. L. R. 31 Cal. 863 (1904).

HARISH CHANDRA MONDOL *v.* JAGABANDHU DUTTA.

execution some payments had been made in partial satisfaction of the decree and that the parties had come to an adjustment under which the decree-holder had agreed to give up his claim for compound interest and to allow a certain remission. It has been found by the Courts below that the adjustment alleged by the judgment-debtors is established by the evidence and this finding is not challenged before this Court. But it is argued that the Courts below had no jurisdiction to deal with the matter of adjustment inasmuch as sec. 258, C. C. P., has not been made applicable to the execution proceedings on the basis of mortgage decrees by the rules framed by this Court under sec. 104 of the Transfer of Property Act. This contention which has been overruled by the Courts below is sought to be supported by a reference to the decision of this Court in the cases of *Kedar Nath* v. *Kali Charan* (2) and *Sham Kissen* v. *Sunder Koer* (3). It is broadly contended that as sec. 258, C. P. C., is not mentioned in the rules framed by the High Court it is not applicable to proceedings in execution of a mortgage decree and that consequently the Court has no power to deal with the question of adjustment alleged by the judgment-debtors. There may perhaps be some expression in the judgment of this Court in the case of *Kedar Nath* v. *Kali Charan* (2) which may lend some apparent support to the argument, but in my opinion the contention is unfounded. It is conceded by the learned vakil for the Appellant that if his contention is carried to its legitimate conclusion he would not be entitled to be heard before this Court at all, for sec. 244, C. P. C., is not one of the sections mentioned in the rules and unless the order of which the Appellant complains is treated as one made under that section, the appeal is incompetent. It is not necessary for the purposes of the present appeal to consider the scope of sec. 104 of the Transfer of Property Act or the effect of the rules framed thereunder. Upon this point there has been some difference of judicial opinion, see *Mulika Gunnoda* v. *Linga Murli* (4) and *Kedar Nath* v. *Kali Charan* (2). It is quite clear, however, that the powers of the Court which are called upon to execute a mortgage decree are not confined within the four corners of the rules framed under sec 104 of the Transfer of Property Act. As explained in *Dakshina Mohan* v. *Basumati Debi* (5) sec. 104 is an enabling section and the rules made by the High Court under the provisions of that section do not limit the applicability of the provisions of the Code of Civil Procedure as regards sales held in execution of mortgage decrees. It may be pointed out that the contrary view put forward on behalf of the Appellant would lead to the anomaly that as rules were not framed till 1892, that is, more than 10 years after the Transfer of Property Act had been passed, there could not have been in the interval any execution of mortgage decrees. Much stress was laid on behalf of the Appellant upon the decision of this Court in the case of *Hatem Ali* v. *Abdul Gaffur Khan* (6)

(2) I. L. R. 25 Cal. 703 (1898).
(3) I. L. R. 31 Cal. 373 (1904).

(2) I. L. R. 21 Cal. 703 (1898).
(4) I. L. R. 25 Mad. 244 at p. 271 (1900)
(5) 4 C. W. N. 474 (1900).
(6) 8 C. W. N. 102 (1903).

HARISH CHANDRA MONDOL v. JAGABANDHU DUTTA.

in which the learned Judges appear to have expressed an opinion that sec. 258, C. P. C., is not applicable to applications under sec. 89 of the Transfer of Property Act. Upon closer examination, however, it is plain that the decision relied upon is of no assistance to the Appellant. The learned Judges held that the execution Court has full power to ascertain what balance of the mortgage debt is really outstanding at the time of the application and to make the order absolute for the realisation of that amount only. It seems to me to be obvious that a Court which is competent to execute a mortgage decree is not only competent, but that it is also its duty, to determine how much is due and realisable under the decree at the time when execution is sought. If an adjustment is pleaded it raises a question relating to the execution or satisfaction, partial or otherwise, of the decree and no intelligible principle has been suggested why the powers of the execution Court should be deemed to be so restricted as not to cover an enquiry of this description. As pointed out by this Court in the case of *Bibijan Bibee* v. *Sachi Bewa* (1) a mortgagor has the right to redeem at any time until the sale of the mortgaged property has been completed and sec. 89 of the Transfer of Property Act does not prohibit the exercise of such right after the passing of an order absolute for sale and before the sale under such order has really taken place. If so, it is indisputable that the Court is competent after the order absolute has been made and before the sale actually takes place, to investigate whether the decree has or has not been adjusted in whole or in part. It follows, therefore, that whether sec. 258 of the Code of Civil Procedure be or be not treated as applicable to proceedings in execution of mortgage decrees, it was quite competent to the Courts below to deal with the matter of adjustment under sec. 89 of the Transfer of Property Act and sec. 244 of the Code, *Ram Kamlessuri* v. *Sukhan Singh* (7). In this view of the matter the decision of the Courts below is manifestly right and ought to be affirmed.

N. G. *Appeal dismissed.*

(1) 8 C. W. N. 681: s. c. I. L. R. 31 Cal. 863 (1904).

(7) 7 C. W. N. 172 (1902).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 492 OF 1905.

MITRA, J. CASPERSZ, J. 1907. Heard, 2 and 3, December. Judgment, 11, December.	IJATULLA BHUYAN and ors., Judgment-debtors, Appellants, *v.* CHANDRA MOHAN BANERJEE, Decree-holder, Respondent.

*Civil Procedure Code (Act XIV of 1882), sec. 211—Mesne profits—*Khamar *land—Interest.*

In determining the amount of mesne profits payable in respect of khamar *land, 5 per cent. on the value of the actual produce was held to be a sufficient allowance to meet the costs of supervision and any other incidental charges for which a proprietor who is not an ordinary cultivator of his* khamar *land may be liable.*

Principle upon which mesne profits of khamar *land should be assessed discussed.*

IJATULLA BHUYAN *v.* CHANDRA MOHAN BANERJEE.

Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by sec. 211, C. P. C.

Interest at 6 per cent. and not 12 per cent. was allowed on mesne profits after possession was delivered.

This was an appeal preferred on the 11th of November 1905, against the order of Babu Ananda Nath Mojumdar, Subordinate Judge, 1st Court of Zillah Mymensingh, dated the 8th of August 1905.

The facts of the case appear from the judgment.

Dr. Rash Behari Ghose, Babus Dwarka Nath Chuckerbutty, Joy Gopal Ghosh, Gobinda Chandra Dey Roy and *Mohini Mohan Chatterjee* for the Appellants.

Babus Tara Kishore Chowdhury, Nogendra Nath Mitter, Chandra Kant Ghose and *Bidhu Bhusan Ganguly* for the Respondent.

The JUDGMENT OF THE COURT was delivered by

CASPERSZ, J.—This appeal arises out of an application by the decree holder Respondent for the judicial ascertainment of mesne profits of certain lands for the period extending from 29th March 1893 up to 27th or 28th December 1899 being the date of delivery of possession. The decree-holder obtained a decree for 5 annas 5 gundas share of a certain revenue-paying taluk. It was not determined what the boundaries of the taluk were, but it was held that a purchaser in the position of the Plaintiff was not bound to recognise any previous partition not made by the Collector. The Plaintiff, therefore, obtained a decree for an undivided share, together with mesne profits, and the Defendant's alleged *sikmi* taluk was set aside. The decree of the first Court was affirmed on appeal by the High Court on the 20th June 1899. Proceedings in execution were taken in due course, and on the 21st April 1903, a Division Bench of this Court (Rampini and Handley, JJ.) interpreted the decree so as to secure to the decree-holder possession of certain specific plots of land as appurtenant to the share of 5 annas 5 gundas decreed to him. We cannot, in any way, discuss or vary the interpretation so arrived at. In the assessment of mesne profits, two different principles must be adopted, one applicable to the case of the rent-paying lands, or *jote* lands, and the other applicable to the case of the specific plots which we have mentioned and which we may call the *khamar* lands.

A Civil Court Amin was deputed to make the necessary local enquiries. His report is before us, and we have, also, referred to the *ekwal*, or abstract, prepared by him. The Civil Court Amin found that the total amount of mesne profits, including the rents for the *jote* lands and the price of the produce of the *khamar* lands, came up to Rs. 16,304-8 as. 0 pice 13½ krants. From this sum he deducted on account of expenditure, that is to say, collection charges at 10 per cent. and the costs of cultivation, Rs. 5,358-6-5-13½, the resultant amount of mesne profits being Rs. 10,946-1-7. These conclusions have been accepted by the learned Subordinate Judge in his order from which the present appeal has been preferred. But the decree of the learned Subordinate Judge brings

up the amount of mesne profits to Rs. 22,335-7-7-11 which figure has been calculated so as to include interest at 12 per cent. on the various sums accruing for the successive years from 29th March 1893 to 7th August 1905 the latter date being the day preceding the day on which the decree was made.

The judgment-debtors have appealed against the decree awarding mesne profits for the amount we have mentioned, and the contention before us are four in number; *first*, as to the true principle of assessment to be adopted; *secondly*, as to the apportionment of the total sum between the several judgment-debtors; *thirdly*, as to the deductions that should be made from the value of the produce of the *khamar* lands on account of the risk and supervision of the cultivation carried on by persons in the position of the decree holder; and, *fourthly*, as to the rate of interest at 12 per cent. allowed by the learned Subordinate Judge.

With regard to the first contention, we observe that the only difficulty that arises is in respect of the *khamar* lands. The contention, as we understand it, is that the decree-holder, not being himself a cultivator, should not be allowed mesne profits calculated on the price of the actual produce. Our attention has been called to the cases of *Surji Pershad Narain* v. *Reid* (1) and *Laljee Shahay* v *Walker* (2), and it has been further urged on the authority of the case of *Raghu Nandan Jha* v. *Jalpa Pattap* (3) that a decree-holder in the position of the present Respondent cannot equitably obtain more than a fair and reasonable rent for the lands, if those lands had been let out to tenants during the period of unlawful occupation by the judgment-debtors. The true principle, as it seems to us, deducible from the authorities is that, on the facts of the present litigation, the decree-holder must be regarded as the potential, and therefore the actual cultivator of the specific plots which were cultivated by the judgment-debtors from whom he succeeded in obtaining possession. The occupation of *khamar* lands in the direct cultivation of the *maliks* very nearly approximates to the occupation of *raiyati* lands held by ordinary cultivators. In some instances the proprietor cultivates his *khamar* land by means of his own ploughs, utilizing the labour of his servants; in other cases, he may not take so much personal interest in the cultivation of such lands, and may prefer to employ hired labour and to exercise the necessary supervision over the cultivation by means of paid agents or factors. It does not, however, make any difference as to the principle upon which a proprietor is equitably entitled to receive mesne profits for *khamar* lands which have been in the wrongful cultivation of others and from which they did not get anything in the shape of rent. The judgment-debtors withheld their papers, and the utmost that they can urge on the facts of the present case, is that the learned Subordinate Judge ought to have deducted some percentage, in addition to the ordinary costs of cultivation which have been allowed by the Civil Court Amin. That percentage, we think, may fairly be calculated, in the

(1) 6 C. W. N. 409 (1902).
(2) 6 C. W. N. 732 (1902).
(3) 3 C. W. N. 748 (1897).

IJATULLA BHUYAN v. CHANDRA MOHAN BANERJEE.

case of *khamar* lands, at half the usual rate on account of collection charges allowed in the case of rent-paying or *jote* lands. The term 'collection charges,' in the latter case, would include a larger establishment, and it would be much more elastic than the ordinary cost of supervising what may be called home-cultivation. We think that 5 per cent. on the value of the actual produce of the *khamar* lands may be regarded as a sufficient allowance to meet the costs of supervision and any other incidental charges for which a proprietor, who is not an ordinary cultivator of his *khamar* lands, may be liable, and to that extent the judgment-debtors may benefit in the calculation of the mesne-profits which they should be called upon to pay. These observations dispose of the first and third contentions on behalf of the judgment-debtors.

There is no force in the second contention, that is, as regards the apportionment which the judgment-debtors urge should be made as between themselves. The case cannot be sent back to the lower Court at this stage for an enquiry to be held into the different degrees of interest they possessed in the different plots held by them, in virtue of their alleged *sikimi* right, before possession was delivered to the decree-holder. The decree was passed against all the judgment-debtors jointly; their *sikimi* was not set aside; and we entertain no doubt that the possession of a 5 annas 5 gundas share in the taluk carries with it a right to obtain mesne profits not merely from the individual *sikimidars*, but from the entire body of the judgment-debtors who were in possession of that share. The *sikimi* taluk set up by the judgment-debtors extended to that share, the specific plots—in respect of which mesne profits have been calculated on the basis of actual produce—were integral parts of the share purchased by the decree-holder; and this view having been affirmed by this Court on appeal, the question is no longer open to discussion. The Defendants other than Defendants Nos. 2, 3, 29 and 30 are not also before us, the latter four Defendants having appealed against the Plaintiff without making the other Defendants parties to the appeal, and we cannot make any order affecting their interest in their absence.

The remaining contention, however, is one which ought to prevail. We may observe that no objection was taken in the Court below or before us with regard to the period limited by the terms of sec. 211 of the Code and the extended period of over six years for which mesne profits have been allowed in the present case. No doubt, a claim for mesne profits includes, and must include, interest on such mesne profits. This was pointed out by their Lordships of the Judicial Committee in the case of *Girish Chandra Lahiri* v. *Sasi Sekhareswar Roy* (4). Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by sec. 211 of the Code, and, in the exercise of a proper discretion, the higher rate of 12 per cent. should, in our opinion, cease after December 1899 when possession was obtained by the decree-holder. The annual rate of interest al-

(4) L. R. 27 I. A. 110 (124): s. c. I. L. R. 27 Cal. 951 (1881).

IJATULLA BHUYAN v. CHANDRA MOHAN BANERJEE.

lowed by the Court on money decreed and pending realization by process or awaiting enquiry in ascertainment conducted by order of, or before, the Court is 6 per cent. only, and the account must be taken to have been made up, as against the judgment-debtors, from the date when the decree-holder superseded them in possession of the lands decreed. In other words, the penal rate, as we may call it, of 12 per cent. should terminate when the wrong doing of the Defendants came to an end and, thereafter, the usual Court rate should be allowed.

The result is that mesne profits must be ascertained on the principles which we have indicated and which were the principles adopted by the lower Court, but subject to a deduction of 5 per cent. on the produce of the *khamar* lands. In making the calculation of interest, the higher rate of 12 per cent. will be limited to the annual amounts accruing from the 29th March 1893 up to the end of December 1899, year by year, and the lower rate of 6 per cent. will be applied from the 1st January 1900 up to 7th August 1905, the dates being taken from the decree of the Subordinate Judge.

Costs will be in proportion to the success of the judgment-debtor Appellants and the decree-holder Respondents.

S. C. S. *Decree modified.*

CIVIL APPELLATE JURISDICTION.

APPEALS FROM APPELLATE DECREES
NOS. 201 AND 318 OF 1906.

BRETT, J. CHITTY, J. 1908. Heard, 3, January Judgment, 13, January.	MOULVIE ABDUS SUBHAN and ors., Defendants, Appellants, v. KURBAN ALI and ors., Plaintiffs, Respondents.

Mahomedan law—Wahabis, right of, to worship at Sunni mosques—Restrictions to its exercise—Special dedication of mosque for use of a particular sect—Validity

Quære—*Whether according to the Mahomedan Ecclesiastical law, a mosque can be specially dedicated for the use exclusively of the Hanafi sect of Sunni Mahomedans.*

Persons belonging to the amil-bil-hadi *(or Wahabi) sect of Mahomedans are entitled to worship at mosques chiefly used by the Hanafi sect and use the loud toned* amin *and raise the hands above the knee during worship.*

ATA-ULLAH v. AZIM-ULLAH (2) and FAZL KARIM v. MOULA BAKSH (3) *relied on.*

In making a declaratory decree that the Plaintiffs were entitled to worship in accordance with the Wahabi rituals, the Court imposed the condition that in exercising this right the Plaintiffs should not interrupt or disturb the worship of others.

These were appeals preferred on the 16th of February 1906, against the decrees of T. W. Richardson, Esq., District Judge of Zillah Patna, dated the 31st of October 1905, reversing those of

(2) I. L. R. 12 All. 494 (1889).
(3) I. L. R. 18 Cal. 448 (1891).

MOULVIE ABDUS SUBHAN *v.* KURBAN ALI.

Babu Joy Proshad Pandey, Munsif, Patna, dated the 27th of May 1905.

The appeals arose out of a dispute relating to the right claimed by the Plaintiffs who belonged to the *amil-bil-hadi* sect of Sunni Musulmans to worship at certain mosques, built by Musulmans of the Hanafi sect of Sunnis primarily for the use of members of that sect. The difference between the two sects lay chiefly in certain matters of ritual, and is noted in the judgment. The District Judge before whom the case came on the Plaintiffs' appeal from the decision of the Munsif passed a decree in favour of the Plaintiffs declaring their right to worship, but in view of the fact that the right declared might be abused made the declaration subject to the proviso "that in the exercise of their rights the Plaintiffs are subject to the general law of the land"

The Defendants preferred this second appeal.

Moulvies Syed Shamsul Huda and *Mahomed Ishfaq* for the Appellants.

Moulvies Mahomed Yusuf, Abdul Jawad and *Babu Biraj Mohan Majumdar* for the Respondants.

The JUDGMENT OF THE COURT was as follows :—

These are two appeals from decrees of the District Judge of Patna reversing (except as to the Defendant Abdul Karim) decrees of the Munsif of Patna and granting the Plaintiffs the reliefs claimed by them in their respective plaints but declaring that in the exercise of their rights the Plaintiffs are subject to the general law of the land. The suits were brought to establish the Plaintiffs' rights to say their prayers and perform other religious duties in two mosques, one in Mohalla Mahamedpur, Shahganj, and the other in Mohalla Bak-sariatola, Chowki Sultanganj, Patna, and further to restrain the Defendants from interfering with such rights. The questions at issue are common to both suits, and were disposed of, both in the Court of first instance and the lower Appellate Court, in one judgment. The same course may be conveniently followed with regard to these two appeals. The Appellants before us are Defendants 1 to 4, 6, 7 and 8, and the active Respondents are the Plaintiffs. A number of issues were raised in the Court of first instance relating to limitation, procedure, joinder of parties and so forth. These were decided in the Plaintiffs' favour. The lower Appellate Court declined to consider them, on the ground that they were not made the subject of a cross-appeal. They have been again put forward in the grounds of appeal before us, but no argument has been addressed to us in respect of them. The sole question laid before us has been as to the right of the Plaintiffs to worship at these mosques, and that is the only point for our determination.

The findings of fact which we must accept are shortly these :—The mosques in question appear to have been built by Musulmans of the Hanafi sect primarily for the use of members of their own sect. They have been used by Hanafis and as a general rule by Hanafis only. The lower Appellate Court has declined to find that either or both the mosques were expressly reserved for the use of the Hanafis. Such an inference

MOULVIE ABDUS SUBHAN *v.* KURBAN ALI.

could not properly be drawn from the evidence on the record. It might also be questioned whether such a special dedication would be in accordance with Mahomedan Ecclesiastical law. The Plaintiffs and Defendants all belong to the Sunni sect of Musulmans. The Plaintiffs, however, belong to a school known as *amil-bil-hadis* or as their opponents style them Wahabis and are regarded unorthodox by the general body of Hanafis to which the Defendants belong. The difference between them is not so much (if at all) in matters of belief, as of ritual. The *amil-bil-hadis* employ the loud toned 'amin' and the raising of hands (rafaa eddain), while the others pronounce the 'amin' in a low tone and do not raise the hands above the knee. These points of ritual though seemingly unimportant in themselves have led to much difference of opinion among Musulmans and consequent litigation. The earliest reported case was a criminal one, *Empress* v. *Ramzan* (1). In that case Mahmood, J., expressed an opinion that the accused was at liberty to say 'amin' in a loud tone and was justified in entering the mosque and worshipping with the congregation, even though he used the loud toned 'amin.' The question in that case was whether there had been an offence under sec. 296, I. P. C., and the majority of the Full Bench concurred in remanding the case for further enquiry as to the facts.

The question came again before the Allahabad High Court in the case of *Ata-ullah* v. *Azim-ullah* (2). There the Full Bench held that members of the Wahabi sect (as are the Plaintiffs here) were Mahammadans and as such entitled to perform their devotions in a mosque though they might differ from the majority of Sunnis on certain points. Those points were the same as are in issue in this case. The learned Chief Justice there expressed an opinion that a Mahammadan would bring himself within the grasp of the criminal law who not in the *bonâ fide* performance of his devotions but *malâ fide* for the purpose of disturbing others engaged in their devotions made any demonstration, oral or otherwise, in a mosque and disturbance was the result.

Lastly in an appeal from this Court in the case of *Fazl Karim* v. *Moula Baksh* (3) their Lordships of the Privy Council upheld the right of an Imam to officiate in a mosque even though he belonged to the *amil-bil-hadis* or Wahabis, and adopted the loud toned 'amin' and the raising of hands (rafaa eddain). It appears clear from these decisions that the Plaintiffs have the right to worship in the mosques in question and that they cannot be debarred from the exercise of such right on the ground of their views in the matter of ritual. This was not seriously contested by the Appellants. What they chiefly desire is that some restriction should be placed upon the Plaintiffs by the Court in declaring their right so as to prevent, so far as may be possible, a breach of the peace or unseemly disturbance in the mosques. This appears to us reasonable. The granting of declaratory relief is discretionary with the Court and there seems no reason why it should not make the

(1) I. L. R. 7 All. 461 (1885).
(2) I. L. R. 12 All. 494 (1889).
(3) I. L. R. 18 Cal. 448 (1891).

MOULVIE ABDUS SUBHAN *v.* KURBAN ALI.

declaration in such a form as will grant the relief claimed and yet provide against n abuse of the right accorded. The learned District Judge has taken this view but we think that his declaration that "in the exercise of their rights the Plaintiffs are subject to the general law of the land" is too vague to be of much practical assistance to the Appellants. We think that if the declaration in avour of the Plaintiffs be accompanied by the proviso that the Plaintiffs in the exercise of their rights of worship do not interrupt or disturb the worship of others it will meet the requirements of the case. We may say that we entirely agree with the *dictum* of the learned Chief Justice of Allahabad to which we have above referred. With this modification the decrees of the lower Appellate Court will be confirmed. We think that each party should bear their own costs of these appeals.

N. G. *Decree modified.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 169 OF 1906.

BRETT, J.
WOODROFFE, J.
1907.
Heard, 11, 12 & 13, November.
Judgment, 20, November.

MOHABIR TEWARI and others, Plaintiffs, Appellants,
v.
PURBHOO NATH CHOWBEY and anr., Defendants, Respondents

Res judicata—*Civil Procedure Code (Act XIV of 1882), sec. 13, Expl. II—Successive purchase of the same land at two execution sales—Suit to set aside one such sale—Purchaser's defence—Whether he is bound to set up title acquired at the other sale—Ground of defence which "ought to" have been taken.*

A purchased village S in execution of a decree obtained by him against C in the Small Cause Court. Subsequently A through B instituted a mortgage suit against C and in execution of the decree obtained therein purchased some lands in the same village S. C instituted two suits, one to set aside the sale in execution of the Small Cause Court decree and the other to set aside the decree and sale in the mortgage suit. The latter suit was dismissed for default, but the former succeeded. In this suit, A did not set up as a ground of his defence the title obtained by him at the mortgage sale,

Held—*That A was not bound to do so, and a suit by A to recover the lands in village S purchased at the mortgage sale is not* res judicata *under Expl. II of sec. 13 of the Civil Procedure Code.*

Per BRETT, J.—*Expl. II of sec. 13 of the Civil Procedure Code refers to the title litigated in the former suit as distinguished from the relief claimed. When several independent grounds of action are available, a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action. This rule equally applies to the converse case of a Defendant when pleading in his defence.*

PITTAPUR RAJA *v.* VENKATA MAHIPATI SURYA (6) and RAMASWAMI AIYAR *v.* VITHINATI AIYAR (5) *relied on.*

This was an appeal preferred on the 12th of February 1906, against the decree of M. Smither, Esq., District Judge

(5) I. L. R. 26 Mad. 760 (1902).
(6) L. R. 12 I. A. 116 (1885).

MOHABIR TEWARI *v.* PURBHOO NATH CHOWBEY.

of Zillah Shahabad, dated the 4th of January 1906, reversing the decree of Babu Nistaran Banerjee, Subordinate Judge of that district, dated the 10th of July 1905.

The Plaintiffs in this suit were certain persons who may be conveniently described as the Tewaris. Plaintiffs Nos. 1 to 4 were the sons and Plaintiffs Nos. 5 to 7 were the grandsons of one Mussummat Bihansa Koer deceased.

There was a mortgage-bond in her favour executed by Budhan and Mahabir and Mahadeo, who may be described as the predecessors-in-title of the Defendants in this suit. The mortgage was for Rs. 1,200, and under the deed, bighas 49-10 of land in Mouzah Sugin Bal (?) out of the *milkiat* of the mortgagors, was hypothecated. A suit on this mortgage bond was instituted by Bihansa Koer and it was contested by Mussummat Lachminia Koer, Sheo Gobind and others, the heirs of the original mortgagors: a mortgage decree however was passed in favour of Mussummut Bihansa on the 27th February 1890, and this was confirmed on appeal on the 7th October 1890. In execution of the mortgage decree, the mortgaged property was sold and purchased by the decree-holder herself on the 7th January 1897. Possession however was not taken till 1st July 1900.

Sheo Gobind and others, the heirs of the original mortgagor, then brought a suit to set aside Bihansa Koer's sale on the mortgage decree. That suit was dismissed for default on 7th May 1901.

The Defendant No. 1, Purbhoo Nath Chowbey, was the purchaser of Mouzah Sugin Bal, under a *kobala*, dated 5th May 1903. On the death of Mussummat Bihansa the Plaintiffs as her heirs applied to have their names registered in the Collectorate with respect to a certain share of Mouzah Sugin Bal respecting the bighas 49-10 of the *milkiat* land. On Purbhoo Nath Chowbey's objection, the Collector disallowed the application for registration, setting aside the Deputy Collector's order directing registration. The Collector's order was upheld by the Commissioner. Hence, the present suit for a declaration that the Plaintiffs were entitled to have their names registered with respect to the bighas 49-10 or such share in Mouzah Sugin Bal as was represented by or equivalent to that area.

The principal defence set up was that the suit was *res judicata* under the following circumstance: That Sheobaran Tewari, the brother of the present Plaintiffs, brought a suit on a simple mortgage-bond for Rs. 99, dated 30th Ashar 1291, purporting to have been executed by the predecessors of the Defendants and recovered a money-decree in the Small Cause Court on the 21st March 1888. In execution of that decree, Sheobaran caused the entire Mouzah Sugin Bal to be sold and purchased it himself. On 30th September 1899 the Defendants instituted a suit to set aside the above sale on the ground of fraud, &c., and this suit was decreed. In that suit Mussamat Bihansa was not made a party. It was however alleged by the Defendants that in the mortgage suit Bihansa was merely the *benamdar* of the Tewaris, that the Tewaris having failed, in the Defendants' suit to set aside the sale in execution of the above Small Cause Court decree, to put forward

MOHABIR TEWARI *v.* PURBHOO NATH CHOWBEY.

their title based on the said mortgage sale, their present claim was barred under Expl. II of sec. 13 of the Civil Procedure Code.

The Subordinate Judge decreed the Plaintiffs' suit. But his decision was reversed on appeal before the District Judge.

Plaintiffs preferred this second appeal.

Babus Umakali Mukherjee and *Makhun Lal* for the Appellants.

Mr. O'Kinlealy (*Advocate-General*) with *Babus Raghu Nath Singh* and *Chandra Sekhar Pershad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

BRETT, J.—The present appeal arises out of a suit brought by the present Plaintiffs Appellants to have their right declared in 49½ bighas of land in village Sajibala, and to have their names registered in the Collectorate as proprietors of those 49½ bighas. It appears that they had applied in the Land Registration Department of the Arrah Collectorate in July 1903 to have their names registered as proprietors of this property claiming title as purchasers in execution of a mortgage decree at a sale held on the 3rd January 1897. The Deputy Collector allowed the application but on appeal the order of the Deputy Collector was set aside by the Collector of Arrah and the decision of the Collector was confirmed by the Commissioner of the Division on the 18th June 1904.

The only point urged in defence which is of importance for the purpose of this appeal was that the Plaintiffs were barred by the doctrine of *res judicata* under the provisions of sec. 13, Expl. (2) of the Code of Civil Procedure. The explanation runs as follows :—"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The Plaintiffs-Appellants all form members of one family of Tewaris descended from one Mussummat Bihansa Koer and her husband Hanker Singh Tewari. The Defendants on the other hand are members of a family of Singhs descended from Mussummat Lachminia Koer and her husband Babu Bhugwan Singh.

On the 1st March 1888 a suit was brought by Sheobaran Tewari, the father of Plaintiffs Nos. 5, 6 and 7, and the brother of the other Plaintiffs, in the Small Cause Court against Mohabir Singh and Budhan Singh, the father of Defendants Nos. 4, 2 and 3, on a bond for Rs. 100 said to have been executed by these two persons in favour of Sheobaran Tewari, on the 8th July 1884. An *ex parte* decree was obtained on the 21st March 1888 and in execution of the same the decree-holder Sheobaran Singh sold the whole village Sujibal on the 7th May 1890 and purchased it himself.

On the 2nd May 1884 a mortgage-bond for Rs. 1,000 is said to have been executed in favour of Bihansa Koer, ancestors of the Plaintiffs, by the predecessor of Defendants Nos. 2 to 4 by which 49½ bighas of Mouzah Sujibal were hypothecated as security for the debt. A suit was instituted in 1889 (No. 91 of 1888) by Bihansa Koer against the present Defendants Nos. 2, 3 and 4, and

MOHABIR TEWARI v. PURBHOO NATH CHOWBEY.

a decree was obtained on the 27th February 1890: The Defendants appealed but their appeal was dismissed on the 7th October 1890. On the 3rd January 1897 the mortgaged property was sold and purchased by the decree-holder, Bihansa Koer.

On the 30th September 1899 a suit was brought by the present Defendants (2, 3 and 4) to have set aside the *ex parte* Small Cause Court decree of the 21st March 1888 and the sale under that decree held on 7th May 1890 on the ground that the bond and the proceedings based on that bond were fraudulent.

On the 13th January 1900 the same Defendants brought another suit to have the mortgage decree of the 27th February 1890 and the sale under that decree of the 3rd January 1897 set aside on the ground that the mortgage-bond and the proceedings based on that bond were fraudulent. This latter suit was dismissed for default on the 7th May 1901. Bihansa Koer, it is to be observed, had died in January or February 1901.

The suit to set aside the Small Cause Court decree and the sale thereunder was decreed in favour of the then Plaintiffs, the present Defendants Nos. 2, 3 and 4, on the 20th December 1900, and that decision was affirmed on appeal on the 12th June 1903.

The present suit was instituted on the 27th September 1904 and the main ground of defence taken by the Defendants was that the Plaintiffs were not entitled to succeed in the suit because they had failed in their defence in the suit instituted on the 30th September 1899 to set aside the Small Cause Court decree to set up the title under which in the present suit the Plaintiffs seek to have their right declared in the 49½ bighas of land in Mouzah Sujibal.

The Subordinate Judge decreed the Plaintiffs' suit, but on appeal the District Judge set aside the judgment and decree of the Court of first instance and dismissed the Plaintiffs' claim on the ground that it was barred by the provisions of sec. 13, Expl. (2) of the Code of Civil Procedure.

In support of the appeal it has been argued, *first*, that the subject-matter of the suit brought on the 20th September 1899 by the Defendants to set aside the Small Cause Court decree did not cover the property in claim in the present suit and therefore sec. 13, Expl. (2) did not impose on the present Plaintiffs-Appellants any duty in that suit to set up as part of their defence the title which they claimed under the sale in execution of the mortgage decree; *secondly*, that even though it may be a matter which they might have pleaded in their defence in that suit, it was not a matter which it can be held that they ought to have pleaded in their defence; and, *thirdly*, that even assuming that it is now open to the present Defendants to raise the objection which they have raised in their defence, still as they were parties to the previous mortgage suit which was decided against them and as they failed in that suit which they instituted to have that mortgage decree and the sale thereunder set aside they are estopped from now setting up the plea which they have raised.

On behalf of the Defendants it has

MOHABIR TEWARI v. PURBHOO NATH CHOWBEY.

been argued that the conduct of the Plaintiffs in the previous litigation was such as to render it compulsory on them to set up in their defence in the suit brought to set aside the Small Cause Court decree the title on which they are now relying in support of the present suit. In that litigation the present Plaintiffs all along repudiated the idea that they had any right under the mortgage deed and asserted that Bihansa Koer was in that suit acting entirely on her own account and that they had no concern with her. In the present case it has been found that the position taken up by the Plaintiffs in that litigation was a false position, and that in fact they were the persons principally interested in the mortgage, and Bihansa Koer was merely acting as their representative in the litigation. It has further been pointed out that the Defendant Sheo Gobind did not attain majority till 1897 and that the other Defendants are younger than him and, therefore, that in the previous litigation all those Defendants were minors. If the findings in the present suit be accepted the Plaintiffs had purchased the whole of the mouzah in execution of the Small Cause Court decree on the 7th May 1890 whereas the purchase in execution of the mortgage decree was not made till January 1897. If the Plaintiffs relied on their title under the two purchases, then when the suit was brought on the 30th September 1899 to set aside the sale of the whole mouzah and to obtain possession of the whole mouzah from the present Plaintiffs, they were bound to set up every title which they had in the mouzah which they could put forward to defeat the claim then made by the present Defendants. They were not entitled to keep back the secret title under which they now claim under the mortgage decree and to bring it forward in the present suit. In support of this contention we have been referred to a long series of rulings commencing with the case reported in *Wafeah* v. *Sahuba* (1), and ending with the cases in *Kameswar Prosad* v. *Raj Kumari Ratan Koer* (2) and *Sri Gopal* v. *Pirthi Singh* (3). None of these cases however are exactly analogous to the present, the decision of which must depend on its own circumstances.

For the Appellants reliance was mainly placed on the case of *Koilash Chandra Mondal* v. *Ram Narain Gir* (4) and *Ramaswami Aiyar* v. *Vithinati Aiyar* (5) also on the passage in the decision of the Privy Council in the case of *Kameswar Prosad* v. *Raj Kumari Ratan Koer* (2), occurring at p. 238, which explains the meaning of the word 'ought' as used in the Expl. (2) of the sec. 13 of Code of Civil Procedure. It has been argued on their behalf that the causes of action based on the title acquired by the purchase in execution of the mortgage decree and on the title acquired by the sale in execution of the Small Cause Court decree were essentially different and that the mere fact that the two titles claimed relate one to a portion of the mouzah and the other to the whole mouzah would not render it obligatory on the present Plaintiffs to have pleaded as a defence to

(1) 8 W. R. 307 (1867).
(2) L. R. 17 I. A. 234 : S. C. I. L. R. 20 Cal. 79 (1892).
(3) 6 C. W. N. 889 (1902).
(4) 4 C. L. J. 211 (1906).
(5) I. L. R. 26 Mad. 760 (1902).

THE

Calcutta Weekly Notes

Vol. XII.] MONDAY, FEBRUARY 10, 1908. [No. 13

Contents.

NOTES

THE PRESENT LAW RELATING TO THE SETTING ASIDE of execution sales can hardly be regarded as satisfactory. To have a sale set aside, the judgment-debtor has to establish not only that there was irregularity in the proceedings leading up to the sale but also substantial injury resulting directly from such irregularity, and these conditions are not satisfied by merely proving the existence of irregularities coupled with inadequacy of price. So it is not at all unusual to find a judgment-debtor who has succeeded in proving that the attachment processes and the sale proclamation were not served on him and that the property was sold for inadequate price, still without a remedy unless he can also prove fraud. The onus thus thrown on the judgment-debtor is very heavy.

COMPARING THIS WITH THE PROCEDURE FOR SETTING aside sales under the Revenue Sale Law and the Putni Regulation, it will be seen that a revenue sale may be set aside by the Commissioner on mere proof of irregularity and he may also recommend to the Board of Revenue to set aside a sale on the ground of hardship. A putni sale also may be set aside on mere proof of irregularity. The ground urged against a relaxation of the conditions for setting aside a Court sale is that if such sales are allowed to be set aside on slight grounds bidders will not come forward to bid at such sales and the judgment-debtors themselves will suffer in the long run. There is undoubtedly a great deal of force in this argument.

THE ONLY RELAXATION SO FAR INTRODUCED IS THE provision of sec. 310A which enables a judgment-debtor to set aside a sale by depositing within 30 days the amount specified in the sale proclamation together with a percentage on the purchase-money by way of compensation to the purchaser. The procedure however is of no avail in the large majority of cases where the sale has been brought about without notice to the judgment-debtor and the judgment-debtor does not come to know of the sale till long after the 30 days have expired. We would therefore suggest for the consideration of the Select Committee in charge of the Civil Procedure Bill whether it may not be possible to provide in the amending Rule No. 88, Order XXI, that a judgment-debtor may, on proof of non-service on him of the processes of attachment and sale, make the deposit within 30 days of his coming to know of the sale. What we wish to impress on the Committee is that a law which causes so much general hardship, as the existing law admittedly does, cannot be good law and should be modified.

THE LAW WORKS HARDSHIP ON THE JUDGMENT-DEBTOR in another way and this also deserves careful consideration. A sale may take place during the pendency of an appeal by the judgment-debtor. In such a case if the purchaser happens to be a third party and not the decree-holder himself the sale will not be set aside. The judgment-debtor's appeal, even if successful, may thus prove infructuous. The principle embodied in sec. 310A, Civil Procedure Code, may well be extended to these cases also. When a third party is a purchaser, it may not involve any serious hardship on him if he has to forego his purchase upon receiving his purchase-money with costs and interests and a percentage on the purchase-money by way of compensation.

THE PROVISIONS OF RULE 4 OF ORDER XL, IN THE Civil Procedure Bill, seem to be very hard and open to objection. This rule amongst other matters provides that for failure on the part of a Receiver to submit his accounts in proper time and in such form as the Court directs, the Court may order the Receiver to be detained in the civil prison for a term not exceeding six months unless in the meantime the Court directs his release. This provision is new. We do not see the necessity of such a rule. By Rule 3 of Order XL the Receiver is required to furnish security and according

to cl. (2) of Rule 4 there is sufficient provision to make good any amount which may be found to be due from him. There is, thus, ample provision for protecting the interests of the beneficiary.

MOREOVER, THE PURPOSE OF THE RULE MAY BE equally served by authorising Courts to issue a commission to a fit person to take account from the Receiver; or, in a fit case, to impose a pecuniary penalty of a particular sum a day (or week) so long as the account is not forthcoming. The effect of such a stringent rule as the one proposed will be either that it will be a dead letter or if it is enforced too freely no respectable and competent person will be found willing to accept appointment as Receiver.

THE ONLY GROUND UPON WHICH SUCH A RULE MAY be supported is that every such default may be considered to constitute the offence of contempt of Court. Assuming that a failure to furnish accounts when asked will in many instances constitute a contempt, the penalty provided for it seems to be too severe. In the management of estates in this country it is a matter of every day experience that however anxious the Receiver may be to render the account delay is sometimes inevitable in obtaining the collection papers and other accounts from his mofussil subordinates. Any one who has experience of the mofussil knows this. The sins of the "amlahs" should not be visited on the Receiver who may be as anxious to obtain the accounts as the Court. We would therefore like to see the provision omitted.

THE CASES OF *Amar Chand Kundu* v. *Nani Gopal Mukherjee*, 12 C. W. N. 308 and *Jogendra Nath Sarkar* v *Gobinda Chandra Dutta*, 12 C. W. N. 310, reported in this number, seem to lay down conflicting rules of procedure for putting forward a claim to attached property on behalf of an Idol, when the decree appears to have been obtained against the *shebait* personally. The former lays down that the matter must be contested in a suit whilst in the latter the procedure indicated is an application under sec 244, C. P. C. The later of the two decisions (that at p. 310) purports to be based on the authority of the Full Bench in *Punchanon* v. *Rabia*, I. L R. 17 Cal. 711. But in a previous case, *Ram Krishna* v. *Mohunt Padmacharan*, 6 C. W. N. 663, the opinion prevailed that the Full Bench decision had no application to a case of this kind. Whilst not unmindful of the analogy which undoubtedly exists between these cases and the case of a legal representative of a judgment debtor setting up a claim to the attached property in his own rights, we think the difference is sufficiently marked to justify the view taken in the last-mentioned case. The question is one of frequent occurrence in the mofussil and the difficulties created by this conflict of decisions are seriously felt. In the case reported at p 310, the Petitioner was advised to file two petitions in the alternative, one under sec. 244 and the other under sec 278. The case of *Haradhan* v. *Purna Chandra*, 11 C. W. N. 145, is another illustration of the practical difficulties experienced on account of this uncertainty in the law. We think an early opportunity ought to be taken to remove this uncertainty by a reference to a Full Bench.

TRANSFER OF CASE FROM ONE MAGISTRATE TO ANOTHER AND *DE NOVO* TRIAL.

In the case of *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose*, reported at page 140 of the current volume of our reports, their Lordships Mitra and Holmwood, JJ., held that sec. 350 of the Criminal Procedure Code does not cover cases of change of trying Magistrates occasioned by the transfer of a case from one Magistrate to another. Their Lordships observed, the "section, it seems to us, is capable of the interpretation that it covers all cases of change of trying Magistrates whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chap. XLIV of the Code." But having regard to some reported cases their Lordships were disposed to put a limited construction on the section.

This section no doubt lays down an exception to the general principle that judgment must be declared by the Judge who has heard the evidence, and in this view it should be strictly construed. There is a risk of miscarriage of justice when a Court which has not heard the evidence in a case and observed the demeanour of the witnesses, is called upon to pronounce judgment. But in exceptional cases the Legislature seems to have thought that the general rule may be modified when the accused consents to the modification. Now when in the midst of a case the trying Magistrate is removed by death or transfer to a different district, an exceptional case no doubt arises which inevitably necessitates the change of the trying Magistrate. To meet such a case, it might be urged, the Legislature for the purpose of saving time and expenses enacted sec 350, with the necessary provisos (*vide* (*a*) and (*b*) of sec. 350) to guard against any possibe prejudice to the accused. But when the Magistrate who has "heard and recorded the whole or any part of the evidence" is not removed by death or transfer to a different district, the occasions for the change of the trying Magistrate will be very few, if any at all. The only other way in which a change of trying Magistrates will arise is when the part-heard inquiry or trial will be transferred to another Magistrate by the District Magi-

trate or the High Court. But part-heard cases are not or should not be transferred by the District Magistrate or the High Court under Chap. XLIV, Cr. P. C., unless there are exceptionally strong grounds for the transfer. That this is the intention of the Legislature is evident from the fact that in cl. (8) of sec. 526 it is provided that the person who wants the transfer of a case should notify his intention to the Court before the commencement of the hearing. As the occasions for the transfer of part-heard cases under Chap. XLIV will be very few, it stands to reason to suppose that the Legislature did not think it necessary to enact any rule similar to that laid down in sec. 350, Cr. P. C., in respect of those case. Some support is lent to this view by the fact that sec. 350 does not cover all cases of change of Courts, for instance it has no application when there is a change of Sessions Judges in the trial of a case. Also under sec. 346, Cr. P. C., when a part-heard case is submitted by the trying Magistrate to another Magistrate, there too no doubt is a change of the trying Magistrates, but in a such case the second Magistrate who pronounces judgment has to try the case *de novo*. Sec. 350 does not cover such a case, vide *Adapa Venkanna*, 4 Mad. 327 and *Kullian Singh* (2 N.-W. P., 468). An argument in favour of this view may also be based upon the words "and is succeeded by another Magistrate," in sec 350, but this argument does not appear to us to be of much force.

On the other hand it may be said that the language of sec. 350 shows that its provisions covers all cases of change of trying Magistrates. The words are "ceases to exercise jurisdiction therein (*i.e.*, in the inquiry or trial), and is succeeded by another Magistrate who has and who exercises such jurisdiction," that is to say, the succession spoken of is succession in the hearing of the case. Moreover it may be urged that whether a change of trying Magistrates takes place on account of the removal of a Magistrate or the transfer of the case from the the file of one Magistrate to another, the effect is the same, *e.g.*, one Magistrate after hearing and recording evidence ceases to try the case it is then tried by another Magistrate. Then why should a distinction be made between a change of trying Magistrates due to the removal of the first Magistrate and the change on account of the transfer of the case from one trying Magistrate to another. As regards Sessions cases, it may be urged that as those cases involve very serious consequences, the economical considerations which prompted the Legislature in enacting sec. 350, did not, in the opinion of the Legislature, justify a departure from the general principle in Sessions cases. It may also be argued that cl. (2) of sec. 350, which enacts "nothing in this section applies to cases in which proceedings have been stayed under sec. 346," shows that sec. 350 applies to cases of transfer giving rise to a change of trying Magistrates; otherwise there would be no necessity of enacting cl. (2) whose object is to restrict the operative part of sec. 350.

The question as to whether sec. 350 covers changes of trying Magistrates on account of transfer of part-heard cases is no doubt a difficult one. But if one has to construe the section on its language it seems to us the provisions of the section include all cases of change of trying Magistrates, whether due to the removal of the first Magistrate or the transfer of a criminal case from one Magistrate to another under Chap. XLIV.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*De La Bere* v. *C. Arthur Pearson (Limited).* Before LORD JUSTICE VAUGHAN WILLIAMS, JUSTICES SIR GORELL BARNES P. and BIGHAM. 22nd November 1907.

Negligence—Damages—Crime, intervention of—Remoteness.

The Defendants had advertised offering to give advice with reference to investments. The Plaintiff accepting the offer, asked for the name of a good stock-broker. In the opinion of the Court this constituted (under the circumstances) a contract for good consideration, under which the Defendants undertook to use reasonable care in the nomination of broker though it did not amount to a warranty of the character or conduct of the broker. The Court further found that the Defendants did not make reasonable enquiries when they recommended a certain outside broker who unknown to the Defendants was an undischarged bankrupt The Plaintiff sent £800 and a further sum of £600 to the broker for investment, but the latter misappropriated it and did not invest it. In this action against the Defendants for damages, the Lord Chief Justice had awarded £1,100 as damages to the Plaintiff. On appeal, the Court upheld that judgment holding that the intervention of the crime which caused the damage did not make the damage too remote.

Mr. McCall, K. C, *Mr. R. W. Turner* and *Mr. Albert Profumo* for the Defendants, Appellants.

Mr. Spencer Bower, K. C., and *Mr. Houghton* for the Plaintiffs, Respondents.

CHANCERY DIVISION.—*In re Harrison and another.* Before MR. JUSTICE PARKER. 21st November 1907.

Bar etiquette—Solicitor briefing counsel contrary to client's instruction—Taxation—Attorney and client.

In this case after proceedings had been commenced in the Probate Court but prior to the issue of the writ, the solicitors consulted in conference a certain King's Counsel who advised, if not adversely, at any rate with considerable hesitation as to whether

the case of his clients was really a good one. The clients thereupon objected to the solicitors employing him as their Counsel at the trial and they communicated their desire to employ another eminent Counsel. The solicitors nevertheless briefed the same Counsel and paid him, being of opinion that under Resolution 20 as to Bar etiquette they were bound to brief Counsel who had advised. The taxing officer allowed the fees paid to him as between solicitor and client notwithstanding the client's objection.

On the present application to review the taxation, his Lordship observed that the rules of etiquette as between members of the profession can have no operation outside and beyond the relations *inter se* of members of the profession on both its branches. If the rules are enforceable at all, they are only enforceable because the members of the profession choose to govern their conduct by reference to them. If a client positively instructs his solicitor not to brief a Counsel he is not bound to brief that Counsel as between himself and his client so as to saddle his client with the liability for briefing the Counsel, merely because under the rules of etiquette which have been sanctioned by both branches of the profession the Counsel is said to be entitled to the brief. *Held*—That the fees ought to be disallowed and also all incidental costs of copying the documents with the particular brief, &c.

Mr. Mantelli for the Applicants.

Mr. J. Austen Cartmell for the Solicitors.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 33 OF 1908 IN THE MATTER OF BILASH CHANDRA MISTRY AND TWO OTHERS, Petitioners. 31st January 1908.

Trespass—Whether Civil or Criminal—Indian Penal Code, sec 447.

The Petitioners, Bilash Chandra Mistry and others, obtained a rule upon the District Magistrate of Backergunge to show cause why the conviction and sentence passed upon them by the Deputy Magistrate of Patuakhally under sec 447, I. P C., should not be set aside. The complaint was that the complainant had taken settlement of some land from the Court of Wards on payment of *salami* but on his going to take possession of it, he was driven out by the Petitioners. The Petitioners stated in their defence that the land had been settled with them by the proprietors; that they got a decree for the land in the Civil Court against the predecessor of the complainant and that the Court of Wards had realised rent from them by certificate proceedings, and that they were in possession of it. The trying Magistrate found that as the term of the Petitioners' lease had expired and the Court of Wards had taken formal possession and settled with the complainant, the Petitioners were guilty of criminal trespass.

Their Lordships held that the case was one of civil nature and not of criminal trespass.

The Petitioners were therefore not guilty under sec. 447, I. P. C. The conviction and sentence were set aside.

Babu Gunada Charan Sen for the Petitioners.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDIDTOIN. Before MACLEAN, C. J., and COXE, J. APPEAL FROM APPELLATE DECREE No 497 OF 1906. KUMAR BANWARI MUKUND DEB BAHADUR, Defendant No. 2, Appellant *v.* BIDHU SUNDAR THAKUR AND OTHERS, Plaintiffs, RANI HARI PRIYA SHAHEBA AND ANOTHER, Defendants, Respondents. 22nd January 1908.

Possession, suit for—Chakran land—Resumption—Putni—Specific performance of contract.

Under a pattah, dated 1823, the then zemindar granted to the predecessors-in-title to the Plaintiffs a *putni* giving them possession of a certain mouzah including the *chakran* lands. At the time of the *putni* the zemindar was the owner of the *chakran* lands and those lands were included and covered by the *putni*. The *chakran* lands were subsequently transferred to the zemindar who took the transfer, subject to the provisions of sec 51 of the Village Chowkidari Act (VI of 1870, B. C) The Plaintiffs brought the present suit to recover possession of those *chakran* lands. Plaintiffs Nos 1 to 8 were entitled to an one-third share under the *putni*; Plaintiff No. 9 to another third; and Defendant No. 3 to the remaining third, who let out his interest in *dur-putni* to Plaintiff No. 10

The Courts below decreed the suit. Defendant No 2 appealed to the High Court.

Held—This was not an action for specific performance of contract, but for possession of *chakran* lands included in the *putni*. The *putni* was a concluded contract and there was no agreement of which specific performance could be granted.

Ranjit Singh v. *Radha Charan Chandra* (I. L. R. 34 Cal. 564) dissented from.

Thazi Newar Khoda v. *Ram Jodu Dev* (I. L. R. 34 Cal. 109) and *Hurry Narain Mojumdar* v. *Mukund Lal Mondol* (4 C. W. N. 814) referred to.

Dr. Rash Behari Ghose and *Babu Kshetra Mohun Sen* for the Appellant.

Babus Nil Madhub Bose and *Hemendra Nath Sen* for the Respondents.

A. T. M. *Appeal dismissed.*

MOHABIR TEWARI v. PURBHOO NATH CHOWBEY.

the suit to set aside the Small Cause Court decree and sale what would have been a defence to the other suit which was brought to set aside the mortgage decree. It is contended that in interpreting the provisions of sec. 13, Expl. (2) of the Code of Civil Procedure the Madras High Court has in the case to which we have been referred rightly laid down that "the real test is whether the cause of action or transaction on which two suits are based is the same and not whether the transaction is sought to be established in different modes or by different means." Reliance was also placed on the dictum of their Lordships of the Privy Council in the case of *Kameswar Prosad* v. *Raj Kumari Ratan Koer* (2), which lays down "that where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would be important." It is pointed out that when the present Defendants instituted a suit on the 30th September 1899 to set aside the Small Cause Court decree they were fully aware that that decree covered so much of Mouzah Sujibal as was excluded from the mortgage decree which had been obtained by Bihansa Koer for 49½ bighas, and this is clear from the fact that on the 13th January 1900 they instituted the second suit to have the mortgage decree and the sale in execution of the same set aside. It has also been pointed out that in the written statement filed in the suit brought by the present Defendants to set aside the Small Cause Court decree the present Plaintiffs who were the Defendants in that suit in their written statement filed on the 18th January 1900 expressly stated the fact that 49½ bighas had been sold in satisfaction of the mortgage decree. It is idle, therefore, for the Defendants in the present suit now to allege that at the time when they instituted the suit to set aside the Small Cause Court decree they were not aware of the existence of the mortgage decree; and it is further clear from the fact that they instituted two suits that the property in respect of which the suit to set aside the Small Cause Court decree was brought did not cover the 49½ bighas included in the mortgage decree. It is, therefore, not open to them, especially after they have failed in their suit to get the mortgage decree set aside now to object to the Plaintiffs' claim on the ground that they are setting up a secret title which they ought to have put forward in defence of the suit brought to set aside the Small Cause Court decree.

In my opinion the arguments which have been advanced in support of the appeal ought to prevail. I think it is clear from the facts on the record that the present Defendants were fully aware when they brought the suit to set aside the Small Cause Court decree that there was outstanding the decree obtained on the mortgage against the 49½ bighas included in the mouzah and there seems no doubt that the scope of the suit brought to set aside the Small Cause Court decree did not extend over the 49½ bighas. The causes of action in the two suits brought one on the 30th September 1899 to set aside the Small Cause Court decree and the other brought on the 13th January 1900 to set aside the mortgage decree were in my opinion distinct and

(2) L. R. 17 I. A. 234 S. C. I Cal. 79 (1892).

MOHABIR TEWARI *v.* PURBHOO NATH CHOWBEY.

were such as could not have been joined in one suit and that being the case as the present Defendants who were the Plaintiffs in that suit would have been precluded from joining the two causes of action together in one suit by way of attack, I am of opinion that it is impossible to hold that the present Plaintiffs as Defendants in that suit were bound under the law to put forward in defence to the suit brought to set aside the Small Cause Court decree, the title which they had under the mortgage decree. To hold otherwise would be to decide that it was open to the present Plaintiffs as Defendants in that suit to bring on the record Bibansa Koer who was a third party and not included in the Small Cause Court suit and to obtain a decision with regard to a cause of action which it was not competent for the Plaintiffs in that suit to raise in support of their claim. I think that such a view is impossible and that it would certainly tend to lead to such confusion as is referred to by their Lordships of the Privy Council in the case of *Kameswar Prosad* v. *Raj Kumari Ratan Koer* (2).

In the case of *Ramaswami Aiyar* v. *Vithinati Aiyar* (5) the law as laid down in secs. 43 and 13 of the Code of Civil Procedure is very fully discussed. After pointing out that their Lordships of the Privy Council in the case of *Pittapur Raja* v. *Venkata Mahipati Surya* (6) when referring to sec. 7 of Act VIII of 1859 which corresponds with sec. 43 of the present Code of Civil Procedure observed that "that section does not say that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim arising out of the cause of action meaning the cause of action on which the suit is brought," the learned Judges of the Madras Court express their agreement with the view taken by the Judges of the same Court in the case of *Allunni* v. *Kunjusha* (7) in dealing with Expl. (2) of sec. 13 of the present Code, namely, that "it refers to the title litigated in the former suit as distinguished from the relief claimed. When several independent grounds of action are available a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." In this view of the law I agree and I hold that it equally applies to the converse case of a Defendant when pleading in his defence.

Under these circumstances I am of opinion that the title which the Plaintiffs set up in the present suit was not one which they ought to have made a ground of defence in the former suit and therefore they are not precluded under the provisions of sec. 13, Expl. (2) of the Code of Civil Procedure from obtaining relief in the present suit. The subject-matters of the suit which was brought to set aside the mortgage decree and the suit which was brought to set aside the Small Cause Court decree were dissimilar and distinct and under these circumstances I think that the present Plaintiffs would not have been entitled under the law to

(2) L. R. 17 I. A. 234 : s. c. I. L. R. 20 Cal. 79 (1892).
(5) I. L. R. 26 Mad. 760 (1902).
(6) L. R. 12 I. A. 116 (1885).
(7) I. L. R. 7 Mad. 264 (1883).

MOHABIR TEWARI *v.* PURBHOO NATH CHOWBEY.

set up as a ground of defence in the suit brought to set aside the Small Cause Court decree the title which they now seek to establish in the present suit.

I hold therefore that the view taken by the District Judge is incorrect and that his judgment and decree cannot be maintained. The conclusion at which the Court of first instance has arrived is in my opinion in accordance with law and I therefore set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the Court of first instance with costs.

WOODROFFE, J.—I am not satisfied that the Defendants have made out the plea which was urged It is doubtful whether the Appellants might have raised the question now debated in the previous litigation. However this may be, I do not think that they were under the circumstances of the case obliged to raise it. As to this I do not think it necessary to say more as each case must in this respect be decided with reference to its own particular circumstances. I agree therefore that the appeal should be decreed in the terms proposed by my learned brother.

N. G. *Appeal decreed.*

CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 695 OF 1907.

RAMPINI, J. SHARFUDDIN, J. 1907. Heard, 4, 6, 7 & 10, December. Judgment, 20, December.	CHINTAMON SINGH, Petitioner, *v.* THE EMPEROR, Opposite Party.

Bad livelihood—Criminal Procedure Code (Act V of 1898), secs. 110 and 117, 192, 256—General repute, evidence of—Evidence of persons who are not neighbours—Transfer of a case under sec. 110, Cr. P. C., power of the District Magistrate to direct—Sec. 256, Criminal Procedure Code, whether applies to cases under sec. 110—Evidence, testing of in cases under Chap. VIII, Criminal Procedure Code.

When a proceeding under sec. 110, Cr. P. C., is drawn up against a person on a police-report and an order is made by the Magistrate under sec. 112 requiring the person to show cause, it is not necessary to give a list of witnesses in support of the proceeding either in the report or in the order under sec. 112.

A case under sec. 110, Cr. P. C., can be transferred by a District Magistrate as he is competent under sec. 192, Cr. P. C., to transfer any case cognizable by a Criminal Court and his power of transfer is not restricted to criminal cases only.

When a Magistrate having no power to transfer a case under sec. 110, Cr. P. C., transfers the case erroneously and in good faith to another Magistrate, the proceeding before the latter Magistrate will not be void, as such transfer would only amount to an irregularity which would be covered by the provisions of sec. 529, cl. (f), Cr. P. C.

AKBAR ALI KHAN *v.* DOMI LAL (1) *referred to.*

Sec. 256, Cr. P. C., has no application to a case under sec. 110, Cr. P. C., and a person called upon to show cause under sec. 110, Cr. P. C., has no right to further cross-examine the prosecution witnesses under sec. 256, Cr. P. C.

In dealing with cases under Chap. VIII of the Criminal Procedure Code, Magis-

(1) 4 C. W. N. 821 (1900).

CHINTAMON SINGH *v.* THE EMPEROR.

trates ought, especially where no previous conviction is proved, to take great care to test the evidence for the prosecution.

Where in consequence of a series of dacoities having taken place in certain villages, a proceeding under sec. 110, Cr. P. C., is instituted against a person for being a robber by habit, the evidence of general reputation, coming from the people of the villages where dacoities had taken place, is certainly to be treated as evidence of general repute as required by sec. 117, Cr. P. C., although that person did not live amidst those people.

RAI ISRI PERSHAD *v.* QUEEN-EMPRESS (2) *distinguished.*

When a witness is called by the Court under sec. 540, Cr. P. C., his cross-examination by the parties cannot, under the law, be restricted to the points on which he has been examined by the Court.

This is a rule issued on the 17th of July 1907, calling on the District Magistrate, Purnea, to show cause why the order of the Sub-Divisional Magistrate of Arariah, dated the 12th of July 1906, which order was on appeal affirmed on 20th of April 1907 by the Sessions Judge of Hughly to whose file the appeal had been transferred by order of the High Court, should not be set aside.

The facts of the case will appear from the judgment.

Messrs. Hill, P. L. Roy, Gregory and *Babus Dasarathi Sanyal, Satish Chandra Ghosh, Moulvi Mohamed Mustafa Khan* and *Babu Sarat Kumar Mitra* for the Petitioner.

Mr. Norton for the Crown.

(2) I. L. R. 23 Cal. 621 (1895).

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why an order under sec 118, Cr. P. C., passed against the Petitioner, Chintamon Singh, a resident of village Matihari within the jurisdiction of the Forbesgunj Thana of the Araria Sub-Division of the District of Purnea, should not be set aside.

The order complained of is dated the 12th July 1906 and requires the Appellant to execute a bond for Rs. 500 with two sureties for Rs. 500 each, to be of good behaviour for a period of three years. The Sessions Judge has by his order, dated the 20th April 1907, affirmed the order of the Sub Divisional Magistrate. We are now asked to revise these orders on the following grounds :—

(1) That the information on which Mr. Lea, the District Magistrate of Purnea, passed an order under sec. 112, Cr. P. C., does not give the necessary details ;

(2) That the enquiry having been begun by Mr. Lea, he had no jurisdiction, after the examination of 109 witnesses, to transfer the case to the file of Mr. Reid, the Sub-Divisional Magistrate of Araria ;

(3) That the trying Magistrate was wrong in not allowing the defence, in accordance with the provisions of sec. 256, Cr. P. C., to recall and recross-examine the prosecution witnesses ;

(4) That the Petitioner was not allowed to cross examine two Police officers, *viz*, Mr. Macnamara and Babu Ram Sadoy Mukherjee, who were summoned by the Appellate Court under sec. 540, Cr. P. C., on matters not referred to in their examination-in-chief ;

CHINTAMON SINGH *v* THE EMPEROR.

(5) That the trying Magistrate was wrong in restricting the examination-in-chief of the defence witnesses, after 46 witnesses had been examined, to 30 hours time;

(6) That the trying Magistrate was wrong in refusing to examine about 1,000 witnesses whom the Petitioner desired to cite and examine;

(7) That the evidence of repute given by the witnesses for the prosecution is not of a nature to justify the order passed, and

(8) That mere association with a number of supposed bad characters cannot justify an order under sec 118, unless the associates are themselves shown to be men of bad character and suspected of committing the dacoities the Petitioner is alleged to have instigated

Other minor points were raised in the course of argument, but they appeared to us to be of no importance.

The Petitioner is an employee of Mr. Forbes, an influential landholder of the District of Purnea, and holds the position of a *sirman* or rent collector on the Sultanpur Estate, which Mr. Forbes manages as executor under the Will of the late Mr. A. J. Forbes.

The proceedings against the Petitioner were initiated as follows:—A report (Ex. F/V), dated the 2nd August 1904, was made by a Police officer, Mr. Tucker, to Mr. G. H Lea, the District Magistrate of Purnea, on receipt of which the latter recorded an order under sec. 112, Cr. P. C., to the effect that he had received information from the Assistant Superintendent of Police, Araria, that the Petitioner was by habit a robber, that he habitually protected and harboured dacoits and habitually committed mischief and extortion and abetted the commission of these offences and that he was of so desperate and dangerous a character as to render his being at large without security being required of him hazardous to the community. The order accordingly directed him to show cause why he should not be called upon to execute a bond of Rs. 500 with two sureties of Rs. 500 each for his good behaviour for a period of three years.

The hearing of the case began before the District Magistrate, who, after the examination-in chief of a number of witnesses, postponed the case, on the application of the Petitioner, who had moved this Court. for a transfer of his case from the file of that officer. A rule was issued, but it was discharged on the 28th September 1904, and the case was resumed by the District Magistrate on the 10th November. The District Magistrate after the examination-in chief of 109 prosecution witnesses and the cross-examination of one of them on the 6th February 1905, transferred the case to the file of Mr. C. H. Reid, Sub-Divisional Magistrate of Araria.

It was proceeded with regularly by Mr. Reid from the 19th June 1905, till the 12th July 1906.

By the 30th September 1905, the prosecution had examined altogether 52 witnesses. The prosecution then presented a petition stating that it did not desire to examine any more witnesses in consequence of the extreme length of the cross-examination to which the witnesses already examined had been subjected. The prosecution closed its case on the 15th November 1905, Mr. Forbes, the

CHINTAMON SINGH *v.* THE EMPEROR.

employer and counsel of the Petitioner, objected that the Court could not put his client on his defence before he had again cross-examined the witnesses for the prosecution. The Magistrate, Mr. Reid, refused to allow the further cross-examination of the prosecution witnesses on the ground that Mr. Forbes's application was made only for the purpose of vexation and delay and to defeat the ends of justice. Mr. Forbes then announced that he intended to apply on the following Monday for an adjournment in order to move the High Court for a transfer of the case. An application to quash the proceedings or in the alternative to transfer the case was subsequently made to this Court and refused on the 5th December 1905.

The examination-in-chief of the defence witnesses commenced on the 7th December 1905, and in the course of 68 sittings the evidence of 48 witnesses was recorded. On the 2nd February 1906, the trying Magistrate passed an order limiting the time for the examination-in-chief of further witnesses for the defence to 30 hours, *i.e.*, to 6 or 7 days more.

The reason for this order was that Mr. Forbes for his client had put in a list of 1760 witnesses, out of which altogether 741 witnesses were examined. It may be mentioned as showing to what an extent the proceedings in this comparatively unimportant case were protracted that the District Magistrate held 9 sittings and the Sub-Divisional Magistrate 228 sittings. There were thus altogether 237 sittings. The record has swollen to most portentous dimensions. The evidence recorded by the Sub-Divisional Magistrate alone covers 6500 foolscap pages. The case proceeded before Mr. Reid for over 14 months and a period of nearly two years elapsed from the beginning of the proceedings till the final order of the Magistrate. The appeal to the Sessions Judge lasted 17 days. Mr. Forbes not only conducted the defence in the Magistrate's Court but himself gave evidence for the defence, 5 days being occupied in recording his deposition. He appears to have so identified himself with the case of his client that it is impossible to resist the conclusion that he regarded the institution of proceedings against Chintamon Singh as a personal affront to himself and as derogatory to his prestige. This seems to us to account for the great length of these proceedings which were protracted to the extent they have been only for the purpose of preventing any final order being passed. We now proceed to discuss the points of law urged by Mr. Hill. The first is as to the want of the necessary materials in the order of the District Magistrate under sec. 112, Cr. P. C. We consider that the order of the Magistrate gives all the necessary information required by the section. This section enacts that when a Magistrate, acting under sec. 110, Cr. P. C., deems it necessary to require any person to show cause, he shall make an order in writing setting forth (1) the substance of the information received, (2) the amount of the bond to be executed, (3) the term for which it is to be in force and (4) the number, character and class of the sureties required. All the above four matters are distinctly stated in the order in question. It has been contended that no list of witnesses is to be

CHINTAMON SINGH v. THE EMPEROR.

found either in the report to the Magistrate or in the order of the Magistrate under sec. 112, Cr. P. C. The law nowhere requires that any list of witnesses should be so given.

Mr. Hill's second plea impugns the power of the District Magistrate to transfer the case. Secs. 192 and 528, Cr. P. C., deal with the powers of a District Magistrate to transfer and withdraw "any case" to and from the file of any Subordinate Magistrate. It is to be observed that the expression used in sec. 192, cl (*1*), Cr. P. C., is "any case," and not any "criminal case." It has been contended that sec. 192, Cr. P. C, applies only to criminal cases, as it is part of a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are, however, quite wide enough to include cases under Chap. VIII of the Criminal Procedure Code. We may also point out that in the Code of 1872, sec. 41 which is the section corresponding to sec. 192 of the present Code, provided only for the transfer of "criminal cases." By the amending Act XI of 1874 the word "criminal" was struck out and it has been omitted from all subsequent enactments. The words "criminal case" are intended to be used in a limited sense and not to apply to every case cognizable by a Criminal Court. But when the words "criminal case" have been altered to "any case," it is clear that the Legislature intended that the power of transfer should not be restricted to criminal cases only, and extended the power of transfer to cases of every description. We, therefore, think that the District Magistrate had ample power to transfer this case to the file of Mr. Reid under sec. 192, Cr. P. C. If the objection with regard to the transfer had any force, even then it could not be regarded as vitiating the whole proceedings; as the action of the Magistrate in transferring the case could only amount to an irregularity which would be covered by the provisions of sec. 529, cl. (*f*), Cr. P. C. [See *Akbar Ali Khan* v. *Domi Lal* (1)].

Mr. Hill's third plea is as to the right of cross-examination under sec. 256, Cr. P. C. The claim set up by the defence for a second cross-examination of all the prosecution witnesses appears to us most unreasonable, considering the inordinately lengthy cross examination of those witnesses before that claim was made. The unreasonably protracted cross-examination of these witnesses relates to so many irrelevant matters that the inference is unavoidable that as observed by the Sessions Judge "even if Mr Forbes was not deliberately manœuvring to drive the Court to fix some time limit, he certainly deliberately omitted to call any important witness in those thirty hours." Apart from the consideration as to whether the application for a second cross-examination of the prosecution witnesses was or was not for the purpose of vexation or delay or to defeat the ends of justice, we consider that sec. 256, Cr. P. C., has no application to the present case. Sec. 256 occurs in Chap. XXI of the Code, which relates to the trial of warrant cases. Sec 251 of that chapter provides that "following procedure shall be observed by the Magistrates in the trial of warrant cases" Sec. 252 relates to the evidence for the prosecu-

(1) 4 C. W. N. 821 (1900).

CHINTAMON SINGH *v.* THE EMPEROR.

tion, sec. 253 to the discharge of the accused, sec. 254 to the framing of the charge, sec. 255 to the plea of the accused and sec. 256 to the defence of the accused. No doubt, under sec. 117, Cr. P. C, the enquiry into bad livelihood cases should be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases. But we do not think that the provisions of sec. 256, Cr. P. C., indicate that the person called upon to show cause under sec 110, Cr. P. C., has a right to further cross-examine the prosecution witnesses under sec. 256, Cr. P. C, inasmuch as the provisions of this section relate to cases where a formal charge, as required by sec 251, has been drawn up and the accused has been called upon to meet that charge. In cases under sec. 110, Cr. P. C., the order of the Magistrate under sec. 112, Cr. P. C, is equivalent to a charge. The object in giving the substance of the information in an order under sec 112, Cr. P. C., is that the person called upon to show cause may clearly understand the matter that he has to meet in his defence, and a Magistrate has no power to go beyond the requirements of his order under sec. 112, Cr. P. C. In warrant cases a charge sheet is prepared for similar purposes. In the above view the cross-examination of witnesses in a proceeding under sec. 110, Cr. P. C., is tantamount to their cross-examination after charge. It cannot be contended that in the present instance the Appellant had no information as to the matters which he would be required to meet. In trials of warrant cases, it is when a charge sheet is drawn up that the accused is for the first time informed as to the offences that have appeared from the evidence against him to have been committed by him, and, hence, it is only right that the accused should in warrant cases be given an opportunity to cross-examine the prosecution witnesses after a charge has been framed. In summons cases the accused is informed in the summons as to the charges against him and hence the Legislature does not require the preparation of any formal charge, as in warrant cases, nor any second cross-examination. For the above reasons we think that the Petitioner had no right to any further cross-examination, especially when the prosecution witnesses had already been cross-examined to a very unreasonable length.

The Petitioner's fourth plea relates to the limits put on the cross examination of Mr Macnamara and Babu Ram Sadoy Mukherjee in the Sessions Court. These witnesses were summoned by the Appellate Court under sec. 540, Cr. P. C., as Court witnesses and as such both parties were equally entitled to a full cross-examination of these witnesses on matters relevant to the enquiry. From the record of their evidence we find that both parties were allowed to cross-examine them. In the recorded evidence of Babu Ram Sadoy Mukherjee we find the following note near the end of the cross-examination by Mr Norton for Crown: "The cross examination is to be confined to the subjects on which I examined the witnesses" There is no such note in the cross-examination of this witness by Mr. Gregory, counsel for the defence The above order of the Sessions Judge may have reference to the whole cross-

CHINTAMON SINGH v. THE EMPEROR.

examination of that witness But no such restriction appears to have been made with reference to the cross-examination of Mr. Macnamara. At all events there is no such note by the Sessions Judge, as we find in the cross-examination of the other witnesses. We have already observed that such restriction is not allowed by law. It is urged that the Appellant has been prejudiced by this restriction. But in the first place, it was the cross-examination by the counsel for the prosecution that appears to have been restricted. In the second place, the evidence of Mr. Macnamara and Babu Ram Sadoy Mukherjee relates only to the manner in which the evidence of repute was collected, and what they say cannot be treated as any evidence of bad repute. If their evidence were eliminated from the record, there would still remain abundance of evidence as to the reputed character of the Appellant

The fifth and sixth objections are as to the trying Magistrate having restricted the examination-in chief of a number of defence witnesses to a limit of 30 hours and to his not allowing the whole 1760 witnesses named for the defence to be called The demand to examine 1760 witnesses for the defence is in our opinion preposterous. But the trying Magistrate did not reject this demand, until it was obvious that an attempt was being made to protract the examination of the defence witnesses to a most unnecessary extent so as to delay, if not to prevent, the final termination of the proceedings. Under these circumstances the trying Magistrate was not unreasonable in fixing some limit of time within which the defence should close its case. We find that inspite of this apparently small limit of time for the examination of the defence witnesses, it was ample ; for we observe that seven hundred witnesses were examined-in-chief during those thirty hours (*i.e*, 6 or 7 days time) allowed. But it cannot be fairly said, we think, that the defence has been prejudiced by the fact that they were not able to examine all the 1760 witnesses they had summoned. It is the quality and not the quantity of evidence that goes to establish a point Under the circumstances the Petitioner has no reason to complain because he was not allowed to examine more witnesses It is also made a grievance that Mr. Forbes was called on to sum up his client's case in one hour's time. But this was after he had been arguing for 15 days.

The seventh objection is that the evidence of repute is not sufficient to justify the order. It appears that out of the witnesses examined for the prosecution the lower Appellate Court has believed the evidence of 10 witnesses who prove the association of the Petitioner with bad characters at various times, especially in most cases immediately before the occurrence of a dacoity.

There had been a series of dacoities in the month of July 1902 and in consequence of this Babu Ram Sadoy Mukherjee was deputed to the Araria Sub-Division to trace out the dacoities, as the local Police had been unable to detect them. Mr Tucker was at that time Superintendent of Police, Purnea, and he sent Babu Ram Sadoy Mukherjee, an Inspector of Police of the Detective Department, to Mr. Duff, Manager of the Sultanpur Estate, for assistance in

CHINTAMON SINGH *v.* THE EMPEROR.

the enquiries that Babu Ram Sadoy was going to set on foot. Mr. Duff deputed the Petitioner, Chintamon Singh, and another man, Janak Lal Missir, to give the required assistance to Babu Ram Sadoy Mukherjee The first result of these enquiries appears to have been the discovery of a gang known as the Barfi Singh gang. On the 5th February 1903, Inspector Sital Prosad drew up a first information report, naming about 150 persons as members of the above gang. The names of the Petitioner, Chintamon Singh, and of Janak Lal Misser appear among the names of the accused in the first information report. But a case was instituted against only 23, for want of sufficient evidence against the rest. During the progress of this enquiry, two other dacoities took place—one at Pathordeva and the other at Balahi. These two were immediately followed by a third dacoity at Sonapur, in which one man was killed and another very seriously wounded. In 1903 there were no less than 19 dacoities, and the present Petitioner is alleged to have been connected with them.

The Petitioner, owing to his position as *sirman* of a rich estate and the protege of an influential zemindar like Mr. Forbes, who is also a Barrister-at-Law, appears to have been dreaded by the villagers and they were naturally afraid to publicly denounce him as one of the instigators of those dacoities. Had it not been for the arrival of Ram Sadoy Mukherjee and his energetic enquiries, no trace would have been obtained of the dacoities. The energy with which these enquiries were conducted and the presence of European Police officers anxious to discover the dacoits evidently emboldened the villagers to open their mouths. Mr. Macnamara, apparently not blindly trusting his subordinates in the enquiry into the present case, seems to have made up his mind to hear with his own ears what Chintamon Singh's reputation was in the vicinity of Forbesgunj. Mr Macnamara was engaged for three days in making those enquiries. The common people appear to have refused to give evidence unless the headmen gave evidence also. And on the 24th July 1904, Mr. Macnamara examined the headmen of Sonapur, Mirgunj and other villages. The statements made by the villagers and headmen to Mr Macnamara disclosed the fact that Chintamon Singh was the leader of the dacoits.

By the evidence of 40 witnesses it is proved beyond all possible doubt that about the end of July 1901, Chintamon Singh had the reputation of being a leader of dacoits. This reputation prevailed amongst the people in whose villages the dacoities had taken place. Under sec. 117, cl. (*iii*), Cr. P C., the fact that a person is a habitual offender may be proved by evidence of general repute. In dealing with cases under Chap. VIII of the Criminal Procedure Code Magistrates ought, especially where no conviction is proved, (as in the present case), to take great care to test the evidence for the prosecution We find that the two lower Courts in their careful and elaborate judgments have concurrently found that the evidence of general repute in the present case has satisfactorily proved that Chintamon Singh is a habitual offender. In cases like the present there should appear clear evidence that the

CHINTAMON SINGH v. THE EMPEROR.

party called upon to show cause is known to have associated with criminals; to have frequently been seen near the places where thefts and other offences have been committed, and that, immediately after his being found associated with criminals, thefts, etc., have taken place. There is abundance of evidence on the record to show that the associates of the Petitioner are criminals, that he has been seen near places where dacoities took place and that immediately after or almost immediately after his meeting with his associates these dacoities occurred.

Our attention has been drawn to the case of *Rai Isri Pershad* v. *Queen-Empress* (2) and it has been contended that in accordance with this Court's rulings in that case a man's general reputation is that which he bears amongst all the townsmen in the place in which he lives and that if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character. In that case acts of extortion were said to have been committed in the neighbourhood of the place where Isri Prosad resided. It was therefore necessary that there should have been reliable evidence of bad repute given by the people amidst whom he lived. In the present case the evidence of general reputation comes from people of villages where the dacoities had taken place and in such a case this evidence is certainly to be treated as evidence of general repute as required by sec. 117, Cr. P. C.

It is of no avail to say that the villagers who have been examined in this case did not volunteer their evidence and that they were silent for such a length of time. In all bad livelihood cases where the accused is either himself a person of influence or is under the protection of such a person, no villager would dare to mention the name of such a man for the fear of bringing retribution down on his own head.

The Petitioner's eighth plea is that his associates have not been proved to have been bad characters themselves, or to have been suspected of being connected with the dacoities of 1903. But that is not so. It appears from the evidence that there are at least 20 associates of the Petitioner who had been convicted before the proceedings were drawn up against him. These convictions had taken place during the period of association. Some of these associates had been convicted once, some twice, some thrice and some four times. These convictions have been either under sec. 110, Cr. P. C., or for dacoity and theft. In one instance, one of his associates, named Dodlu Dosadh, was hanged and six others transported for life, two have been sentenced to ten years' imprisonment and the rest for smaller terms. A man who associates with criminals of this class can hardly be regarded as a man of good character.

It is contended that there is no evidence on the record to show that the associates of the Petitioner had ever been suspected of any of the dacoities. But this is not so, as it appears from the evidence of the prosecution witnesses Mukund Lal, Doman, Talak Chand Sahu, Achay Lal Bhagat Kusdas and others that Chintamon's associates and he him-

(1) I. L. R. 23 Cal. 621 (1895).

CHINTAMON SINGH v. THE EMPEROR.

self were always suspected of being concerned in the dacoities.

We may add that the Petitioner's first two pleas relate to preliminary matters. They should have been taken before Mr Lea and Mr Reid. It appears from the judgment of Mr. Lea that he had afforded the defence before the commencement of the case facilities for putting forward any legal point Then, in his motion to the High Court on the 5th December 1905, the Petitioner had a further opportunity of pressing these objections. In his first motion to the High Court in September 1904, the first objection raised here was not urged at all. In his motion to the High Court in December 1905, these objections were urged, but this Court declined to interfere. It is futile now to set up these objections after the Petitioner failed to urge them or urged them unsuccessfully in the preliminary stages of the proceedings.

We have been asked to go into the merits of the case in detail, but the concurrent findings of facts by both the Courts below render it unnecessary for us to consider the evidence at greater length than we have done. We have heard the comments made by counsel on both sides on the evidence and we consider that the lower Appellate Court was right in excluding the evidence of some of the witnesses for the prosecution as untrustworthy and acting on the evidence of others. We in no way differ from his views on this subject.

For the above reasons we decline to interfere with the order of the Magistrate complained of in this case, and discharge the rule.

B. C. *Rule discharged*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE
No. 2175 OF 1905.

RAMPINI, C. J.
SHARFUDDIN, J.
1907.
Heard,
7, June.
Judgment,
12, June.

AMAR CHAND KUNDU and others, Defendants, Appellants,
v.
NANI GOPAL MUKERJEE and anr., Plaintiffs, Respondents.

Civil Procedure Code (Act XIV of 1882), secs 244 and 278—Personal decree against shebait—Execution against debutter *property—Suit to declare property* debutter, *if maintainable.*

A suit instituted by the shebait *of an idol to have it declared that property sought to be sold in execution of a personal decree against the Plaintiff is the endowed property of the idol is maintainable.*

RAM KRISHNA MAHAPATRA v. MOHANT PADMA CHARAN DEB (1) *followed.*

This was an appeal preferred on the 14th of November 1905, against the decree of Moulvi Abdul Barry, Subordinate Judge, 2nd Court of Zillah Hughly, dated the 9th of August 1905, affirming the decree of Babu Sarada Prosad Bakshi, Munsif, 2nd Court of Hughly, dated the 22nd of February 1904.

It appears that in execution of a personal decree against the present Plaintiffs the disputed properties were attached.

The present Plaintiffs applied under sec. 278 of the Civil Procedure Code alleging that these properties belonged to certain family Thakurs and that they were mere *shebaits* of those Thakurs.

The claim of the present Plaintiffs was

(1) 6 C. W. N. 663 (1902).

AMAR CHAND KUNDU v. NANI GOPAL MUKERJEE.

disallowed and the disputed properties were sold and purchased by the decree-holders.

This regular suit was thereupon instituted by the Plaintiffs for a declaration that the disputed properties were the endowed properties of the Thakurs.

The Defendants pleaded that the value of the subject-matter of the suit exceeded Rs. 1,000 and that consequently the suit was not triable by the Munsif, that the suit was bad for non-joinder and misjoinder of parties and causes of action, that a regular suit was not maintainable, that the Plaintiffs' claim was barred by estoppel, that this suit was an infringement of the rule against perpetuity, that with regard to property *ka* the Plaintiffs' mother was *benamdar* of her husband and that consequently she had no right to make an endowment of it, and generally, that the disputed properties were not *debutter*.

The learned Munsif overruling all these objections decreed the Plaintiffs' case.

An appeal against the decree of the Munsif was dismissed by the learned Subordinate Judge.

The Defendants preferred this second appeal.

Babus Golap Chandra Sarkar and *Aukshoy Kumar Banerjee* for the Appellants.

Babu Brojo Lal Chakrabutty (for *Babu Monindra Nath Bhattacharjee*) for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit to have it declared that certain property is the endowed property of certain idols, and cannot be sold in execution of a personal decree passed against the Plaintiffs, the *shebaits* of the idols. Both the lower Courts have decreed the suit. The Defendants appeal. It is urged (1) that a separate suit is not maintainable, (2) that the property is not entirely *debutter* and (3) that the Munsif had no jurisdiction, as the decretal amount exceeded Rs. 1,000.

These pleas in our opinion must all fail. The Plaintiffs sue as *shebaits* on behalf of the idols. They are as such different persons from themselves as judgment-debtors, under the decree given against them in their personal capacity. The suit is therefore not barred by sec. 244, C. P. C. The case of *Ram Krishna Mahapatra* v. *Mahant Padma Charan Deb* (1) is sufficient authority for this proposition. No ruling exactly contrary to this has been been shown us.

We have examined the terms of the *arpannama*. It appears to us to be a valid dedication of the property to the worship of the idols named therein.

There can be no doubt that the Munsif had jurisdiction to decide the suit. The value of the property has been held by the .Subordidate Judge to be less than Rs. 500.

The appeal is dismissed with costs.

N. G. *Appeal dismissed.*

(1) 6 C. W. N. 663 (1902).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER No. 275 OF 1907.

MACLEAN, C. J.
COXE, J.
1098.
Heard,
9, January.
Judgment,
24, January.

JOGENDRA NATH SIRKAR and others, Judgment-debtors, Appellants,
v.
GOBINDA CHANDRA DUTTA, Decree-holder, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 244 and 278 – Decree, personal, against shebait—*Claim to attached property on behalf of idol, if may be tried in execution proceedings.*

When immoveable property is attached in execution of a decree passed against a shebait *personally, the latter can object to the attachment on the ground of the property being* debutter *and, the claim is triable under sec 244 of the Civil Procedure Code.*

PUNCHANON BANDOPADHYA v. RABIA BIBI (1) *followed in principle.*

This was an appeal preferred on the 1st of July 1907, against an order of F. Roe, Esq., District Judge of Hughly, dated the 17th of April 1907, affirming the order of Babu Sripati Chatterjee, Subordinate Judge of Hughly, dated the 13th of February 1907.

The facts of the case are as follows:—

One Ramani Dasi instituted Suit No. 24 of 1900 for arrears of rent of a *dur-putni* taluk against the original *dur putnidars*, Purna Chandra Chakraburty and others, making the present Respondent who was her co-sharer a party *pro formâ* Defendant in the suit. Subsequently the Respondent, Gobinda Chandra, was made a co-Plaintiff with his consent and the present Appellants, Jogendra Nath Sirkar and others, were made Defendants on their own application in which they stated that the *dur-putni* had been purchased by their father Kenaram Sirkar, deceased, from the Chakraburties. A decree was passed against the present Appellants for the whole rent and a declaration was made therein that half of the rents was due to Ramani Dasi and the other half to the present Respondent. Ramani Dasi put the decree in execution in Execution-Case No 48 of 1902 and attached the *dur-putni* and proclaimed it for sale. But after various proceedings her dues were satisfied. Thereafter Gobinda Chandra applied for execution to recover his dues under the decree by attachment and sale of the *dur-pŭtni* taluk. At this stage the present Appellants took the objection that the *dur-putni* was acquired by their father for the benefit of the Thakur Kasinath and as the Thakur was not made a Defendant in the suit the taluk could not be seized in execution. They preferred this objection in two applications drawn up in similar terms one purporting to be made under sec. 244, C. P. C, in their capacity as judgment debtors and the other under sec. 278, C. P. C., as *shebait* of the Thakur.

The learned Subordinate Judge rejected both applications, the application under sec. 278, C. P. C., on the ground that the decree was a rent decree, and the application under sec. 244, C. P. C., *first*, because he was not satisfied that the taluk was really the property of the Thakur and, *secondly*, because the judgment-debtors allowed themselves to be made parties to the suit in their personal capacity and so it did not lie in their mouth to say that the *dur-putni* was not their property, but the property of the

(1) I. L. R. 17 Cal. 711 (1890).

Jogendra Nath Sirkar *v.* Gobinda Chandra Dutta.

Thakur. He observed that by coming up with an objection like the present they really wanted to impugn the decree which they could not be allowed to do under sec. 244, C. P. C.

The judgment-debtors then preferred an appeal before the District Judge who observed as follows :—

'The judgment-debtors are not at liberty in their personal capacity to say that the property is *debutter* property. If there is any allegation to this effect, it must be made specifically by the idol who will then be responsible for costs if he fails." The learned District Judge was further of opinion that the decree was a money decree inasmuch as it gave a specific share of the rent to each co-sharer. But he thought that the question did not arise. He dismissed the appeal.

The judgment-debtors thereupon preferred this second appeal.

Babu Mohendra Nath Roy (with him *Babu Krishna Prosad Sarbadhikary*) for the Appellants relied on *Beg Raj* v. *Sreemutty Kundali* (2) and *Punchanon* v. *Rabia Bibi* (1), which was a Full Bench case. *Ram Krishna Mohapatra* v. *Mohunt Padma Charan* (3) and *Ramanathan Chettiar* v. *Levvai Marakayar* (4) were against him, but they were not consistent with the Full Bench decision of the Calcutta High Court.

Babu Brojo Lal Chakrabutty for the Respondents relied on *Bhajahari Pal* v. *Ram Lal Das* (5), *Ram Krishna Mahapatra* v. *Mohunt Padma Charan* (3), an reported judgment in *Amar Chand Kundu* v. *Nani Gopal Mookerjee* (6). *Punchanon* v. *Rabia Bibi* (1) and *Beg Raj* v. *Sreemutty Kundali* (2) are distinguishable. In the former the claim was by the judgment debtor of the attached property as his own property. In the latter case also, part of the property in dispute was claimed as the judgment-debtor's own private property. See *Murigeya* v. *Hayat Saheb* (7).' The reasons given in *Ram Krishna Mahapatra* v. *Mohunt Padma Charan* (3) are conclusive of the present case

The Judgment of the Court was as follows :—

Maclean, C. J.—It is not very easy from the terms of the judgment of the District Judge to ascertain what the appeal is about. But from the terms of the grounds of appeal and the arguments addressed to us the question appears to be whether the Appellants could properly raise the question they desired to raise, on an application under sec. 244 of the Code of Civil Procedure. It appears that a decree in the suit was passed against them personally, that in execution of that decree attachment was issued, or was about to be issued against certain property. The Appellants say that property does not belong to them personally, but that it belongs to them as *shebaits* of an idol : that, as such, it is not liable to attachment, and they contend that this question is properly triable under sec.

(1) I. L. R. 17 Cal. 711 (1890).
(2) 8 C. W. N. 353 (1902).
(3) 6 C. W. N. 663 (1902).
(4) I. L. R. 23 Mad. 185, F. B. (1899).
(5) 6 C. W. N. 63 (1901).

(1) I. L. R. 17 Cal. 711 (1890).
(2) 8 C. W. N. 353 (1890).
(3) 6 C. W. N. 663 (1902).
(6) Since reported, 12 C. W. N. 308 (1907).
(7) I. L. R. 23 Bom. 237 (1898).

JOGENDRA NATH SIRKAR *v.* GOBINDA CHANDRA DUTTA.

244. They made two applications, one under sec. 244, the other under sec. 278. There appears to be some inconsistency, in making these two applications. Both have been dismissed. So far as the order was made under sec. 278, admittedly there is no appeal but they say that, so far as it was an application under sec. 244 there is an appeal. This is what we have to decide, and the question is whether the question could be determined under sec. 244. As the Appellants were parties to the suit, we think the case fell within sec. 244. There has been some difference of judicial opinion upon the point, but we need not go through the cases as the question seems to be concluded, in principle, by the Full Bench decision of this Court, in the case of *Punchanon Bandopadhya* v. *Rabia Bibi* (1).

I do not consider that the Appellants have lost any right *quâ* their application under sec. 244 because they made a mistake in applying under sec. 278.

The appeal must be allowed with costs and the case must go back to be tried out on its merits. I have assumed throughout that the Appellants are the only *shebaits*.

We assess the hearing fee at 3 gold mohurs.

COXE, J.—I agree.

N. G. *Appeal allowed.*

(1) I. L. R. 17 Cal. 711 (1890).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 548 OF 1906.

MOOKERJEE, J. CASPERSZ, J. 1907. Heard, 21, August. Judgment, 26, August.	TALEWAR SINGH and others, Plaintiffs, Appellants, *v.* BHAGWAN DAS and others, Defendants, Respondents.

Civil Procedure Code (Act XIV of 1882), secs 138, 139, 584—Documents not mentioned in list filed with plaint—Discretion of Court in excluding—Certified copies of public documents or records of judicial proceedings—Erroneous exclusion—Second appeal.

When a Plaintiff seeks to produce documents at the trial which he had failed to mention in the list annexed to the plaint the Court has clearly a discretion under sec 139 of the Civil Procedure Code whether to receive or reject them. But in exercising this discretion the Court has to bear in mind that the section was enacted to prevent fraud by the late production of suspicious documents and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings.

SYED IKRAM HOSSIEN *v.* RAM LOCHUN DUTT (3) and RANCHHOD HIRABHAI *v.* THE SECRETARY OF STATE (4) *relied on.*

When a subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted, the High Court has ample power to interfere under sec. 584, C. P. C.

(3) 23 W. R. 29 (1874).
(4) I. L. R. 23 Bom. 173 (1896).

TALEWAR SINGH *v.* BHAGWAN DAS.

MONI LAL BANDOPADHYA *v.* KHIRODA DASI (5), DEVIDAS JAGJIVAN *v.* PIRJADA BEGAM (6) and MINAKSHI *v.* VELU (7) *followed.*

Unless called upon by the Court, it is not obligatory on the Plaintiff to produce documents on which he relies but which he has not filed with the plaint, at the first hearing when issues are framed.

MAHBUB HOSSEIN *v.* PATASU KUMARI (1) and GOUR HURREE CHOWDHURY *v.* PRANHUREE LAHA (2) *followed.*

This was an appeal preferred on the 9th of April 1906, against the decree of Babu Annada Prosad Bagchi, Subordinate Judge, 1st Court, Gya, dated the 18th of December 1905, affirming the decree of Babu D. C Mazumdar, Munsif, 1st Court of that place, dated the 19th of May 1905.

The facts of the case material to this report appear from the judgment.

Babus Mohendra Nath Roy, Kulwant Sahay for the Appellants

Babu Joy Gopal Ghosha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

The subject-matter of the litigation out of which this appeal arises is an estate which was sold for arrears of cesses, under the Public Demands Recovery Act, on the 30th September, 1891. The Plaintiffs allege that the effect of the sale has not been to affect their interest in the property and that consequently they are entitled to recover possession from the auction purchaser. The purchaser resisted the claim mainly on the ground that the Plaintiffs had no interest whatsoever in the property. The substantial question in controversy between the parties therefore was whether the estate was the property of the judgment-debtor Sangam Lal alone or whether it was the property of a joint family of which the judgment-debtor as well as the Plaintiffs were members. The Courts below have dismissed the suit on the ground that the Plaintiffs have failed to prove that they formed members of a joint family with the judgment-debtor at the time when the properties were acquired.

The Plaintiffs have appealed to this Court and it has been contended by their learned vakil that the decision of the Courts below is vitiated by reason of improper exclusion of important documentary evidence tendered on their behalf in the Court of first instance. The suit was commenced on the 16th September 1901 and to the plaint was attached a list of documents which the Plaintiffs stated would be produced later on The first hearing of the case took place on the 8th December 1904, on which date the issues were settled and the 24th January was fixed for hearing. It was stated before this Court on behalf of both the parties when this appeal was argued, that on that date the Plaintiffs were not called upon by the Court to produce their documentary evidence. On the 22nd December following, documentary evidence was filed on behalf of the Defendants. On the 6th January 1905 the Plaintiffs put in a petition and filed along with it their documentary

(1) 1 B. L. R 120 (1868).
(2) 21 W. R. 42 (1873).
(5) I. L R. 20 Cal 710 (1893).
(6) I. L. R. 8 Bom 377 (1884).
(7) I. L. R. 8 Mad. 373 (1885).

evidence; this petition explained the reasons for the delay. The order of the Court upon the petition was that it should be filed. The case was taken up for disposal on the 19th April 1905. The hearing proceeded and on the 27th April the Plaintiffs asked for permission to use the documents, most of which had been mentioned in the list annexed to the plaint and all of which had been filed in Court along with the petition of the 6th January 1905 The pleader for the Defendants however took objection to the reception of the documents on the ground that they had not been filed in time and that they should be excluded under sec 139 of the Civil Procedure Code. The Court of first instance gave effect to this objection. Evidence was then taken and the case disposed of on the merits. It was found, *first*, that upon the evidence on the record as it stood the Plaintiffs had not been able to establish that the disputed property had been acquired at a time when they formed members of a joint family with Sangam Lal, *secondly*, that they had failed to prove that they had any share in the estate in controversy, and, *thirdly*, that they had failed to prove their possession within twelve years of the suit. In this view of the matter, the suit was dismissed. The Plaintiffs then appealed to the Subordinate Judge and urged their objection that their documentary evidence ought not to have been excluded. The Subordinate Judge overruled this contention and upon the evidence on the record affirmed the conclusion of the Court of first instance that the Plaintiffs had failed to prove their title and possession

The Plaintiffs have now appealed to this Court and on their behalf it has been argued that their documentary evidence has been improperly excluded. In our opinion this contention is well-founded and ought to prevail. The documents which have been excluded may be divided into two classes. There are some which were mentioned in the list annexed to the plaint and there are others which were produced for the first time in Court on the 6th January 1905. As regards the first class of documents it is clear that there is no good ground for their exclusion. The learned vakil for the Appellants invited our attention to the provisions of secs. 59 and 63 of the Code. Sec. 59 provides that "if a Plaintiff sues upon a document in his possession or power he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint. But if he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint." Sec. 63 then lays down that "a document which ought to be produced in Court by the Plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the Court, be received in evidence on his behalf at the hearing of the suit." In the case before us the documents were not such as ought to have been produced in Court when the plaint was presented. It was therefore only necessary for the Plaintiffs to enter

TALEWAR SINGH *v.* BHAGWAN DAS.

them in the list which they annexed to the plaint. This was done. At the first hearing therefore when the issues were framed, it was not obligatory on the Plaintiffs to produce them unless they were called upon to do so. This is clear from the decision of this Court in the case of *Mahbub Hossein* v. *Patasu Kumari* (1) and *Gour Hurree Chowdhury* v. *Pranhuree Laha* (2). So far therefore as the documents mentioned in the list annexed to the plaint are concerned there is no case for their exclusion. It is now stated, however, on behalf of the Respondents, that when the issues were drawn up, a note was added at the foot thereof that the parties should produce their documents. If this was communicated to the Plaintiffs, it would be their duty to file the documents mentioned in the list annexed to the plaint. Failure to do so, would not, however, necessarily lead to their exclusion, as will presently be shown.

As regards the other documents which were produced in Court for the first time on the 6th January 1905 and which had not been mentioned in the list annexed to the plaint, the Court of first instance clearly had a discretion, whether to receive or to reject them. Now under sec. 139, C. P. C., no documentary evidence in the possession or power of any party which should have been, but has not been, produced in accordance with the requirements of sec. 138 shall be received at any subsequent stage of the proceeding, unless good cause be shown to the satisfaction of the Court for the non-production thereof. No doubt the Plaintiffs have brought themselves within the scope of this section, and it was for the Court of first instance to decide whether the documents which ought to have been mentioned in the original list, or ought to have been produced earlier, were not so produced for good and sufficient reasons. At the same time, we must remember the object which the Legislature had in view in enacting sec. 139, C. P. C. It was pointed out by this Court in the case of *Syed Ikram Hossien* v. *Ram Lochun Dutt* (3) and by the learned Judges of the Bombay High Court in the case of *Ranchhod Hirabhai* v *The Secretary of State* (4) that sec 138 of the Code was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion such as certified copies of public documents or records of judicial proceedings. Now on an examination of the documents which the Plaintiffs seek to produce at a late stage of this case, it turns out that by far the majority of them are copies of public documents. They are in most instances copies of judicial proceedings as to the genuineness of which there could not be any possible controversy. There is only one document which does not fall within this description. It is a *kabuliyat* executed on the 26th January 1889 by Bharosi Singh in favour of Sangam Lal. We have not been informed whether this document was registered. If it was a registered document, it could not be suggested that there was any prejudice to the Defendants by reason of delay in its production; it

(1) 1 B. L. R. 120 (1868).
(2) 21 W. R. 42 (1873).
(3) 23 W. R. 29 (1874).
(4) I. L. R. 22 Bom. 173 (1896).

TALEWAR SINGH *v.* BHAGWAN DAS.

could not be said that the Plaintiffs wanted time to manufacture it. Under these circumstances we must hold that the documents which were not mentioned in the list of 6th January 1905 should also be received in evidence except this *kabuliyat* which may be received in evidence if it is a registered document, otherwise it will be excluded

The learned vakil for the Respondents strenuously contended that even in the view that these documents have been improperly excluded, there is no cause for a remand, because upon the facts found by both the Courts below, the claim of the Plaintiffs is obviously barred by limitation. We are unable to accede to this contention. The documents which have been excluded relate not only to the question of title but also to the question of possession and it is conceivable that if these documents had been received and acted upon the conclusion of the Courts below upon the question of limitation might have been in favour of the Plaintiffs. We must therefore hold that the Plaintiffs are entitled to have their case tried out after these documents have been received in evidence. There can be no possible question that when a Subordinate Court has refused in the erroneous exercise of its discretion to receive documentary evidence which ought to have been accepted the High Court has ample power to interfere under sec. 584, C. P. C, see ***Moni** Lal Bandopadhya* v. *Khiroda* ***Dasi*** (5), ***Devidas** Jagjivan* v. *Pirjada* ***Begam*** (6) and *Minakshi* v. *Velu* (7).

(5) I. L. R. 20 Cal. 740 (1893).
(6) I. L. R. 8 Bom. 377 (1884).
(7) I. L. R. 8 Mad. 373 (1885).

The result therefore is that this appeal must be allowed, the decrees of the Courts below discharged and the case remanded to the Court of first instance in order that the evidence which has been excluded may be received as directed above. The Plaintiffs will be at liberty to prove such of these documents as are required by law to be proved and the Defendants will be at liberty to adduce rebutting evidence.

The costs of this appeal will abide the result.

N. G. *Case remanded.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No 31 OF 1907

MACLEAN, C. J.
HARINGTON, J
FLETCHER, J.
1907.
27, November.

SM INDRA BIBEE
v.
JAIN SARDAR AHIRI

Registration Act (III of 1877), secs 17, 21, 49 and 80 —Power-of-attorney purporting to create charge on immoveable property—Non-compliance with provisions of Registration Act.

Where A executed a power-of-attorney in favour of B purporting to create a charge generally on immoveable property but the instrument did not sufficiently describe the parcels of property and was moreover stamped and registered as a power-of attorney and entered in Book IV,

Held—*That the instrument did not operate as a charge.*

NAJIBULLA MULLA *v.* NUSIR MISTRI (1) *referred to*

This was an appeal by the Plaintiff, against the judgment and decree of Mr. Justice Chitty, dated the 20th of

(1) I L. R. 7 Cal. 196 (1881).

SM. INDRA BIBEE *v.* JAIN SARDAR AHIRI.

May 1907, dismissing the Plaintiff's suit with costs.

The facts of this case appear fully from the two judgments of Chitty, J, which are as follows :—

"The Plaintiff in this case is the administratrix of the estate of her late husband, Bisseswar Das, and sues for a declaration of a charge on the estate of one Sitab Chand Ahiri, deceased. The Defendant is the administrator of the estate of Sitab Chand Ahiri and the sole beneficiary is Dhunwa Bibee, grand-daughter of the Defendant.

"The Plaintiff claims that her husband advanced moneys amounting to about Rs. 5,000 to the Defendant for purposes of the administration of the estate of Sitab Chand Ahiri, and these advances are not denied by the Defendant. It is also admitted that on the 5th August 1898 the Defendant executed in favour of Bisseswar Das a general power-of-attorney to enable him to recover the rents and profits of the properties of which the Defendant is the administrator in order to recoup himself for the advances which he had made.

"It is by virtue of this power of-attorney that the Plaintiff claims to have a charge upon the estate of Sitab Chand Ahiri. It is admitted that no leave of the Court was obtained before the power-of attorney was executed and if a charge was thereby created upon the property there was a breach of the provisions of sec. 90 of the Probate and Administration Act, 1881.

"The estate has been represented in this suit so far by the Defendant alone and under ordinary circumstances, no doubt, an administrator is fully competent to represent an estate the administration of which has been entrusted to him by the Court. There are, however, cases in which the estate cannot be said to be fully and properly represented by the administrator, and it appears to me that this is one of such cases. However strongly the administrator may argue that no charge has been created or that no charge could be created against the estate, it must always be apparent that in so doing he is arguing against the validity of his own acts.

"It is also obvious that in a case like the present one where the Plaintiff seeks to charge the estate, and the estate alone, and does not seek to fix the Defendant administrator with any personal liability, there is no real interest in the administrator to dispute the charge. On the contrary, it is rather to his interest to allow the Plaintiff to proceed against the estate than against himself. Under these circumstances it appears to me that it is highly advisable and indeed necessary that the person really interested in the estate that is to say Dhunwa Bibee should be before the Court, and should be heard before any order is passed which may be to her detriment.

"The fact that she is or may be a minor seems to me of no importance, she can be represented here if necessary by a guardian *ad litem.*

"Three questions arise in the case :—

'*Firstly*—Whether the power-of attorney did in fact create a charge.

'*Secondly*—Whether that charge would be valid and thirdly to what extent it ought to be enforced against the estate. I do not profess at this stage to express any opinion on these three points as I

think the case ought to be argued a fresh when the beneficiary has been brought before the Court.'

"I therefore propose to order that she be added as party Defendant and be served with summons and that if she does appear the case will be reargued. The order will be made under sec. 32 of the Code of Civil Procedure and it is in accordance with the provisions of sec. 437, which says that the Court may if it thinks fit, order persons insterested in the estate to be made parties to the suit.

"The question of costs of this suit up to to-day must be reserved.

"If the application is not made by the Plaintiff for the necessary summons upon her within three weeks the suit will be put down for disposal."

Later on Chitty, J., delivered the following judgment dismissing the suit.

"In this suit by my judgment, dated 19th February 1907, I directed that Dhunwa Bibi the sole beneficiary of the estate of Sitab Chand Ahiri should be made a party before I could determine whether the power-of-attorney, dated 5th August 1898, in the plaint mentioned, did in fact create a charge in favour of the Plaintiff on the said estate and, if so, to what extent. That judgment should be read as part of this judgment; Dhunwa Bibi has now been added as a party Defendant and the matter has been more fully argued before me. The only question to be decided at the present stage is whether as claimed in para. 11 of the plaint, this power-of-attorney constitutes a charge upon the estate which this Court can enforce. There is no doubt that in England powers-of-attorney of a similar character have been held to constitute an equitable mortgage, see *Bennett* v. *Cooper* (2), *In re Parkinson* (3) and *Abbott* v. *Stratton* (4). In India however the question is subject to different considerations. In the first place it is not so easy to draw the line of distinction between a mortgage and a charge; *secondly*, we are here confronted with the provisions of the Stamp and Registration Acts which have to be strictly observed. Now in this case it is not suggested that there was any other contract between Jain Sardar Ahiri and Bisseswar Lal Pagulia than that contained in this power-of-attorney. If a charge was created it was created by that document alone. I will assume for the moment that that document did not amount to a mortgage as defined by sec. 58 of the Transfer of Property Act, but merely operated to create a charge in favour of Bisseswar Lal Pagulia. It would nevertheless come within the definition of a mortgage deed as given in the Stamp Act (I of 1879) (the Act governing this case), and would therefore require a stamp of Rs. 50. It would also require registration under sec. 17 of the Registration Act, as purporting or operating to create, declare or assign a right, title or interest in immoveable property of the value of more than Rs. 100. The document was no doubt stamped and registered in Book IV as a power-of-attorney but it was neither sufficiently stamped nor was it registered in accordance with the provisions of the Registration Act as a document affecting immoveable property. It did not contain

(2) 9 Beavan 252 (1846).

(3) 13 L. T. 26 (1865).

(4) 3 Jo. and Lat. 609 ; 9 Ir. Eq. Rep. 233 (1846).

Sm. Indra Bibee v. Jain Sardar Ahiri.

a description of the property said to be affected sufficient to identify the same; (sec. 21) nor was it entered in Book I (sec. 51). Having regard to these facts I can only conclude either that the parties did not intend that the document should operate as a charge, or that, so intending, they did not take the proper and necessary steps to give effect to that intention. The provisions of the Registration Act are imperative and the intention of the Legislature must have been that no document not properly registered should directly or indirectly operate to create an interest in immoveable property. Sec. 49 prohibits the receipt of such a document as evidence of any transaction affecting the property [see *Bengal Banking Corporation* v. *Macketich* (5)]. For these reasons I am of opinion that this power-of-attorney cannot be received as evidence of the charge, and as no other evidence is admissible the Plaintiff's suit must fail. It is therefore unnecessary for me to go further into the case.

"The suit is dismissed with costs on scale 2 including reserved costs.'

The power-of attorney which the Plaintiff contended operated to create a charge was in these terms :—

"Know all men by these presents that I Jain Sirdar Ahiri son of Lochmun Sirdar Ahiri, deceased, in the District of Gya, but at present residing at No. 54 Brajo Bandu Doctor's Lane, in the town of Calcutta, the administrator to the property and credits of Sitab Chand Ahiri, deceased, in order to enable Bisseswar Das Pagulia hereinafter named to recoup himself of the several sums of money which he has obtained for the maintenance and residence suitable to the position of Dhunwa Bibee the infant daughter of the said deceased and for the obtaining of Letters of Administration whereby I have become such administrator as aforesaid and for the costs of the suit instituted by Rohshun Lal Khettry against me and others being Suit No. 69 of 1898 in the High Court of Judicature at Calcutta Original Side do hereby constitute and appoint Bisseswar Das Pagulia, son of Buktwar Chand Pagulia, residing at No. 26 Ram Prosad Saha's Lane Sindurlaputty in the town of Calcutta aforesaid, my true and lawful attorney for the purposes hereinafter expressed that is to say, to receive the rents and profits of and manage all the messuages lands hereditaments and tenements of or to which I as such administrator as aforesad now am or at any time or times hereafter shall or may become seized possessed or entitled with liberty in the course of such management to let or demise the said premises or any part thereof either from year to year or for any term or number of years not exceeding five years or for any less period than a year at such rents and either with or without any fine or premium and subject to such covenants and conditions as my said attorney shall think fit and with liberty to make allowances to and arrangements with lessees tenants and others to repair and rebuild houses or other buildings to repair fences drain or otherwise the said premises or any part thereof to appoint and employ agents servants and others to assist in the management of the said premises and to remove them and appoint others in their

(5) I. L. R. 10 Cal. 315 (1884).

SM. INDRA BIBEE *v.* JAIN SARDAR AHIRI.

place and to pay and allow to the persons to be so employed as aforesaid such salaries, wages, or other remuneration as my said attorney shall think fit. And with power also to give effectual receipts and discharges for the rents and profits of the said premises and on non-payment of any such rent or any part thereof or the breach of any covenant agreement or condition which ought to be observed or performed by any lessee or tenant of the said premises or any part thereof to distrain for such rent or to commence carry on and prosecute any action or other proceedings whatsoever for compelling payment of such rent or for or on account of any such breach of covenant as aforesaid as my attorney shall think fit. And generally to do all such acts and things in or about the management of the said premises as would conduce to the well being and improvement of the said estate Also to use and take such lawful ways and means for the recovering and receiving obtaining or getting defending or protecting any messuage lands and hereditaments Belonging to the estate of the said Sitab Chand Ahiri deceased which do or shall or which by my said attorney shall be conceived or thought to belong to the said estate as fully and effectually as I myself might or could use or take if I were personally present and did the same. Also to ask demand sue for recover and receive all sums of money goods effects and things now owing or payable or belonging to the estate of the said Sitab Chand Ahiri, deceased, or which shall at any time or times hereafter be owing or belonging to the said estate of Sitab Chand Ahiri, deceased from any person or persons either by virtue of his or their office or by virtue of any security or upon any balance of accounts or otherwise howsoever and on payment transfer or delivery thereof or of any part thereof respectively to give sign and execute receipts releases and other discharges for the same respectively and on non-payment non transfer or non-delivery thereof or of any part thereof respectively to commence carry on and prosecute any action or other proceedings whatsoever for recovering and compelling the payment transfer or delivery thereof respectively Also to state settle adjust compound submit to arbitration and compromise all actions suits accounts reckonings claims and demands whatsoever which now are or hereafter shall or may be depending between me as such administrator as aforesaid and any person or persons whomsoever in such manner in all respects as my said attorney shall think fit. And I authorize and direct my said attorney to pay all moneys which shall come to his hands by virtue of any of the powers herein contained or so much thereof as shall remain after paying thereout the costs charges and expenses incurred by him in the excercise of any of the powers and authorities herein contained into my account to be opened by my said attorney at the Bank of Bengal Calcutta or otherwise to pay and apply the same as I shall from time to time by writing direct. And also thereout for the support of Dhunwa Bibee to pay me Rs. 125 monthly and to apply the blance towards liquidation of the debt due to himself. And to render an account of dealings to me on

THE

Calcutta Weekly Notes.

Vol. XII.] . MONDAY, FEBRUARY 17, 1908. [No. 14

Contents.

NOTES

The constitution of the Benches and the distribution of business amongst them will be as follows from date.

PRESIDENCY GROUP AND PRIVY COUNCIL DEPARTMENT.—The Chief Justice and Mr. Justice Das.

RAJSHAHYE GROUP.—Mr. Justice Stephen and Mr. Justice Holmwood.

PATNA GROUP.—Mr. Justice Brett and Mr. Justice Coxe.

BURDWAN GROUP.—Mr. Justice Rampini and Mr. Justice Sharfuddin.

CRIMINAL BUSINESS.—Mr. Justice Geidt and Mr. Justice Woodroffe.

CASES BELOW Rs. 1,000.—Mr. Justice Mitra.

ORIGINAL SIDE.—Mr. Justice Chitty and Mr. Justice Fletcher will sit singly.

THE FIRST CRIMINAL SESSIONS OF THE YEAR 1908, will commence its sittings from date. Mr. Justice Harington presides.

IN THE CASE OF *Thaman Bandi* v. *The Maharaja of Vizianagram* reported at I. L. R. 29 All. p. 593, a Divisional Bench of the Allahabad High Court (Aikman and Griffin, JJ.,) held that possession acquired during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. In this case the Plaintiff granted a lease for a term of years to a certain person and during the continuance of the lease the Defendants got possession of some plots of the demised land and continued to be in adverse possession for the statutory period. The Plaintiff some two years before the expiry of the lease brought a suit to eject the Defendant from the plots. The Court of first instance found that the Defendants established a right by adverse possession and dismissed the Plaintiff's suit but the High Court of Allahabad agreeing with the Subordinate Judge decreed the Plaintiff's suit holding that the possession of the Defendants during the continuance of the lease was not adverse to the Plaintiff, the lessor. The reasons given are "it would be unjust to hold that a lessor, who was regularly in receipt of the rent reserved by the lease for a long term of years, who therefore had nothing to put him on enquiry, might find at the expiration of the term of his lease that a considerable portion, it may be, of his property has passed out of his hands by a trespasser taking possession of it without his knowledge."

IT MIGHT BE SAID THAT BY THE ACT OF THE TRESPASSER only the lessee was dispossessed but so long as the lessor continued to receive his rent from the lessee, there was no dispossession as against the lessor. The view of law taken by their Lordships of the Allahabad High Court is no doubt in accordance with the view of the Calcutta High Court in the case of *Sharat Sundari Debia* v. *Bhobo Pershad Khan Chowdhuri*, I. L. R. 13 Cal. 101, *Krishna Govinda Dhur* v. *Hari Charan Dhur*, I. L. R. 9 Cal. 367 and the recent case of *Kishwar Nath Sahai Deo* v. *Kali Sankar Sahai*, 10 C. W. N. 343.

WE HAVE NOTHING TO SAY AGAINST THIS DECISION of the Allahabad Bench. But in the concluding portion of the judgment their Lordships (Aikman and Griffin, JJ.) of the Allahabad High Court expressed a doubt as to the correctness of the decision of the Calcutta High Court in the case of *Gobinda Nath Shaha* v. *Surja Kantha*, I. L. R. 26 Cal. 460, in these words, "we are quite unable to appreciate the reasoning of the learned Judges who decided the latest case in the Calcutta High Court namely *Gobinda Nath Shaha* v. *Surja Kantha*." Now the case of *Gobinda Nath Shaha* v. *Surja Kantha* was a case of relinquishment of a *putni* and *dar-putni* interest by the

lessees and the question which was decided in that case was that the title by adverse possession acquired by a trespasser against the *putnidar* and *dar-putnidar* would be operative as against the zemindar who got *khas* possession by the relinquishment of the *putni* and *dar-putni*. The zemindar was not bound to accept the relinquishment when he found that his lessee had lost title to some of the lands by the adverse possession of others. Indeed in this case it might be said that the zemindar derived his right to sue from or through the relinquishing *putnidar* and *dar putnidar*.

IF THE RELINQUISHMENT HAD NOT TAKEN PLACE THE zemindar would have no right to sue the trespassers, because so long as the *putni* tenure subsisted his rights were not affected in the least. If the *putni* came to an end on account of a sale under the *Putni* Regulation or some other law, the zemindar would have been able to oust the trespassers on the ground that their adverse possessions were incumbrances. The Calcutta High Court would have come to a quite different conclusion if the *putni* had not come to an end by a relinquishment which is nothing but a contract between the *putnidar* and the zemindar to put an end to the *putni*. At page 164 I. L. R. 26 Cal., their Lordships observe, "it cannot be said that the zemindar became entitled to *khas* possession by reason of the *putni* having come to an end otherwise than by the voluntary act of the *putnidar*. Again on the same page, "in the present case the Plaintiffs became entitled to *khas* possession by the relinquishment of the *putnidar* and *dar-putnidars*, and so they must be held to be affected by adverse possession that was taken against the *putnidars* and *dar-putnidars*, whose rights they had acquired through their voluntary relinquishment."

CURRENT INDIAN CASES.

VAHAZULLA SAHIB *v.* BOYAPATI NAGAYYA, I. L. R. 30 Mad. 519. *Mahomedan Law—Gift.*

Gifts between Mahomedans by registered instruments are invalid unless the requirements of Mahomedan law as to possession are also complied with.

VELAYUTHA *v.* GOVINDASAWMI, I. L. R. 30 Mad. 524. *Lien—Unpaid purchase money—Adverse possession.*

In deciding the question as to whether the possession of an unpaid vendor was adverse it was held that it was not so having regard to the evidence that after the conveyance the vendor in whose name the *patta* formerly stood had a *patta* issued in the name of the vendee instead.

A vendor is not entitled to retain possession of the property sold by virtue of his lien for unpaid purchase money

HALIMA *v.* ROSHAN BEE, I. L. R. 30 Mad. 527. *Contribution—Co-sharer.*

A co-sharer is not liable to share the expenses of litigation *bonâ fide* carried on by another co-sharer in respect of the common property.

SAMINATHA *v.* MUTHUSAMI, I. L. R. 30 Mad. 531. *Office brocage agreement.*

An office brocage agreement is invalid as opposed to public policy.

SANKARA *v.* SUBRAYA, I. L. R. 30 Mad. 536. *Civil Procedure Code, secs. 108, 582.*

After an appeal is filed, the power to pass an order under sec. 108, C. P. C., becomes vested by virtue of sec. 582, C. P. C., in the Appellate Court.

Art. 164 of Sch. II of the Limitation Act applies to such a case.

MAHALINGA *v.* KUPPANA CHARIAR, *Civil Procedure Code, sec. 232.*

Under the proviso to sec. 232, C. P. C., the Court cannot order execution in favour of the transferee without notice to the Defendants, but if the Defendants are dead, no such notice, as is contemplated by the section, can be sent until their representatives are brought on. An application to bring in the representatives is a step in aid of execution.

EMPEROR *v.* LAZAR, I. L. R. 30 Mad. 555. *Penal Code, sec. 494.*

A native Christian having a Christian wife living married a Hindu woman according to Hindu rites without renouncing his religion, *held* that he was guilty of an offence under sec. 494, I. P. C.

FANI BHUSAN *v.* SURJYA KANT, I. L. R. 35 Cal. 25. *Evidence Act, sec. 108—Presumption of death.*

The question for which provision is made in sec. 108 of the Evidence Act is whether a man is alive or dead when the question is raised, not whether he was alive or dead, at some antecedent date.

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Ogden* v. *Ogden.* Before LORDS JUSTICES COZENS-HARDY M. R., SIR GORELL BARNES P. and KENNEDY, 18th November 1907.

Marriage of English woman with foreigner—Incapacity according to law of domicile—Lex loci contractus *governs.*

The Respondent, then Miss Williams, an English woman and aged 25, in 1899, went through the ceremony of marriage with a Frenchman, Leon Phillip,

aged 19 who had come over to England temporarily. The marriage took place without the knowledge of the father of either party. After the marriage the parties co-habited in England for a short time and the Respondent became pregnant and a child was born. The father of Leon Philip coming to know subsequently of this marriage took away his son to France and in July 1899 instituted proceedings in the French Courts for a decree of nullity on the ground that his son was under age (25) at the time of marriage and the consent of the parents had not been given. The French Courts declared the marriage to be invalid. Later on Leon Phillip having married in France, the Respondent brought an action against him for divorce and her Counsel at the hearing before Sir Francis Jeune asked for a decree of divorce or an order that the French decree was a valid and effective decree. That learned Judge refused to make a decree of divorce on the ground of jurisdiction because the Petitioner came before him as the wife of a domiciled Frenchman and therefore as a domiciled Frenchwoman. The other prayer also he refused as no decree for nullity was asked for but he was only asked to say that the French decree was operative. "I am not going to disturb that decree, but you do not ask me to deal with it upon the point of English law." In October 1904, she married Mr. Ogden in Lancashire according to English rites and she lived with him for some time and had a child by him. Mr Ogden having subsequently ascertained the true facts of the case brought this suit to have it declared that his marriage with the Respondent was bad on the ground that she was according to English law still the lawful wife of Leon Philip.

MR. JUSTICE BARGRAVE DEANE gave judgment in favour of Mr. Ogden, holding that the *lex loci contractus* must prevail over the *lex domicilii* and the English law must prevail.

In this appeal by the Respondent SIR GORELL BARNES delivered the Court's judgment, dismissing the appeal. The *lex loci contractus* applied and the decision of the French Court was not binding on Courts in England.

Sir Edward Clarke, K. C., and *Mr. Bayford* for the Respondent.

Mr. Middleton for Mr. Ogden.

COURT OF APPEAL.—*Curtice* v. *London City & Midland Bank.* Before LORDS JUSTICES COZENS-HARDY, M. R., FLETCHER MOULTON and FARWELL. 11th December 1907.

Cheque—Countermand by telegram—Negligence.

A cheque was drawn by the Plaintiff upon the Bank to a third person. On the same day after banking hours a telegram was sent by the Plaintiff to the bank countermanding payment of the cheque. It was found that the telegram reached the Bank's office on 31st October after the Bank was closed and was put into the Bank letter box, but that it did not come into the hands of the Bank officials until morning of November 2nd under circumstances which seemed to show negligence on the part of the Bank. There was a difference of opinion in the Divisional Court (Darling and Lawrence, JJ.). On appeal Lawrence J.'s opinion prevailed. The Master of the Rolls observed that "a telegram may reasonably and in the ordinary course of business be acted upon by the Bank, at least to the extent of postponing the honouring of the cheque until further enquiry can be made." But he was not satisfied that the Bank would be bound as matter of law to accept an unauthenticated telegram as sufficient authority for the serious step of refusing to pay a cheque. "Countermand is really a question of fact." It means much more than a change of purpose on the part of the customer. "There was no such thing as a constructive countermand in a commercial transaction of this kind."

Mr. Hugo Young, K. C, and *Mr. H. Cassie Holden* for the Defendants Appellants.

Mr. English Harrison, K. C., and *Mr. Douglas Hogg* for the Plaintiff.

Appeal allowed.

COURT OF APPEAL.—*Williams* v. *Midland Ry Co.* Before the EARL OF HALSBURY, SIR GORELL BARNES, P. and BIGHAM, J. 9th December 1907.

Contract with railway company—Special rate for special risk—Reasonableness.

A dog consigned by the Plaintiff for carriage by the Defendant Company was lost owing to the negligence of the company. The value of the dog was agreed to be £300. But the Plaintiff had signed a special contract by which the Defendant was not to be responsible for "dogs, deers or goats beyond £2 each unless a higher value was declared at the time of delivery to the company and a percentage of 1½ p. c. (minimum 3*l.*) paid upon the excess value declared." No declaration of value and no excess payment had been made, the Plaintiff having paid the ordinary rate for any distance, namely 4*s* The question was, was the contract just and reasonable within sec. 7 of the Railway Coy.'s Traffic Act 1851.

On this appeal, by the Defendant against whom judgment had been entered in the first instance by Walton, J., the Court of Appeal held that the evidence showed that the contract was reasonable. LORD HALSBURY observed : "No doubt the question whether a rule was reasonable or not was a difficult question as it was based upon opinion and opinion on such a question might well vary from time to time. But he could not himself see why it should be said that the rate here was unreasonable."

Sir Robert Finlay, K. C., Mr. B. Francis Williams, K. C., Mr. J. D. Crawford and *Mr. W. O. Hodges* for the Defendant.

Mr. S. T. Evans, K. C., and *Mr. Rhys Williams* for the Plaintiff.

Judgment reversed.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION Before CASPERSZ and COXE, JJ CRIMINAL APPEAL No. 13 OF 1908. KASHI NATH KAIBARTA DAS AND ANOTHER, Appellants *v.* THE EMPEROR. 25th January 1908.

Indian Penal Code, sec. 201—Applicability of.

The Appellants were charged with murdering one Ram Kumar Dam and also with causing the disappearance of his corpse with the intention of screening the murderers from punishment. There were also minor charges. The jury acquitted the Appellants of the offence of murder and of the minor offences, but they convicted them under sec. 201, I. P C, and the Judge passed sentence of 2 years' rigorous imprisonment on each Appellant. This appeal was preferred by the prisoners from jail and was disposed of in Chambers.

Their Lordships observed :--

"We are of opinion that the verdict cannot be upheld and that the conviction and sentence must be set aside. The Judge overlooked the wording of sec. 201 and the case of *Taiap Ali* v. *Queen Empress,* I L R. 22 Cal 638 in which the law was explained and the authorities were considered As in that case, the evidence here is to the effect that the murder was committed by the accused themselves and not by other persons We find no suggestion that Ram Kumar Dam was murdered by persons other than the Appellants or their accomplices In these circumstances, having regard to the case of *Taiap Ali,* we think that the conviction of the Appellant cannot be sustained.

We have considered whether there should be a retrial, but after examining the evidence, we are of opinion that no jury could convict the Appellants of murder or any other offence. The corpse of the deceased being decomposed the medical officer could not form an opinion as to the cause of death The eye-witnesses prove very little beyond the fact that the dead body was removed"

B. C. *Prisoners acquitted*

CIVIL APPELLATE JURISDICTION Before STEPHEN and DASS, JJ. APPEAL FROM APPELLATE DECREE No. 748 OF 1906 MOHARAJADHIRAJ BIJOY CHAND MOHATAP BAHADUR, Plaintiff, Appellant *v.* ISHAN CHANDRA MAITI, Defendant, Respondent. 24th January 1908.

Mesne profits—Collection charges—Wrong-doer—Deduction—Onus of proof.

The Plaintiff was the auction-purchaser of the [illegible]fendant's *putni* tenure in land held under him as [illegible] He was in possession of the *putni* tenure [illegible]ction sale for the year 1309. A suit [illegible] set aside the sale which was set aside on a compromise. The Plaintiff then sued for rent from 1309 to 1311. The Defendant set up his right to deduct from that claim as mesne-profits, the rent collected in his tenure in respect of 1309. That claim was not disputed but the Plaintiff replied that he was entitled to deduct from that rent the charges of his collection. This claim was disallowed by the lower Appellate Court on the ground that the Plaintiff was a wrong-doer in acting on his rights under the auction purchase.

Held—That the right to deduct collection charges from mesne-profits is an ordinary incident of the law and the Plaintiff, could not be held to be a wrong-doer in such a way as to deprive him of this right when he was the purchaser in an auction sale.

It is for the Defendant to show that the ordinary law allowing the Plaintiff to deduct collection charges from mesne-profits which he had to pay was abrogated by the terms of the *solenama.*

Babus Basanta Kumar Bose and *Sharashi Churn Mitra* for the Appellant.

Babu Digumbar Chatterji for the Respondent

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM APPELLATE ORDER No. 557 OF 1906 JAMINI KANT SEN AND ANOTHER, Appellants *v* ALI AHMED MIA AND OTHERS, Respondents. 27th January 1908

Limitation—Execution of Decree—Step in aid of execution—Benefit derived from other decree-holder's execution.

The question in the appeal was: "Was the decree in execution barred between the years 1897 and 1903?". The decree was passed on the 27th August 1891. The first application for execution was made early in 1897; the second application was made on the 27th December 1897; but the application was struck off on the 19th March 1898 During the pendency of the proceeding, an order was issued for attachment of a decree pending in another Court, *i.e.* at S. Nothing, however, was done by the decree-holders from the 19th March 1898 until the 11th September 1903, when they made their third application for execution.

Another decree-holder J executed the decree in the Court of S and he realized the full amount of the decree in 1901. During the whole of that interval, the present decree-holders did not present any application to the Court of S or take any steps to realise any portions of the money covered by the decree.

Held—That the decree-holders could not take advantage of the steps taken by another decree-holder, though they might have got some benefit by the execution of the decree.

Babus Dwarka Nath Chuckerbutty and *Romes Chunder Sen* for the Appellants.

Babus Jyoti Prosad Sarbadhikary and *Saileswar Sen* for the Respondents.

A. T. M. *Appeal dismissed.*

A vendo[illegible] the property [illegible] purchase money

DWARKA NATH MANJI *v.* THE EMPEROR.

embankment in question was 250 feet long and 2½ feet high. The trying Magistrate has found that there was an old embankment there before and that the Petitioners have merely added to or repaired this *bundh* by throwing earth on it and that the Sub-overseers and peons both saw them do this. In these circumstances we think that the Petitioners have committed an offence within the meaning of sec. 76 of Act II of 1882 (B. C.) because that section prohibits not only the construction of new *bundhs* but adding to old *bundhs* so as to obstruct the flow of water. And this was done in a prohibited area which was to be left unoccupied for spill purposes. It stands to reason that if persons construct a *bundh* in a prohibited area they must interfere with and obstruct the flow of the water.

It is unnecessary, therefore, for us to interfere and we discharge this rule.

B. C. *Rule discharged*

PRIVY COUNCIL.

[CONSOLIDATED APPEALS FROM OUDH.*]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
19, November and
11, December.

MUHAMMAD NASEEM
v.
MIRZA MUHAMMAD ABBAS ALI KHAN.

*Suit for redemption—Mortgage deed—Construction—Accounts—Compound interest—Maintenance costs—Enhanced Government revenue—Arrears of rent, statute barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—*Res judicata *—Recovery of costs thereof—Practice—Point not taken before either of the lower Courts whether open before their Lordships.*

On the construction of cl. (4) of th mortgage deed, which provided that "in case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have, immediately on such default, power either to recover the whole of his principal, interest, and (sud mazid munafa mazkura) *further interest on the said interest according to the rate herein fixed, ... ; or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property," their Lordships agreed with the lower Appellate Court that the mortgagor was not liable for compound interest since the mortgagee entered into possession of the mortgaged premises.*

Their Lordships upheld the concurrent finding of both the lower Courts that under the mortgage deed in this case the mortgagee was entitled to get from the mortgagor over and above the usufruct of the mortgaged property the amount paid by him on account of maintenance and enhanced Government revenue.

Under cl. (10) of the mortgage deed which provided that "whenever after the term of the mortgage or during the said term I (mortgagor) pay to the mortgagee in any khali fasl (*fallow season*), i.e., *in the month of Jeth, the whole of the mortgage money and the whole of interest together with Government revenue, arrears of rent, and* takavi *advances due from tenants, and other expenses incurred under the*

---

* Consolidated appeals of Muhammad Naseem *against* Mirza Muhammad Abbas Ali Khan ; of Muhammad Naseem *against* Mirza Muhammad Abbas Ali Khan , and of Mirza Muhammad Abbas Ali Khan *against* Muhammad Naseem.

MUHAMMAD NASEEM *v.* MIRZA MUHAMMAD ABBAS ALI KHAN.

terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor, shall have power to redeem the mortgaged property," their Lordships agreed with the lower Courts that the mortgagee was entitled against the mortgagor to arrears of rent due from tenants even when such arrears were statute barred as against the tenants.

The mortgagee had previously brought a suit against the mortgagor alleging that at the date of the suit there was due to him a sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or in the alternative for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8½ were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing an order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on the date of that suit,

Held *by their Lordships, who adopted the conclusion of the lower Appellate Court, that nothing had occurred in the previous suit to raise an estoppel against the mortgagor and therefore he might in the subsequent suit show if he could that under the terms of the deed compound interest was not payable.*

The mortgagee was not entitled to recover the costs of the previous suit in the absence of any provision in that behalf in the mortgage deed.

A point not taken by a party before either of the lower Courts was not open to it at the time of the hearing of the appeal before their Lordships.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh, dated the 27th July of 1904, which varied a decree of the Court of the Subordinate Judge of Bara Banki, dated the 29th November of 1902.

The principal question involved in the case was the settlement of the terms on which the above named Muhammad Naseem, hereinafter called the Appellant, was entitled to redeem a mortgage dated 30th September 1885. The said mortgage was executed by Chaudri Imdad Ashroff in favour of the above named Mirza Muhammad Abbas Ali Khan, hereinafter called the Respondent. The property mortgaged was the whole village of Ilyaspur, an 8 anna share in the villages of Husainabad, Patti Yakub and Karmenan, and a 6 annas share in the village of Olhepur. The term of the mortgage was for 10 years, the amount of the mortgage money was Rs. 29,000 and the rate of interest payable was Rs 0-13-4 per mensem, *i.e.*, 10 per centum per annum. The material clauses of the mortgage deed were the following.

"II. The gross rental of the entire village and the shares in the villages that are mortgaged amount to Rs. 6,003-8-6 according to the (zemindari) assesment (*taradud*) of 1293 fasli, and after deduct-

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

ing Government revenue and other expenses the net profits of the said villages and shares amount to Rs. 3,640-5-6.

"III. As the said mortgagee has entered into this mortgage transaction on the faith of the statements made by me, the mortgagor, without himself making any enquiry into the rental, &c., of the mortgaged villages and shares, he shall have the right to realize before the expiry of the term of the mortgage, by aid of the Court, the entire amount of principal with interest from me (personally) as well as from the mortgaged property and every other moveable and immoveable property of any kind belonging to me, together with costs and future interest at the rate stipulated for in this deed, if on enquiry by the mortgagee, made now or in future, the rental, expenses and profits stated by me, be found to be deficient, or in excess, (*i.e.*, the rental and profits be deficient and the expenses in excess).

"IV. That without making any excuse based on earthly and heavenly calamities, or of drought, or hail-storm, &c., the mortgagor shall pay the interest every year at the rate of 13 annas 4 pies per centum per mensem amounting to Rs. 2,900 per annum, by two equal instalments payable every 6 months to the mortgagee at Lucknow, till the redemption of the mortgage. In case of default in payment by me of the instalment of interest at the time herein appointed, the mortgagee shall have, immediately on such default, power either to recover the whole of the principal interest, and *sud mazid munafa mazkura* further interest on the said interest according to the rate herein fixed, by aid of the Courts from myself as well as from the mortgaged property and from my other properties of every description, moveable and immoveable, together with costs of the suit, future interest at the fixed rate of 13 annas 4 pies as provided for in this document, and interest accruing due during the pendency of the suit till liquidation of the whole demand in the Execution Department at the aforesaid rate, without waiting for the expiration of the term of 10 years, provided for in this document, to which I and my representatives shall have no objection; or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property.

"V That in the case of taking possession of the mortgaged property the mortgagee aforesaid shall have power immediately to have his name recorded in the revenue papers in place of mine by mutation proceedings, costs of the proceedings being payable by me.

"VI. That after coming in possession of the mortgaged property, the mortgagee shall have power as my representative in interest, to manage the property, to collect all the income of the village and shares mortgaged, *viz.*, rent *mal*, *sewai*, and zemindari dues, to eject tenants, to enhance and reduce rents, to make wells, to build houses of tenants, to advance *takavi*, to let the mortgaged property on *thika*, and to dismiss and appoint Patwaris and Chowkidars.

"VII. That while in possession of the mortgaged property the mortgagee aforesaid, shall after payment of Government Revenue and other amounts assessed by the Government which may hereafter be

assessed or fixed by the Government, as well as the village expenses, pay off the establishment kept for making collections in the mortgaged property, costs of litigations, expenses incurred in settling tenants, building their houses and making wells and *takavi* advances, etc., appropriate the balance towards the interest of the mortgage money, irrespective of the fact that such balance exceeds the amount of interest due at the rate aforesaid, but if the said balance fall short of interest at the rate fixed by this deed, I shall be liable for the deficiency.

"VIII. That the zemindari dues which the said mortgagee realizes as my representative while in possession of the mortgaged property shall be disregarded in ascertaining the amount of interest received by the mortgagee and the declarant shall not call upon him to account for the same.

"IX. That if during the time that the mortgagee is in possession the income of the mortgaged property is reduced or lost (entirely) owing to droughts, hail storms, new settlements, or other accidents, or if the mortgagee has to pay the Government revenue, etc., from his own pockect, or if any rights or interests in the mortgaged property are attached and proclaimed for sale in execution of any decree, or if the whole, or any part of the mortgaged property passes out of my ownership on the claim of any person under the orders of the Government, then in all such cases the mortgagee shall have the right to recover the principal and interest together with other expenses specified in this deed from me personally and from the mortgaged property, as well as from my other properties of any description. I and my representatives shall have no objection to pay the same.

"X. That whenever after the term of mortgage, or during the said term I pay to the mortgagee in any *khali fasl* (fallow season) *i.e*, the month of Jeth, the whole of the mortgage money and the whole of the interest together with Government revenue, arrears of rent, and *takavi* advances due from the tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor shall have power to redeem the mortgaged property.

"XI. That I shall have power to pay the principal mortgage money within the term of the mortgage by instalments provided the amount of such instalment is not less than 1,000 rupees, and interest on the instalments paid shall be credited to me in the account.

"XII. That during the continuance of the mortgage and after the redemption of the mortgaged property, I, and my representatives shall have no claim to any income, profits or damages of any description against the mortgagee or his representatives."

On 4th November 1886 the mortgagor paid Rs. 2,699-8 on account of principal, and from 4th April 1886 to 29th May 1892 he paid various sums amounting to Rs. 13,461 on account of interest.

On 15th September 1892 the mortgagee sued the mortgagor, who had failed to pay the instalment of interest in accordance with the terms of the mortgage deed, for possession of the mortgaged property. On 18th September 1893, his

claim was decreed with costs amounting to Rs. 1,765-2 by the District judge of Fyzabad and on 27th January 1894 the mortgagee obtained possession of the mortgaged property. The following were the issues fixed in that suit:—

"(1) Is the account filed by the Plaintiff correct?

"(2) If not what sum is due to Plaintiff, or rather what sum is due to Plaintiff under mortgage deed."

The judgment of the District Judge of Fyzabed ran as follows:—

"Claim for possession of the property mortgaged, specified in the margin, entire village Ilyaspur and half of the shares in villages Husainabad, Patti Yakub, Karmeman, and of 6 annas share in village Olhepur, Pargana and Tahsil Haidergarh, district Bara Banki, or for Rs. 33,088-13-3½ principal Rs. 26,300-8 and interest Rs. 6,788-5-3½ on a bond, dated 30th September 1885.

"As to the issues fixed, the Defendant agreed to accept the oath of Har Parshad. Har Parshad has taken the oath adversely to the Defendant, so the accounts as filed by Plaintiff (*i.e.*, as corrected by the Commissioner) must be regarded as accurate.

"As Plaintiff sues for possession, I give a decree for possession of the mortgaged property as claimed. There is no necessity for passing any order as to the amount due under the mortgage to Plaintiff, beyond saying that the account filed by Plaintiff after the correction reported by the Commissioner is correct.

"Decree for possession of property in suit in favour of Plaintiff with costs."

On 11th June 1894 the same District Judge dismissed with costs amounting to Rs. 201-6 an application for review of judgment which had been filed by the mortgagor.

The mortgagor on 21st December 1899 sold the village of Ilyaspur to the Appellant, who on 5th June 1900 tendered a sum of Rs. 37,000 to the mortgagee in redemption of the mortgage. The tender was refused. On 12th June 1900, the mortgagor and the Appellant instituted against the Respondent the present suit in the Court of the Subordinate Judge of Bara Banki for redemption on judgment of Rs. 27,289-1 5 in accordance with accounts annexed to the plaint. In defence the Respondent filed a written statement. He did not deny the right to redeem, but claimed that he was entitled to receive on redemption over Rs. 50,000. The points in dispute are sufficiently indicated by the issues, which were as follows:—

(1) Has the amount due to the Defendant been settled in a former suit, in Mirza Muhammad Abbas Ali Khan *v.* Chaudri Imdad Ashraf.

(2) If so, is the matter *res judicata*?

(3) Is the Defendant entitled to (*a*) interest and (*b*) compound interest on the amount due to him on the date he obtained possession?

(4) If so, at what rate?

(5) Has Defendant cut down any trees, and if so, of what value?

(6) Is the Defendant liable to be debited with such value?

(7) Are there any, and what arrears of rent due from tenant? and is Defendant entitled to the same?

(8) Is Defendant entitled to get from Plaintiff over and above the usufruct of the mortgaged property, the amount paid

by him on account of *guzara* and enhanced Government rental?

(9) What amount is Defendant entitled to get before Plaintiff can obtain redemption?

(10) Did Plaintiff tender Rs. 37,000 to the Defendant on the 5th June 1900, and was the tender proper and sufficient to pay off the mortgage?

(11) If so, what is the effect of Defendants' refusal to receive the amount?

On 29th November 1902, the Subordinate Judge delivered his judgment. He decided the 1st and 2nd issues in favour of the Plaintiffs. On the 3rd and 4th issues he decided that on the true construction of cl. 4 of the mortgaged deed compound interest was payable at the rate of 10 per cent per annum. On the 5th and 6th issues, he allowed the mortgagor a sum of Rs. 100. On the 7th he held that Rs. 225-3-3 should be allowed to the mortgagee for arrears of rent. He decided the 8th issue in favour of the mortgagee in the following terms.

"The *guzara* item the Plaintiffs have already allowed in their abstract of accounts annexed to their plaint. This matter is not under controversy and as to the question of Government Revenue at the enhanced rate, think the Defendant is entitled to charge it on the Plaintiffs. cl. 4 of the mortgage deed supports his demand and I answer this issue in the affirmative."

On the 9th issue he allowed the mortgagor credit for rent on plots of land cultivated by the mortgagee. He decided the 10th and 11th issues in favour of the Plaintiffs. By his decree he ordered an account to be taken on the basis of the above findings and decreed redemption on payment of the amount determined by the account.

Both parties, thereupon, appealed to the Court of the Judicial Commissioner of Oudh, which Court heard the two appeals together and delivered judgment on 22nd February 1904. It held that on the true construction of the mortgage deed compound interest was not payable in the event of the mortgagee taking possession of the mortgaged property, for the following reasons:—

"It was contended on behalf of the Plaintiffs that the expression *sud mazid munafa mazkura ka*, in cl. 4 does not mean compound interest at all. I cannot accept this contention. The word *munafa* is used in the deed as a euphemism for interest and the literal translation of these words is. 'Further interest of (or on) the interest.' It appears to me quite clear that if the mortgagee had not taken possession under the last part of cl. 4, he would have been entitled to claim compound interest, but this clause gives the mortgagee two alternatives, he he may either sue for principal, interest, and compound interest and costs, etc. or take possession of the property, but he cannot do both. Upon taking possession the rights of the mortgagor and himself are regulated by cls. (5) to (10) and as nothing is said about compound interest in any of these clauses, the mortgagee cannot claim compound interest in case the net profits fall short of the interest. The provision in cl. 7 that the mortgagee may take the balance or net profit in lieu of interest seems to mean that he may take in lieu of simple interest on the amount of the principal for the time being remaining unpaid,

and not as contended by the mortgagee interest upon the principal and interest due at the time when the mortgagee took possession. The effect of cls. 7 and 10 taken together is that upon redemption in case the net profits have been less than the simple interest payable under the deed, an account must be taken of these profits for the period during which the mortgagee was in possession, but in case the net profits have been equal to or greater than the simple interest then no account need be taken of them for the period. In both cases the mortgagor must upon redemption pay to the mortgagee the amount due from the tenants on account of rent or advances, the amount of any additional revenue imposed by Government on a re-settlement of the land, and any sums decreed against the property and paid by the mortgagee The Subordinate Judge held that compound interest was payable up to the date on which the mortgagee took possession, because he did not see why the stipulation for compound interest should apply only if the mortgagee sued for his money and not if he took possession. But the answer to this view is that the mortgagee is clearly given a choice of two remedies and having elected to take possession he cannot claim the benefits of the other alternative. The terms of the contract so construed may seem rather strange, but the contract must be interpreted as it is and not according to any notion of what would have been a reasonable arrangement. The deed as it stands provides for compound interest only in the case of a suit brought by the mortgagee on the occurence of a default in payment of interest.

"Mr. Jackson on behalf of the mortgagee admitted that according to the construction of the deed, which I have adopted, the interest due to the mortgagee while in possession has been recovered out of the profits and he said that an account should not be taken for that period."

The Court of Judicial Commissioner upheld the finding of the Subordinate Judge on the first and second issues relating to *res judicata* for the following reasons:—

"On 15th September 1892, the mortgagee brought a suit against the mortgagor alleging that there was then due to him a sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or in the alternative for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs 33,087-9-3½ were due to the mortgagees at the date of the suit. The Court in giving judgment held that there was no necessity for passing any order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It is contended by the mortgagee in the present suit that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on 15th September 1892. It has often been held that when a mortgagee sues for possession as a mortgagee, the Court should not determine the amount then due, but should

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

leave the accounts to be settled when the mortgagee sues for sale or foreclosure or the mortgagor sues for redemption. It appears to me quite clear that the Court did not in the suit brought by the mortgagee decide the question of the amount due to the mortgagee. It expressly refrained from doing so. It may be that the mortgagor did not in that suit dispute the right of the mortgagee to compound interest, but nothing has occurred to raise an estoppel against him and therefore he may now show if he can that under the terms of the deed compound interest is not payable."

The finding of the Subordinate Judge as to the value of the trees was accepted, and it was not disputed that rent for land cultivated by the mortgagee was properly allowed. The motgagee was also allowed credit for the amount paid by him for maintenance, for enhanced Government revenue and for mutation of names, and also for costs of the previous suit. An order was made remanding the case to the Court of the Subordinate Judge to report. "What amount was due to the mortgagee on the date of the tender, and if the amount tendered was insufficient, what amount would be due to the mortgagee on the 15th June 1904 and if the amount tendered was sufficient, and the Plaintiffs so desired, what amount was due to the mortgagee after debiting him with the gross profits for the period subsequent to the tender." On 7th April 1904 the Subordinate Judge returned his finding. He decided that the tender was insufficient and that on the 5th June 1904 the sum due to the mortgagee was Rs. 41,040-6-3 and in addition the arrears due from tenants the amount of which could not be ascertained and that the same amount would be due to the mortgagee on the 15th June 1904.

The judgment proceeded as follows:—

"It is admitted on behalf of the parties that the mortgagee did not advance any money as *takavi*. It was further admitted that at the end of 1307 Fasli the amount due from the tenants on account of arrears of rent was Rs. 301-2-9, out of which the recovery of Rs. 190 3 was barred by limitation while the recovery of the the remaining sum of Rs. 110-5 9 was not so barred.

"It was contended on behalf of the Plaintiffs that the mortgagee could get Rs. 110-5-9 only.

"The provision of the mortgage deed in question runs thus:

"When in the Jeth fallow season whether within the specified term or after it has expired I pay to the said martgagee the whole principal and interest with the revenue and amounts due from the tenants on account of advances or arrears of rent or other expenses according to the terms of this deed without legal objection as to limitation etc., (*bila uzr a qanooni hadde samact whaghaira ke*), then I shall be entitled to redeem the mortgaged property."

"I am, therefore, of opinion that the mortgagee is entitled to get the money due to him from the tenants on account of arrears of rent, whether its recovery is barred by limitations or not."

In the mean time both parties had applied to the Court of the Judicial Commissioner of Oudh for a review of judgment. The following is the material

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

portion the order of the Court passed on the Plaintiffs' application :—

"The 1st, 2nd and 3rd paragraphs of the application refer to the costs decreed to the mortgagee in the previous suit. We held that the amount of these costs should be taken into consideration in calculating the amount due to the mortgagee. It is said that the mortgagee did not claim these costs in the present suit, and the reason may be as the applicants allege, that the mortgagee has taken out execution of the decree which he obtained.

"In writing the judgment I certainly omitted to notice this. I would admit this application as regards the costs in question.

"The 4th, 5th and 6th paragraphs of the application challenge our decision that the mortgagee is entitled to receive from the mortgagor the amount paid by him on account of enhanced revenue, and the amounts paid on account of maintenance. It is contended that this question was not raised at the hearing, but our notes show that it was raised. Mr. Jackson on behalf of the mortgagee distinctly urged that his client was entitled to these sums For the applicants it is urged that the 7th clause of the deed has not been correctly translated in the judgment. The clause was not translated as literally as it might have been. It might be translated thus :—"In case he takes possession of the mortgaged property the mortgagee may after paying the Government revenue and other sums assessed by Government, which may hereafter be assessed or fixed by Government."

It is said that the words "which may hereafter be assessed or fixed by Government," refer to additional revenue which might be assessed, but the construction of the sentence shows that this is not the meaning and cl. 9 of the deed supports this construction, because it provides that an enhancement of the revenue at a re-settlement and a consequent shrinkage of the profits shall give the mortgagee a cause of action. Taking the various clauses of the deed together, I think there can be no doubt that the intention was that the mortgagee should be entitled to be paid the amount of any enhancement of the revenue. A provision that a mortgagee may after defraying certain expenses take the profits remaining in lieu of the interest even if they exceed the interest, and that the mortgagor shall pay unexpected charges such as enhancements of revenue is commonly found in mortgage deeds and the validity of such a provision has never been challenged.

"As regards the sums paid on account of maintenance the position is still clearer. It cannot have been intended that the mortgagees should pay those sums out of the profits and have no right to recover them from the mortgagor. Indeed Mr. Lincoln who appeared for the applicants, was unable to point to anything to the deed to justify his contention except the word *waghaira* in cl. 7.

"In my opinion except in regard to the costs of the previous suit no sufficient ground has been established for a review of the judgment of this Court. As regards those costs, I would admit the application, and direct that notice be issued to the mortgagee Muhammed Abbas Ali Khan.

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

"The date fixed for the hearing should be the same as that fixed for the disposal of the appeal after the findings of the Court below have been received."

The two appeals were finally disposed of on 27th July 1904. The mortgagee was not allowed credit for costs of the previous suit, nor for the cost of the office and well. He was allowed credit for arrears of rent whether barred by limitation or not. In the result two decrees were made in the two appeals, which directed redemption on payment of Rs. 39,871-6-3 The material portion of the judgment was asfollow :—

"The question of the costs incurred by the mortgagee in the previous suit must now be decided. Mr. Jackson on behalf of the mortgagee contends that the costs of the previous suit were properly incurred by his client in enforcing his security, and he has referred to some English authorities which seem to show that in England the mortgagee would certainly be entitled to add such a sum of money to the mortgage money. There seems to be no Indian authority on the question. Sec 92 of the Transfer of Property Act provides only for the taking of an account of the mortgage money, and of the costs of the suit for redemption. The mortgage deed does not provide that the mortgagee may add to the mortgage money the costs of the suit for possession brought under cl 4 of the deed. These costs were claimed by the mortgagee in his written statement, but the claim does not seem to have been pressed in the Court below It was not put forward in the memorandum of appeal and it was not mentioned in the course of the argument in this Court.

"Upon further consideration I think that the costs of the previous suit should not be allowed. The law does not provide for them, nor does the contract between the parties: and as a matter of fact the mortgagee endeavoured to realize those costs in execution of the decree which he obtained. As regards these costs then I think that the application for review snould be allowed. . . . . .

"On behalf of the mortgagor it is contended that the Subordinate Judge in ascertaining the amount due at the date of the tender was wrong in taking into account arrears of rent the recovery of which was barred by limitation at the date of the tender. But in my opinion the 10th clause of the deed is perfectly clear. It provides that the mortgagor shall upon redemption pay amongst other items the amounts due from tenants on account of advances *takavi* or arrears of rent, whether recovery of such amounts is barred by limitation or not. I cannot accept the argument that this provision applies only to sums claimed on account of enhancements of revenue and other expenses (*ikhrajat*) ; no question of limitation should arise as to them ; whereas a question of limitation might arise and in fact has arisen with regard to the arrears of rent. Therefore in my opinion in considering whether the sum tendered on 5th June, 1900, was or was not sufficient ; the whole amount then due from tenants on account of rent or advances, namely, Rs. 301-2-9 should be allowed."

The Appellant, thereupon, preferred two appeals which were consolidated, to His Majesty in Council. The Respondent, on the other hand, filed a cross-appeal

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

by special leave of His Majesty in Council for the following 'reasons':—

1. Because the amount due to the mortgagee was determined in the previous suit, and the parties are bound by the finding of the Court on that question

2. Because the Respondent is entitled to compound interest after the date up to which the interest and the compound interest were included in the account taken in the previous suit.

3. Because, owing to the non-production of the original sale deed executed by the mortgagor in favour of the Plaintiff, the suit of the Plaintiff should have been dismissed.

4. Because the costs of the previous suit should have been added to the amount awarded to the Defendant in the present suit, with interest thereon.

5. Because the Respondent is entitled (*a*) to interests on the costs of the mutation proceedings, (*b*) the costs of preparation of the well and the thana with interest thereon, (*c*) interest on the amount paid on account of maintenance and the enhanced revenue.

Mr. DeGruyther, for the Appellant, at the outset referred to the Transfer of Property Act (IV of 1882) secs. 83 and 96 (*i*) and to clauses 10, 4 and 2 of the mortgage deed and contended that the mortgagee had no right to compound interest. The Subordinate Judge found that compound interest was due up to the date of possession but not later. That finding was not right, because the mortgagee had got the option of charging compound interest or taking possession. He exercised that option and preferred to take possession. He could not, therefore, have compound interest. The decision of the Judicial Commissioner on that point was right.

As to costs of the previous suit there was no provision in the deed itself for that. That point was not open to the mortgagee, who after claiming those costs in his written statement, did not press that claim before the Subordinate Judge. He did not put that claim in the memorandum of appeal to the lower Appellate Court and did not mention it in the course of the argument before that Court, whose finding, it was submitted, was right.

The mortgagor was not liable to be charged for the enhanced Government Revenue, which was provided for in the deed, unless the profits were less than the interest payable to the mortgagee. That sum was wrongly charged. The charge for maintenance could not be made under clause 7, of the mortgage deed. The Courts were wrong on that point.

After referring to sec 72 of the Transfer of Property Act it was submitted that the mortgagee was not entitled to arrears of rent, the recovery of which was barred by limitation. The mortgagee was not entitled to credit for the whole of the profits of the mortgaged property as interest on a portion only of the mortgage debt. The Appellant was, on the taking of account, entitled to interest on payments made by him in discharge of the principal. On the true construction of the mortgage deed and a true account, the amount due to the mortgagee on 5th June 1901, did not exceed Rs. 37,000.

[SIR ARTHUR WILSON.—The tender has no effect except on interest.]

Mr. DeGruyther—The tender made on that date being sufficient, the Appellant

was entitled to the gross profits as from 5th June 1904.

Mr. Ross for the Respondent —The concurrent finding of the lower Courts that the tender made by the mortgagor to the mortgagee, was not sufficient to pay off the amount due to the mortgagee was right. As to maintenance charge the lower Courts concurred in allowing that to the mortgagee, and it was submitted that they were right. The Subordinate Judge said in his judgment that the maintenance item was not disputed before him In the grounds of appeal to the lower Appellate Court no exception was taken to that remark, and the item was not pressed before that Court on the hearing of the appeal. That point was not open to the Appellant at that stage of the case Both Courts in India were right in charging the mortgagor for the enhanced Government revenue. The mortgagee was entitled to all arrears of rent whether statute-barred or otherwise. It was a matter of construction of the deed, and the Courts below had rightly decided that in favour of the mortgagee. After referring to sec. 13 of the Civil Procedure Code and the issues fixed in the mortgagee's suit for possession in 1892 it was contended that the amount due to the mortgagee at the time of the institution of that suit was determined in the previous suit and the parties were bound by the finding of the Court in that suit.

[LORD COLLINS.—Where is the account?]

Mr. Ross.—Not on record, my Lord. But one of the issues was: "Is the account filed by the Plaintiff correct?" The Court held that "the account filed by the Plaintiff after the correction reported by the Commissioner is correct." The Civil Procedure Code expressly says "issue" and the question of accounts was an issue in that suit. It was submitted that the account then found correct could not be questioned now. In that account compound interest was allowed. The Respondent was entitled to compound interest after the date of that account. The mortgagee was entitled to recover costs of previous suits under sec. 72 of the Transfer of Property Act, and also under the mortgage deed, cl. 4 of which refers, to taking possession, an act which would entail costs. The costs in dispute were incurred in the suit brought for taking possession. The Respondent was entitled under sec. 72 of the Transfer of Property Act to recover what he claims under the 5th reason of his cross-appeal.

Mr. DeGruyther, in reply, after referring to secs. 9 and 11 of the Indian Evidence Act (I of 1872) contended that there was no evidence on record to show what was the precise conclusion in the previous suit. The judgment in that case says:—"There is no necessity for passing any order as to the amount due under the mortgage" to the mortgagee. There was no finding as to the amount then due to the mortgagee and consequently the question was not *res judicata* as contended. As to the statute-barred arrears of rent cl. 10 of the mortgage deed could not mean that the mortgagee could sue third persons for arrears. The mortgagor simply undertook not to raise the question of limitation but he could not give any undertaking on the part of third persons. The Respondent claim

MUHAMMAD NASEEM v MIRZA MUHAMMAD ABBAS ALI KHAN.

under the 5th "reason" of his cross-appeal did not fall under sec. 72 of the Transfer of Property Act.

Their LORDSHIPS' JUDGMENT was delivered by

LORD COLLINS.—These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh. The principal Appellant obtained leave to appeal in India in the usual way. The Cross Appellant obtained from His Majesty in council special leave to appeal.

The questions in these appeals turn upon the construction of a deed of mortgage and relate to the terms upon which the mortgagor was entitled to redeem The mortgage was executed by one Chaudhri Imdad Ashraf in favour of the Respondent on 30th September 1885. The material parts of the deed are set out in the Record and are abstracted in the judgments below, and need not be here repeated. The mortgage money was Rs. 29,000, and the rate of interest 10 per cent, per annum, By the 15th September 1902 the mortgagor had paid in all Rs. 13,461 on account of interest. On the 4th of November 1886 he paid Rs. 2,699 on account of principal. Afterwards he made default in paying interest, and the mortgagee instituted a suit for possession, and on 18th September 1893 got a decree under which he was put in possession on the 27th January 1894. The mortgagor on 21st December 1899 sold a portion of the mortgaged property to the Appellant, Chaudhri Muhammad Naseem, who, on the 5th June 1900, tendered to the mortgagee a sum of Rs. 37,000 in redemption of the mortgage. The tender was refused, and this suit for redemption was instituted by the Appellant and the mortgagor. One of the chief matters in controversy was whether compound interest was in the circumstances payable by the mortgagor. This point was decided by the Subordinate Judge in favour of the mortgagee, but on appeal the Judicial Commissioners took a different view and disallowed it. There were also other items in the account as to which disputes arose which were decided by both Courts in favour of the mortgagee. The result was that on an account taken on the basis of the interpretation and findings adopted by the Judicial Commissioners, it appeared that the sum of Rs. 37,000, which on the 5th June, 1900 had been tendered by the mortgagor and refused by the mortgagee as the sum payable to entitle the former to redeem, was less than the true amount as ascertained by the judgment of the Judicial Commissioners by about Rs, 200. Against this decision both sides have appealed, after having first been heard on motions to vary in certain respects the terms of the decrees. Naturally, on the hearing of the appeals before this Board, each side tried to vary the account in his favour by attacking particular items so as to establish or destory the sufficiency of the tender.

A number of these controverted items had involved inquiry into the facts in the Court of first instance, and were accordingly reported upon by a Commissioner appointed by the Subordinate Judge, who made the report the basis of his decision. It is, of course, impossible for this Board to review findings of fact on such materials, nor were they

MUHAMMAD NASEEM v. MIRZA MUHAMMAD ABBAS ALI KHAN.

invited to do so, but it will be found that the real controversy narrows itself down to some two or three questions of principle, which have been discussed and decided in the Courts below. These questions would appear to be—

1. On the true construction of the agreement, is the mortgagor liable for compound interest since the mortgagee entered into possession of the mortgaged premises?

2. Is the mortgagee entitled to get from the mortgagor over and above the usufruct of the mortgaged property the amount paid by him on account of maintenance and enhanced Goverment revenue?

3. Is the mortgagee entitled against the mortgagor to arrears of rent due from tenants even where such arrears are statute barred as against the tenants?

4. Is the mortgagee entitled to credit for the whole of the profits during the period when, in consequence of part payment, the whole debt was no longer due?

5. Is the mortgagor entitled, on the taking of accounts interest on payments made by him in discharge of the principal?

Their Lordships will consider these points in their order:—

First, as to compound interest. This turns upon the construction of clause 4 of the agreement. On this point their Lordships agree with the reasoning and interpretation of the Judicial Commissioners.

Secondly, as to maintenance and enhanced revenue, even if the point as to maintenance is still open to the mortgagor, which is doubtful, their Lordships adopt the construction of the agreement on these points in which both the Courts below concurred.

Thirdly, as to statute-barred rent, their Lordships agree that this point, as held by the Subordinate Judge, is met by the express language of the 10th clause of the mortgage deed.

Points 4 and 5 were not taken by the mortgagor either before the Subordinate Judge or the Judicial Commissioners, and are not now open to the mortgagors, neither is there anything to be found in the agreement to support them.

With regard to the "reasons" put by the mortgagee for his Cross-Appeal to His Majesty in Council, their Lordships adopt the conclusions and reasons of the Court below on the 1st, 3rd, and 4th of those "reasons." The 2nd reason raises the question of compound interest, which has already been dealt with. The fifth is not open to the mortgagee; the fact that he abstained from taking it is made the subject of comment by the Commissioners.

The result is that, in the opinion of their Lordships, the appeals and the cross-appeal all fail, and they will therefore humbly advise His Majesty that they should be dismissed.

The costs of the appeals will be borne by the respective Appellants.

Solicitors: *Messrs. Barrow, Rogers* and *Nevill* for Muhammad Naseem.

Solicitors: *Messrs. Young, Jackson, Beard* and *King* for Mirza Muhammad Abbas Ali Khan.

Appeals and Cross-Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 269 OF 1906.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard,
9, January.
Judgment,
14, January.

SHIBU ROUT and others, Appellants,
v.
BABAN ROUT and anr., Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata.

In order to establish the plea of res judicata *the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised.*

It is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal.

BHUGWANBUTTI CHOWDHRANI *v.* FORBES (4) *distinguished.*

TOPONIDHEE DHIRJ GIR GOSAIN *v.* SREEPUTTY SAHAME (3) and PATHUMA *v.* SALIMAMMA (13) *not followed.*

RAI CHARAN GHOSE *v.* KUMUD MOHON DUTT CHOUDHURY (1) and RAM GOPAL MAZUMDER *v.* PRASANNA KUMAR SANIAL (2) *referred to.*

This was an appeal preferred on the 2nd of March 1906, against the decree of Mr. J. J. Platel, Officiating District Judge of Zillah Cuttack, dated the 4th of January 1906, affirming that of Babu Bidhu Bhusan Chakrabutty, Subordinate Judge of that district, dated the 21st of February 1905.

The facts of the case are thus stated in the judgment of the lower Appellate Court.

"In this case Plaintiff-Respondent sued for declaration of title to an 8 annas share of certain properties, for recovery of joint possession thereof with the principal Defendants and for mesne profits from the date of dispossession in 1896. Plaintiff's case was that the lands in suit formed part of the ancestral holding of one Paramananda Rout who left 3 sons, Nitai, Hari and Arjun, that Hari separated from the rest of the family and that the remaining ⅔ share was managed by Shiba, Defendant No. 1, son of Nitai as *karta* of the joint family, that Plaintiff is the grandson of Arjun and as such is entitled to an 8 annas share of the properties held by Shiba.

"The defence set up by the contesting Defendants was that Paramananda had only one son Nitai, and that Nitai was not joint with Arjun or Plaintiff. As regards certain portion of the properties in suit the plea of *res judicata* was raised"

The Court of first instance decreed the suit. The Defendants appealed in the lower Appellate Court.

The question for decision was as follows :—

Has the genealogical tree given by the Plaintiff been proved? Is the plea of *res judicata* good?

The lower Appellate Court dismissed the appeal and after discussing the evidence made the following observations :—

(1) I. L. R. 25 Cal. 571 (1897).
(2) 10 C. W. N. 529 (1905).
(3) I. L. R. 5 Cal. 832 (1880)
(4) I. L. R. 28 Cal. 78 (1900).
(13) I. L. R. 8 Mad. 83 (1884).

SHIBU ROUT *v.* BABAN ROUT.

"I am therefore of opinion that the genealogical tree set up by Plaintiff has been satisfactorily proved. As regards the plea of *res judicata* it appears that a few years ago when Plaintiff sold some of his lands to one Gobinda Mangraj in the name of Gobinda's uncle, Kripa Sindhu, Defendant No. 1, Shiba, brought a suit in the Court of the Munsif of Kendrapara against the vendor and vendee to set aside the *kobalas* and recover possession of the conveyed properties. In that suit one of the issues was whether Baban, the present Plaintiff, had any right or interest in the land claimed. The lower Court found that Plaintiff had no right or interest in the land claimed and disbelieved the evidence adduced to prove relationship and joint possession. It is contended on behalf of Appellants that this judgment of the Munsif of Kendrapara operates as *res judicata* so far as Plaintiff's title to the lands in the present suit are concerned, and in support of this contention the ruling in *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahame* (3) is cited. That case has not so far as I know, been overruled explicitly, but the ruling in that case is in direct opposition to a long line of rulings from the Privy Council downwards in which the dictum laid down by Peacock, C. J, in *Mussummat Edun* v. *Mussummat Bechun* (14) has been followed The dictum is as follows, "concurrency of jurisdiction in two Courts is a necessary part of the rule which creates the estoppel," known as *res judicata* and that "in order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given as conclusive." This proposition of law has been followed in *Run Bahadur Singh* v. *Luchoo Koer* (6) *Ramdayal* v. *Janki Das* (7), *Bhavasi* v. *Sarat Chandra* (11) and may now be taken to be settled law. It would therefore follow that the judgment of the Munsif of Kendrapara will not operate as *res judicata* in the present suit as the Munsif had not jurisdiction to try the present suit.

"This disposes of the two main issues of the case. The appeal was confined to these issues, and as I decide them against Appellants and in favour of Plaintiff, I have nothing more to do than to order that the decree of the lower Court be affirmed, and this appeal dismissed with costs."

Babus Nilmadhub Bose, Shib Chandra Palit and *Ram Chandra Majumdar* for the Appellants.

Babus Lal Mohan Das and *Girish Chandra Paul* for the Respondents.

The JUDGMENTS OF THE COURT were as follows:—

STEPHEN, J.—In this case the Plaintiff sues for a declaration of his title to an 8 annas share in certain property, for joint possession thereof with the principal Defendants and for mesne profits. In the lower Courts the case was contested chiefly on questions of fact relating to the family genealogy and the history of

(3) I. L. R. 5 Cal. 832 (1880).
(14) 8 W. R. 175 (179) (1867)

(6) L. R. 12 I. A. 23 : s c. I. L R 11 Cal. 301 (1884).
(7) I. L. R. 24 Bom. 456 (1900).
(11) I. L. R. 23 Cal. 415 (1895).

SHIBU ROUT *v.* BABAN ROUT.

the property in relation to the family of which all the parties were members, which were decided in the Plaintiff's favour and with which we are not concerned. A point of law was however raised on behalf of the Defendant which has been argued before us on a second appeal. This is that the suit is *res judicata*, and it arises as follows.

years ago the Plaintiff sold certain lands to one Gobinda Charan Mangraj, and Defendant No. 1 in the present suit, one of the Appellants before us, sued in the Court of the Munsif of Kendrapara for recovery of the possession of the property so conveyed, and to have the Kobala granted by the present Plaintiff to his vendee set aside. He succeeded in the former claim, judgment being given in his favour on the 14th August 1899, on the ground that the present Plaintiff had no share in the disputed land and that the relationship between the Plaintiff and the first Defendant, and consequently the other Defendants, found as proved in the present case did not exist. This decision was affirmed on appeal to this Court. There is no finding before us, as to the identity of the land affected by Munsif's decree with that now in suit, or any part of it. The Kobala granted by the Plaintiff to Gobinda is however on the record and boundaries are given therein which might show that such lands are part of those now sued for. They appear only to be a part because the present suit is not within the jurisdiction of Munsif, and it is not suggested that they are more than a part.

The question before us therefore resolves itself into two parts. First, can the present suit be entertained as to so much of the land in suit as was the subject-matter of the suit in the Munsif's Court Secondly, can the issue whether the Plaintiff is related to the Defendant, as alleged, be tried in the present suit after having been decided before the Munsif The answer of course depends primarily on sec. 13 of the Civil Procedure Code which runs so far as it is material as follows "No Court shall try any suit or, issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties ......litigating under the same title in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court." Taking the second point first the truth of the genealogy was an issue before the Munsif and is an issue here: and it follows from the judgment of Banerjee, J. in *Rai Charan Ghose* v. *Kumud Mohon Dutt Choudhury* (1) based on the cases there referred to and followed in *Ram Gopal Mozumder* v. *Prasanna Kumar Sanial* (2) that what we have to consider is the competency of the Munsiff to try the present suit, not that of the High Court, by whom his decision was affirmed on appeal. This concludes the question as the present suit is beyond the Munsif's jurisdiction. The case of *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahame* (3) is referred to by the lower Appellate Court, but has not been relied on by

(1) I. L. R. 25 Cal. 571 at p. 576 (1897).
(2) 10 C. W. N 529 (1905).
(3) I. L. R. 5 Cal. 832 (1880).

SHIBU ROUT v. BABAN ROUT.

the appellant here, as it was decided on the Code repealed by the present Civil Procedure Code, which alters the law on the subject.

On the first point we are invited to follow the decision in *Bhugwanbutti Chowdhrani* v. *Forbes* (4) followed in the second case above mentioned. That case is however distinguishable from the present in an essential feature. There the Plaintiff sued before a Subordinate Judge for road and public work cesses, embankment cesses, dâk cesses and other matters designated as "etc." claiming an amount which exceeded that for which he could sue before a Munsif. In a previous suit before a Munsif the Defendant had sued for a refund of what he had paid for road and public work cesses, and the suit was decreed on the ground that the Plaintiff was not liable to pay the cesses at the enhanced rate claimed. It was held that the Plaintiff in the second suit could not join a cause of action on which he had been previously defeated with new causes of action, and that such an action amounted to an evasion of sec. 13 In the present case it was not open to the Plaintiff to devide his cause of action as he might have done in the former case. By sec. 43 he was compelled "to include the whole of the claim which (he was) entitled to make in respect of the cause of action." The land he sued to recover was all held under one title according to his case. He might it is true have omitted the land which was the subject-matter of the action before the Munsif, and it may be argued that this was not land he was entitled to make a claim in respect of. But this argument is not of sufficient force to induce me to extend principle of the decision to a case where the facts differ so essentially. The principle makes an apparent, though not a real, inroad on the meaning of sec 13. To extend it as suggested to this case, would in my opinion be making the inroad a real one. The appeal is accordingly dismissed with costs.

MOOKERJEE, J —The only substantial question of law which calls for decision in this appeal is, whether the suit is barred by the principle of *res judicata* The Courts below have concurrently answered this question against the Appellants.

It is argued before this Court that the suit is barred by *res judicata*, *first*, because the question of title to the disputed property, which turns upon the relationship of the parties, was directly and substantially in issue in the litigation of 1899 and was then decided in favour of the present Appellants, and, *secondly*, because the question of title, in so far as it affects that portion of the disputed property which formed the subject-matter of the litigation of 1899, can, in no view of the matter, be re-opened for a fresh adjudication.

In support of the first branch of this argument, reliance is placed upon the decision of this Court in the case of *Toponidhee* v. *Sreeputty* (3). It is clear, however, that although that decision has never been formally dissented from, the rule laid down therein can no longer be regarded as good law. That case turned upon the construction of sec. 13 of Act

(4) I. L. R. 28 Cal. 78 (1900).

(3) I. L. R. 5 Cal. 832 (1880).

SHIBU ROUT *v.* BABAN ROUT.

X of 1877, the language of which was materially different from the language of sec. 13 of Act XIV of 1882. In the present Code, the words "competent to try such subsequent suit or the suit in which such issue has been subsequently raised" were expressly added, so as to make it clear that the competence required is in respect of the subsequent suit also. This view is amply supported by the decision of their Lordships of the Judicial Committee in *Raghubar Dayal* v. *Sheo Baksh Singh* (5) and *Run Bahadur Singh* v. *Lachoo Koer* (6). Under the present Code, in order to establish the plea of *res judicata* in cases of the description now before us, it has to be shown that the Court of concurrent jurisdiction which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit [see *Ramdayal* v. *Janki Das* (7) and *Panga* v. *Unnikutti* (8)]. It follows, therefore, that the first branch of the contention of the Appellants cannot be sustained.

The second branch of the contention of the Appellants is that the suit is barred by *res judicata* at least with respect to that portion of the disputed property which is alleged to have been the subject-matter of the previous litigation. In support of this position, reliance is placed upon the cases of *Bhugwanbutti* v. *Forbes*. (4) and *Ram Gopal* v. *Prasanna Kumar* (2). The decision of the question raised, however, must depend primarily upon the language of the Code, which seems to me to make it reasonably plain that in order to establish the plea of *res judicata* the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised. In support of this proposition, it is sufficient to refer to the decision of their Lordships of the Judicial Committee in *Gokul Mandar* v. *Padmanand Singh* (9) in which Lord Davey pointed out that sec. 13 of the present Code, which embodied the principle just enunciated, goes in this respect beyond sec. 13 of the previous Code (Act X of 1877) and also beyond the law laid down by the Judges in *The Duchess of Kingstone's case* (10). Lord Davey further observed that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. If the principle thus interpreted by the Judicial Committee is applied to the case before us, there can be no possible controversy that the plea of *res judicata* cannot be sustained.

It was faintly suggested, however, on behalf of the Appellants that as in the previous litigation the decision of the Court of first instance was subsequently affirmed by this Court, and as in the present litigation also the matter has

(2) 10 C. W. N. 529 (1905).
(4) I. L R. 28 Cal. 78 (1900).
(5) L. R. 9 I A. 197 : s. c. I. L. R. 9 Cal. 439 (1882).
(6) L R. 12 I. A. 23 . s. c. I. L. R. 11 Cal. 301 (1884).
( ) I. L. R. 24 Bom. 456 (1900).
(8) I. L. R. 24 Mad. 275 (1900).
(9) I L. R. 29 Cal. 707 (1902).
(10) Smith L. C. Vol. II, p. 713 (1776)

been carried before this Court, the plea of *res judicata* ought to be allowed, or, in other words, that the true criterion is the competency of the Court of Appeal to decide the question. In my opinion, this contention is not well-founded. It is now firmly settled that it is the competency of the original Court which decided the former suit that must be looked to and not that of the Appellate Court in which the suit was ultimately decided on appeal. [See *Bharasi* v. *Sarat Chandra* (11) *Kailash Chandra* v. *Tarak Nath* (12) and *Ram Gopal* v. *Prassana Kumar* (2)].

It was argued, further, that the view we take is inconsistent with the decision of this Court in *Bhugwanbutti* v. *Forbes* (4). It may be a matter for controversy, whether some of the observations, at any rate, in the decision relied upon may not be difficult to reconcile with the provisions of sec. 13 of the Code as interpreted in the judgment of the Judicial Committee to which reference has been made. This much is clear, however, that the decision turned upon facts and circumstances which are essentially distinguishable from those of the case before us, for the reasons set forth in the judgment of my learned brother.

Reliance was also placed upon the decision of the learned Judges of the Madras High Court in *Pathuma* v. *Salimamma* (13), with reference to which it is only necessary to observe that although it was decided after the present Code had come into force, some of the observations, at any rate, appear to be based upon the law as it was understood to be under the Code of 1877.

On these grounds, I must hold that the second branch of the contention of the Appellants cannot be supported. The appeal consequently fails and must be dismissed with costs.

S. C. S. *Appeal dismissed.*

(2) 10 C. W. N. 529 (1905).
(4) I. L. R. 28 Cal. 78 (1900).
(11) I. L. R. 23 Cal. 415 (1895).
(12) I. L. R 25 Cal. 571 note (1897).
(13) I. L. R. 8 Mad. 83 (1884).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 530 OF 1906.

GEIDT, J.
CHITTY, J.
1908.
31, January.

RAJ KUMAR SINGH and ors., Judgment-debtors, Appellants,
v.
SHEO NARAIN SAHU, Decree-holder, Respondent.

Mortgage decree—Order for sale—Costs—Costs if can be recovered from the mortgagor personally—Transfer of Property Act (IV of 1882), sec. 90.

The costs awarded by a decree directing the sale of mortgaged property form part of the mortgage decree and the decree-holder must proceed to recover the costs by a sale of the mortgaged property in the first instance, and it is only when the mortgaged property is found to be insufficient to satisfy the decree that the decree-holder can proceed against the other properties of the mortgagor in the manner provided by sec. 90 of the Transfer of Property Act.

RATNESSUR SEN *v.* JUSODA (1) *and* DAMODAR DAS *v.* BUDH KUAR (2) *distinguished.*

(1) I. L. R. 14 Cal. 185 (1886).
(2) I. L. R. 10 All. 179 (1888).

RAJ KUMAR SINGH *v.* SHEO NARAIN SAHU.

MAQBUL FATIMA *v.* LALTA PROSAD (3) *followed.*

This was an appeal preferred on the 13th of December 1906, against an order of Babu Sarada Prosad Bose, Subordinate Judge of Zillah Chapra, dated the 18th of August 1906.

This appeal arose out of an application by judgment-creditor in whose favour a mortgage decree (for sale) had been passed praying *inter alia* for execution of so much of the decree as related to costs against the person and other properties of the judgment-debtor.

The judgment-debtors preferred objections to the application under sec. 244, C. P. C., to the following effect *viz.*, that the decree obtained by the decree-holder was a mortgage decree and the costs the Court awarded to the decree-holder formed part of the mortgage decree. The decree-holder therefore had no right to execute the decree for costs as a money decree against the person and other properties of the judgment-debtors, and his remedy was limited to asking for the sale of the mortgaged property; and it was therefore improper on the part of the decreeholders to put up the other properties in the schedule for sale and to attach the same. Accordingly, the judgment-debtors prayed that the application for execution might be rejected.

The learned Subordinate Judge, rejected the petition of objection relying on the cases reported in *Ratnessur Sen* v. *Jusoda* (1) and *Damodar Das* v. *Budh Kuar* (2) and held that the decree-holder could execute the decree for costs against the judgment-debtors personally and against their other properties.

The judgment-debtors appealed from this decision.

Babu Dwarka Nath Mitter for the Appellants.

Babu Harendra Krishna Mukerjee for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The only question we have to decide is whether a decree-holder in executing a mortgage decree, can, for the purpose of recovering the costs awarded by the decree, put up to sale properties other than the mortgaged property. The Subordinate Judge has held that he can: and in support of his view has referred to two cases—one reported in *Ratnessur Sen* v. *Jusoda* (1) and and the other in *Damodar Das* v. *Budh Kuar* (2). These however were not cases where the decrees had been for sale of the mortgaged properties. They were decrees passed for foreclosure where the mortgage had been by way of condition sale. The present case is similar to one decided by the Allahabad High Court reported in *Maqbul Fatima* v. *Lalta Prosad* (3) where it was held that the costs were really part of the amount for which the mortgaged property had been ordered to be sold. We are clearly of opinion that the decree for costs is a part of the mortgage decree and that the decreeholder must proceed in the first instance against the property mortgaged. It is only in the event of the mortgaged property being

(1) I. L. R. 14 Cal. 185 (1886).
(2) I. L. R. 10 All. 179 (1888).
(3) I. L. R. 20 All. 523 (1898).

(1) I. L. R. 14 Cal. 185 (1886).
(2) I. L. R. 10 All. 179 (1988).
(3) I. L. R. 20 All. 523 (1898).

RAJ KUMAR SINGH *v.* SHEO NARAIN SAHU.

found insufficient to satisfy the mortgage decree, that a decree-holder can proceed against the other properties in the manner provided by sec. 90, of the Transfer of Property Act.

In this view of the case we allow the appeal, and set aside the order of the Subordinate Judge allowing the decree-holder to proceed against properties other than the mortgaged properties.

The appellants are entitled to their costs from the respondent, the hearing fee being assessed at three gold mohurs.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1342 OF 1907.*

RAMPINI, J.
SHARFUDDIN, J.
1907.
Heard,
17, December.
1908.
Judgment,
3, January.

BENI MADHAL SINGH, Petitioner,
v.
THE EMPEROR, Opposite Party.

Special constables—Appointment, circumstances justifying—Act V of 1861, secs. 17 and 19—Disobedience of order under sec. 17—No offence under sec. 19.

The circumstances which justify the appointment of special constables under sec. 17 of Act V of 1861 are that a disturbance of the peace is apprehended and that the police force available is insufficient to preserve the peace and protect the inhabitants of the place where the disturbance is apprehended.

In the absence of those circumstances an order under sec. 17 of Act V of 1861 is improper and there should be no conviction of the persons appointed special constables for disobedience of the same.

This was a rule granted on the 28th of November 1907, against an order of Babu B. N. Roy, Sub-Divisional Magistrate of Aurangabad, dated the 28th of September 1907, convicting Petitioners under sec. 19 of Act V of 1861 and sentencing him to pay a fine of Rs. 40.

The facts material to the report will appear from the judgment.

Mr. Hill and *Babu Ganesh Dutt Singh* for the Petitioner.

No one appeared to show cause against the rule.

The JUDGMENT OF THE COURT was as follows :—

These are four rules to show cause why the conviction of and fines imposed on the Petitioners under sec. 19, Act V of 1861 should not be set aside.

The Petitioners were appointed special constables under sec 17, Act V of 1861, neglected to serve as such and had been prosecuted and fined under sec. 19 of the Police Act.

The facts are that a Sub-Inspector of Police reported to the Sub-Divisional Magistrate of Aurangabad that there was a dispute about certain land in which the Petitioners were concerned which was likely to lead to a breach of the peace. He therefore recommended that the Petitioners should be appointed special constables and this was done. The Petitioners refused to receive their letters of appointment and on appearing before the Magistrate in the month of August last,

* Criminal Revisional cases Nos. 1343, 1348 and 1349 were analogous to the above and were dealt with in the same judgment.

BENI MADHAB SINGH v. THE EMPEROR.

he said he did not require their services, as additional Police had now been quartered in the villages where breaches of the peace were apprehended. Notwithstanding this, the Petitioners were subsequently prosecuted under sec. 19, Act V of 1861 and fined Rs. 40 each.

The grounds on which these rules have been supported are that the Police officer who reported to the Magistrate was a Sub-Inspector and not an Inspector, as required by sec 17, Act V of 1861, (2) that the letters of appointment were never delivered to the Petitioners and (3) that their appointment as special constables was inexpedient.

The first two pleas are of a technical nature. But we consider that these rules must be made absolute on the ground that the order under sec. 17 was an improper one and that the conviction of the Petitioners under sec. 19 of the Act is bad. The circumstances which justify an order under sec. 17 are that a disturbance of the peace is apprehended and that the Police force available is insufficient to preserve the peace and protect the inhabitants of the village where disturbances are apprehended.

It is idle to say that in this case any such circumstances existed. We are satisfied they did not. Then the Magistrate after telling the Petitioners that he did not want their services, should not have prosecuted them under sec 19. The Magistrate now says the Petitioners were prosecuted for neglect to serve as special constables during the period antecedent to his order dispensing with their services. But if the Petitioners' services were not required, and we are satisfied they were never required, it was quite unnecessary and improper to prosecute them for disobeying an order which should never have been passed.

We set aside the convictions, and sentences. The fines, if paid, must to be refunded.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1265 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
13, December

BALAI DEY and ors., Petitioners,
v.
THE EMPEROR, Opposite Party.

Village Chowkidari Act (VI B. C. of 1870), sec 39, cl. (2)—Daffadar's authority to arrest—Continuing offence—Theft—Offence, how long continues.

Under sec. 39, cl. (2) of Act VI (B. C.) of 1870, a daffadar *is only entitled to arrest a person for theft committed in his presence.*

One R after having cut down some plantain trees belonging to J with the intention of dishonestly taking them, loaded them in a cart and was driving away the cart. J pursued the cart and on his crying out that R had cut and was taking away his plantain trees, a daffadar *came up and arrested R,*

Held—*That the offence of theft did not continue when the* daffadar *came up and as the offence of theft was completed before the* daffadar *came up, and arrested R, the arrest was illegal and therefore the rescue of R from the* daffadar's *custody was not an offence.*

This is a rule granted on the 12th of November 1907, against an order passed by Babu Ashutosh Bagchi, Deputy Magis-

BALAI DEY *v.* THE EMPEROR.

trate, 1st Court, Kalna, dated the 4th of June 1907.

The material facts of the case as they appear from the judgment of the Deputy Magistrate are as follows :—

The Complainant who was a *daffadar* one day at about 7 or 7-30 P. M., heard one Jadu Bagdi crying out that his plantain trees were cut and taken away. He ran to the spot and on the road next to the garden of Jadu Bagdi saw a cart loaded with 5 or 6 plantain trees and being driven by Radha Nath Dey. Jadu Bagdi who was 5 or 6 cubits behind the cart said that Radha Nath had cut the trees from his garden, but that he could not seize him (Radha Nath) because the latter had threatened to cut him with a *dao.* The *daffadar* caught hold of Radha Nath and turned the cart back and proceeded a short distance towards the thana, when the Petitioners rushed towards him. Petitioner No. 1 gave order to beat the *daffadar* and Petitioner No. 2 raised his *lathi* to strike him but one Sita Nath Mondal who was on the spot averted the blow. Then the Petitioner No. 1 forced Radha Nath away from the hands of the *daffadar* and gave orders to his companions to turn the cart back which he himself with some others did. The *daffadar* then proceeded to the thanah and lodged his first information with the Sub-Inspector at about 10-3 P.M. The Sub-Inspector came to the spot the next morning. He found the stumps of 5 newly cut plantain trees in the garden of Jadu Bagdi. The Petitioners were tried by the Deputy Magistrate of Kalna who convicted the Petitioner No. 1 under secs. 225 and $\frac{353}{114}$, I. P. C. the Petitioner No. 2 under secs. 225 and 353, and the Petitioners Nos. 3 and 4 under sec. 225, I. P. C. and sentenced each of the Petitioners Nos. 1 and 2 to a fine of Rs. 50, in default a month's rigorous imprisonment and the Petitioners Nos. 3 and 4, to a fine of Rs. 30 each, in default 15 days rigorous imprisonment.

As to the contention of the defence that the custody of the *daffadar* was not a legal custody, the Deputy Magistrate observed as follows in his judgment : "It has been argued that the custody of the *daffadar* was not a legal custody inasmuch as the village Chowkidari Act makes no mention of the appointment of a *daffadar.* But a *daffadar* is only a head Chowkidar having the same duties as the Chowkidar. The name is only given to distinguish him from others who have a more limited beat, and there can be no question that he is a Chowkidar under Act VI (B. C. of 1870).

"The offence of theft was continuing at the time when the stolen property was being removed. Under sec. 59, Cr. P. C. even a private person had a right to arrest Radha Nath, who was then committing the theft. The custody in which Radha Nath was detained was therefore certainly legal."

The Petitioners obtained the present rule to set aside the convictions and sentences.

Babu Debendra Nath Bagchi for the Petitioner.

No one appeared to show cause for the Opposite Party.

THE JUDGMENT OF THE COURT was as follows :—

This is a rule, calling upon the District Magistrate of Burdwan to show cause

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, FEBRUARY 24, 1908. [No. 15

Contents

NOTES

WE DRAW ATTENTION TO THE DECISION IN *Beni Madhub Singh* v. *The Emperor*, reported at p 366 of this issue. Their Lordships have definitely laid down that when the circumstances required by law to justify the appointment of special constables do not exist, an order appointing any person a special constable is improper and should be set aside. It will be remembered that in the matter of *Umes Chandra Gupta and others*, Brett and Stephen, JJ. differed in opinion and the matter was referred to Maclean, C. J. But the reference proved infructuous, the Government of Eastern Bengal and Assam having withdrawn from the prosecution. The decision we report is of great importance as being the first definite pronouncement that when the services of special constables are not required for the maintainance of peace, it is an abuse of sec. 17 of. Act V of 1861 to enrol people as special constables and to prosecute them subsequently under sec. 19 for alleged disobedience of order. The question of the jurisdiction of the High Court to interfere in cases of prosecution started under sec. 19 is also set at rest by this decision, if not by the earlier decision of Wilson, J. in the case of *Gopinath Paryah* v. *The Empress* (10 C. W. N. 82).

THE DECISION OF THE LEARNED CHIEF JUSTICE AND Mr. Justice Coxe in the matter of *Babu Nabin Chandra Das*, commonly known as the "Bhola pleader's case," is eminently sound and fair. The two points in the decision are firstly that a pleader or vakil can always refuse a brief without giving any reasons. Next, that he cannot be subjected to an examination by any judicial officer or Court for disclosing his reasons for such refusal. In the words of his Lordship the Chief Justice it is idle to say that sec 13 of the Legal Practitioners Act has any application in such cases The learned Chief Justice very rightly suggests that matters of professional etiquette observed amongst English barrister-at-law do not necessarily govern vakils and pleaders.

WE DO NOT PROPOSE TO DISCUSS HERE WHETHER A barrister is bound to accept a brief when he is not previously retained on the opposite side But the one fundamental difference between the two sections of the profession consists in the fact that the professional engagement between a pleader and a client is to all intents and purposes a contract while it is not so in the case of a barrister. A pleader may sue for his fees and also be sued for return of fees or damages for having neglected his duty. But a barrister cannot surely sue or be sued in connection with his professional engagements It is because of this that a set of rules have evolved out of practice which pass under the name of professional etiquette for the breach of which a barrister may be taken to task by members of his own profession or by the High Court under its disciplinary powers. To extend those conventional rules to pleaders and vakils who incur contractual obligations in respect of their professional engagements would be both inappropriate and unjust.

SINCE THE ENGAGEMENT BETWEEN A PLEADER AND HIS client is contractual, it is but fair that he should be left free to accept or reject the offered brief without giving any reasons for it. It is always against public policy to coerce a person to enter into a contract. When a man feels that owing to his ethical, political or personal opinions or having regard to the nature of the case he cannot properly discharge his duties towards his client, it is neither fair to him nor to his client that the Court should compel him to accept the brief. Public policy

in law does not mean political policy. The District Judge of Buckergunge seems to have been labouring under a confusion of ideas in this respect. We believe, the judgment of the learned Chief Justice will have a wholesome effect on the subordinate judiciary in correcting an erroneous impression that in some cases they are to take note of the political policy of the executive even in determining personal rights and liberties according to law.

IN THE CASE OF *Augora Kunwar* v *Baba* REPORTED at p 638 I. L. R. 29 Allahabad series, it was held by his Lordship Aikman, J, that when a person acting on the erroneous advice of his pleader files an appeal in a wrong Court, and the appeal being returned by that Court, is then filed in the proper Court after the limitation period for filing the appeal has expired, he is entitled to the benefit of sec. 5 of the Limitation Act His Lordship observed in the course of the judgment that although the provisions of sec. 14 of the Limitation Act do not apply to appeals but only to suits, yet the principle of that section should be adopted in applying sec. 5 of the Limitation Act, or in other words the filing of an appeal in a wrong Court on *bonâ fide* reliance upon an erroneous advice of a legal adviser is a sufficient cause for extending the period of limitation prescribed for an appeal.

THE QUESTION AS TO WHEN A *bonâ fide* MISTAKE AS to the forum for presenting an appeal will be a sufficient cause for extending the period of limitation under sec. 5 of the Limitation Act has been recently considered by their Lordships Mukerjee and Holmwood, JJ., in the case of *Sarat Chandra Bose* v. *Saraswati Debi*, I. L. R. 34 Cal. 221. We may also refer to the case of *Karsun Das Dharamsey* v. *Bai Gungabai*, I. L R. 30 Bom. 329, in which their Lordships Jenkins, C. J., and Batty, J., point out that Courts should not apply sec. 5, Limitation Act in favour of an Appellant unless they are satisfied of the justice of the grounds on which the benefit of sec. 5 is asked for. Their Lordships observe, "When the time for appealing is passed a very valuable right is secured to the successful litigant: and the Court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree, and then perhaps depriving the successful litigant of the advantage which he has obtained."

THE REVENUE SALE LAW (ACT XI OF 1859) WAS passed about half a century ago. Since then there has been practically no amendment. The working of the Act during this long period has shown that it admits of many alterations which may remove many a hardship of the proprietors of estates without any prejudice to the interests of Government. One of thé chief objects in passing the Act was to afford landholders, particularly absentees, facilities in guarding against the accidental sale of their estates for arrears of revenue by reason of the neglect or fraud of their agents; but it has been found in many cases that the provisions in this respect are not sufficient and that in many cases of hardship they are left without any remedy whatsoever. We therefore suggested sometime ago that provisions similar to those of sec. 174 of the Bengal Tenancy Act and sec 310A of the Civil Procedure Code should be introduced into the Revenue Sale Law so that sales may be set aside by deposit of the arrears of revenue within thirty days from the date of sale. Babu Jogendra Nath Mukerjee also contributed a series of articles to this journal and made representations to Government in the course of in which be made, among others, the above suggestions. We wonder why the Government has not yet taken any steps for the amendment of the law which has pressed hard on proprietors of revenue-paying estates.

CURRENT INDIAN CASES.

TRIKAMDAO *v.* HARIDAS, I. L. R. 31 Bom. 583. *Bequest—Uncertainty.*

A bequest "for purposes of popular usefulness or for purposes of charity" is void for uncertainity.

NAGARDAS *v.* ANANDRAO, I. L. R. 31 Bom. 590. *Guardian and Wards Act.*

"The Guardians and Wards Act makes no provision for setting aside an order made under the Act, but judging from the analogy of English practice I have no doubt that in these miscellaneous matters the Judge sitting in chambers and making orders on petitions and applications has the power to vary, alter, modify or set aside his own order when he finds that the order is one that requires in the interests of justice to be dealt with in that way" (*Per* Davar, J.)

Indian Majority Act.

When an order of appointment of a guardian of a minor is cancelled the minor attains majority at the age of 18 and not at the age of 21 years. *Ibid.*

Notes of Cases.

ENGLISH LAW COURTS.

COURT OF APPEAL.—*Beswick* v. *Smith*. Before the EARL OF HALSBURY, SIR GORELL BARNES, P., and JUSTICE BIGHAM. 5th December 1907.

Defamation—Innuendo.

This appeal arose upon an application by the Defendant Smith for judgment or a new trial in an action brought against him for damages for libel, &c. The Plaintiff was a commercial traveller formerly in the employ of the Defendant's firm. On 6th July 1906, the Defendant firm circulated among his customers cards in unfastened envelopes with these words on them. "H. Beswick is no longer in our employ. Please give him no order or pay him any money on our account." The Lord Chief Justice before whom the action came up for trial left it to the Jury to say whether the words were libellous and whether the Defendants had acted maliciously in circulating them. The jury assessed damages at £200 and the Lord Chief Justice gave judgment for the Plaintiff.

Upon this appeal, LORD HALSBURY observed that he did not deny that there might be a publication under such circumstances as to make that which was *primâ facie* not libellous convey in fact a defamatory imputation. That was not the case here. The word taken in their natural sense could not convey to the mind of a person of ordinary intelligence that any imputation had been made. Such an inference as that there was an imputation seemed to him to be the invention of an imagination already tainted with the idea that there was something wrong in the termination of the employment.

Mr. Scott Fox, K. C., and *Mr. C. C. Scott* for the Defendant, Appellant.

Mr. Tindal Atkinson, K. C., and *Mr. Rowsell* for the Plaintiff.

Appeal allowed.

KING'S BENCH.—*Spiers* v. *Hunt*. Before JUSTICE PHILLIMORE. 12th December 1907.

Promise of marriage by married man—Breach—Public policy and morals.

The Plaintiff claimed damages for breach of promise of marriage by the Defendant. At the time the promise was alleged to have been made the Defendant was a married man to the knowledge of the Plaintiff. The action was brought on the death of the Defendant's wife on 11th July 19 /. Immoral relations appeared to have begun between the parties about March 1899 and continued till 10th March 1904, during which time, Plaintiff bore Defendant several children. The promise was alleged to have been made in February or March 1899.

Held—That the promise made in such circumstances was against public policy and morals and will not be enforced

Mr. G. F. Mortimer for the Plaintiff.

Mr. Manisty, K. C., and *Mr. Charles Mellor* orf the Defendant.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. CRIMINAL APPEAL No. 981 OF 1907. GUHI JENA, Appellant *v.* THE EMPEROR. 22nd January 1908.

Indian Penal Code, sec. 75, how should be used.

The Appellant was convicted under sec. 379/75, I. P. C. and sentenced to 10 years' rigorous imprisonment and five years police supervision for stealing a *gamcha*, valued 4 ans., after previous conviction the last of which in 1900 resulted in a sentence of 7 years' rigorous imprisonment.

The prisoner appealed to the High Court and the appeal was admitted in Chambers for a consideration of the sentence.

Their Lordships observed .—

The Appellant is not a dangerous criminal, this is evident from the circumstances of the case and the nature of the theft. Sec 75 is not to be used to enhance enormously the heniousness of petty offences, *Shamjee Nashyo*, 1 C. L R. 481.

We affirm the conviction, but reduce the terms of imprisonment to eighteen months of which 3 months will be passed in solitary confinement. The order for police supervision will stand."

B C. *Sentence reduced.*

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1418 of 1907. ISLAM MOLLA AND ANOTHER, Petitioner *v.* THE EMPEROR. 21st January 1908.

Criminal Procedure Code, sec. 106—Order when to be made.

A boat belonging to the Petitioners was damaged by a steamer and the Petitioners and others climbed on to the steamer and committed the offence of rioting. They were convicted of rioting and sentenced to six weeks' rigorous imprisonment and were also bound down under sec. 106, Cr. P. C. to keep the peace for 6 months. On their application to the High Court for setting aside the conviction and sentence and the order under sec. 106, Cr. P. C. a rule was issued only with respect to the order under sec. 106, Cr. P. C.

Their Lordships observed:—"They (the Petitioners) seem to have gone on board for the purpose of assaulting the Serang and the crew and claiming compensation for damage. They had no right to do this because their boat was damaged owing to an accident. In the circumstances therefore we consider that the conviction and sentence are correct. But we do not think it necessary to affirm the order passed under sec. 106, Cr. P. C., because in our opinion the Petitioners acted upon the impulse of the moment; there is not the slightest likelihood of their repeating the unlawful act."

Mr. H. N. Sen with *Babu Upendra Lal Roy* for the Petitioners

No one for the Opposite Party.

B. C. *Rule made absolute and order under sec. 106, Cr. P. C. set aside.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEAL FROM ORIGINAL DECREE No. 81 OF 1906. SARAT CHUNDER ROY CHOWDHRY, Appellant v. RAJONI MOHAN ROY AND OTHERS, Respondents. Heard, 30th January 1908. Judgment, 10th February 1908.

Administration bond—Surety—Mutual mistake and misrepresentation—Estoppel—Minor.

D, B and H were three brothers, sons of R. D died in July 1898 leaving a son M who was then a minor, and his widow R, mother of M. Shortly after the death of D, a dispute arose as to the share, if any, of B and H, to certain properties they claimed to be the joint properties of the family. On the 5th October 1898 an instrument, in the nature of a family arrangement, was executed by B, H and R on behalf of M, by which M's share was fixed at 8 annas, H's share $4\frac{1}{2}$ annas and that of B's $3\frac{1}{2}$ annas.

Thereafter B applied for the appointment of himself to be the guardian of the property of the minor M. An order was made on the 26th March 1900 by the District Judge appointing him guardian. On appeal to the High Court, the order was set aside on the 28th January 1902 and the High Court expressed an opinion to the effect that an administrator to the estate of the deceased D should be appointed instead of a guardian of the property of the minor. In the proceedings which took place in the lower Court, subsequent to the order of the High Court, the Plaintiff R was appointed administrator. R took possession as such administrator, on the 26th February 1902, of the properties of the minor. Thereafter B submitted his account to the District Judge for the period of his management of the minor's estate, that is, from 18th June 1900 to the 26th February 1902.

The present suit was instituted on the 21st January 1905, by R for the purpose of an enquiry into the correctness of the account submitted by B, for a decree for such sum or sums of money as might be found due on the taking of account and for recovery of the same from B or from other Defendants who had becomes sureties for B, in the proceedings for realization of the debts to the estate of D under Act VII of 1889 or for management of the minor's properties, under Act VIII of 1890.

B was the Defendant No. 1 and the Appellant Defendant No. 2, who executed a bond for Rs. 20,000 as surety of B for his due administration of the estate of the minor. The bond was dated the 13th June 1900. The other Defendants stood sureties for Defendant No. 1, for realization of debts under Act VII of 1889.

The Defendants, other than Defendant No. 2, accepted the judgment of the lower Court directing the account to be taken by a Commissioner according to the directions given in that judgment.

The grounds urged in appeal were that B having been appointed guardian of the property of M, the Appellant, as surety, was responsible only for the conduct of B with respect to such property and not any share of the property which was not covered by that petition, and that the District Judge having found, in the proceeding appointing B as guardian, that the three brothers D, B and H were joint, there was a bar in the nature of estoppel to any claim as against a surety for any money with respect to the share that came to B and H by the deed of 1898.

Held—Bonds executed in proceedings under Act VIII of 1890, as administration bonds generally, must be construed according to the conditions contained in them.

The ground of estoppel cannot be pleaded against an infant. An administration bond can not be invalidated on the ground of mutual mistake and misrepresentation.

Debendra Nath Dutt and Banka Behary Banerji v. *The Administrator General of Bengal*, I. L. R 33 Cal. 713 referred to.

Hence the appellant was bound to pay for any wrongful conduct of the Defendant No. 1 with respect to all the properties to which the minor was entitled. But if a third person was wrongfully in possession, as H was, of a share of $4\frac{1}{2}$ annas and Defendant No. 1 did not receive the profits with respect to such share, neither he nor his surety would be liable for them.

Dr. Priya Nath Sen for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Hari Bhusan Mukerji* for the Respondents.

A. T. M. *Appeal dismissed.*

vivos, so equally there can be an alienation by a *shebait* by his Will. But the distinction is obvious. There is nothing to pass under the Will, but there is something which can pass by an alienation *inter vivos*, by the then existing interest of the *shebait*. I am, therefore, with great respect, unable to concur in that decision, I think that there was nothing which Lalit Mohan could pass by his Will so far as relates to the shebaitship. As the title of the Plaintiff is dependent upon this supposed alienation by Lalit Mohan, his case must fail.

Then it is suggested that there is some usage in the family relating to the particular worship of this idol and to the shebaitship which would justify the alienation by Will. I do not think that is made out. The learned Judge of the Court of first instance did not think so. It appears from the proceedings in this case, that attempts have been made from time to time by certain members of the family to deal with this shebaitship by Will. It is clear from the terms of the decree, dated the 26th of August 1882 referred to in the proceedings that the alienation then made by Will failed. It is suggested that that was a case of alienation made by a Will to a stranger. That may be so: but the alienation in fact failed. As regards the other cases which are referred to, they seem to have been cases in which the bequest,—if I may rightly so call it—was to those who would have been the *shebaits* in the ordinary course of descent. Consequently, there was no object in challenging the Will on the point. I do not think any usage or established practice in the family has been made out, to justify the alienation.

In my opinion, the view taken by the Court of first instance is right, and this appeal must be dismissed with costs.

MITRA, J.—I am of the same opinion. The case is one of hereditary shebaitship both under the Will of Chitra Dasi and under the general law. The status of Lalit Mohun was that of a *shebait* and as such he was in the same position as a manager of an infant heir. He had no power to alienate except for necessity or clear benefit to the Thakur. No case of necessity or benefit to the Thakur has, however, been pleaded or attempted to be made out by the evidence. The evidence of a family usage as giving the power to bequeath shebaitship by Will is also very meagre. Lalit Mohan's right to manage as a *shebait* must cease with his death and he had, in fact, nothing to bequeath.

WOODROFFE, J.—I agree that Lalit Mohan could not alienate the office of shebaitship by Will. I wish to express no opinion on the question whether the office of shebaitship may be alienated by transaction *inter vivos* or, if so, under what conditions and I think that the question of usage does not affect the matter which is now before us. I agree that this appeal should be dismissed with costs.

Messrs. G. C. Chunder & Co., Attorneys for the Appellant.

Messrs. Kutter & Co., Attorneys for the Respondents.

P. R. C. *Appeal dismissed.*
A. N. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 1 OF 1907.

MACLEAN, C. J. HARINGTON, J FLETCHER, J. 1907. Heard, 18, November. Judgment, 6, December.	LAKHAN CHUNDER SEN and ors., Plaintiffs, Appellants, *v.* MODHU SUDAN SEN and others, Defendants, Respondents.

Dispossession - Action in ejectment, previous—Issue between Defendants—Original and Appellate judgments, period intervening—Right of action in suspense—Limitation Act (Act XV of 1877), secs. 9 and 14, Sch. II, Arts. 142 and 144.

C's heirs brought a suit for possession against the respective heirs of B and M, claiming a certain share in a certain property in the possession of the heirs of B. In the judgment in the action pronounced on the 20th April 1903 upon an issue raised by the Defendants the heirs of B as between themselves and their co-Defendants the heirs of M, it was declared that the latter were entitled to a share in the property. The Appellate Court set aside on the 22nd February 1904 the judgment of the lower Court, so far as it affected M's heirs, on the ground that in a suit in ejectment no decree could be made against a co Defendant. M's heirs, then, on the 14th November 1904, instituted this suit for a declaration of their share in the property, for possession, partition and other reliefs, stating that they had been dispossessed on the 18th January 1892. The lower Court dismissed the suit, holding it to be barred by limitation.

Held on appeal—*The Plaintiffs were entitled to deduction of the period between the 20th April 1903 when in the previous suit they obtained a decree in their favour and the 22nd February 1904, the date of the reversal of that decree by the Appellate Court, their right of action having been in suspense in the interval.*

MUSSAMAT RANEE SURNOMOYEE *v.* SOSHEE MUKHEE BURMONIA (1), PRAN NATH ROY CHOWDHURY *v.* ROOKEA BEGUM (2) *referred to.*

Quare—*Whether sec. 14 of the Limitation Act is applicable to this case.*

A Court ought to relieve parties against the injustice occasioned by its own acts and oversights at the instance of the party against whom the relief is sought.

PULTENEY *v.* WARREN (3), EAST INDIA COMPANY *v.* CAMPION (4) *referred to.*

This was an action brought by the Plaintiffs for the ascertainment of their share in the property scheduled to the plaint in this suit, for possession, partition and other reliefs. The suit was filed on the 11th November 1904 and the Plaintiffs who were the heirs of one Moni Madhub Sen, alleged in their plaint, that Moni Madhub Sen was dispossessed on the 18th January 1892. The principal contention before the Court of first instance was whether the suit was barred by limitation, as more than 12 years had elapsed from the dispossession and the bringing of the suit. The Court of first instance holding it to be barred dismissed the suit. The Plaintiffs appealed.

The suit was brought under the following circumstances :—

One Guru Charan Sen died intestate

(1) 12 M. I. A. 244 (1868).
(2) 7 M. I. A. 357 (1859)
(3) 6 Vesey 92 (1801).
(4) 11 Bligh 187 (1837).

LAKHAN CHUNDER SEN v. MODHU SUDAN SEN.

on the 12th November 1872 leaving his widow, Sarat Kumari, and 3 sons, namely Bani Madhub Sen, Moni Madhub Sen and Chooni Lall Sen. Chooni Lall died on the 2nd November 1881, leaving a widow and several sons of whom the eldest was one Nemyo Charan Sen. A deed of declaration was executed on the 30th June 1891 in favour of Sarat Kumari by Bani Madhub and Moni Madhub and by that deed it was declared that Sarat Kumari was absolutely seized and possessed of the property in dispute and that she having called upon Bani Madhub and Moni Madhub to hand over the management of the property, they made it over to her. Nemye Charan Sen was an attesting witness to that deed. Sarat Kumari executed on the 18th January 1892 a conveyance of the property in dispute in favour of Bani Madhub, his wife, Nrita Moni Dasi, and his daughter-in law, Sarala Sundari Dasi, appointing them *shebaits* and conveying the property to them subject to the trusts for the performance of the worship of certain idols named in the indenture of conveyance. Sarat Kumari died on the 18th November 1892.

In 1896 all the sons of Chooni Lall, except Nemye Charan, instituted a suit in the High Court, being Suit No. 882 of 1896, for the possession of their share in the above property and for other reliefs. The Defendants in that suit at first, were, Bani Madhub, Moni Madhub, Nrito Moni, Sarada Sundari and Nemye. During the pendency of that litigation both Bani Madhub and Moni Madhub died and their heirs and representatives were brought on the record. The Plaintiffs in that suit stated in their plaint that the properties belonged to Guru Charan Sen, who was possessed of them up to the time of his death, subject to the worship of 2 idols, being private idols no one outside having any interest or concern in their worship. On Guru Charan's death his 3 sons succeeded to the possession of the properties in dispute and to the shebaitship. Since the execution of the Indenture of Conveyance dated the 18th January 1892 they had been excluded from the use and enjoyment of the above property. It was alleged that the deed of declaration was executed in order to save the said property from the hands of the creditors of Bani Madhub and Moni Madhub who had become heavily involved in debt. The claim of the Plaintiffs in that suit was supported by the heirs of Moni Madhub but was strongly resisted by the heirs of Bani Madhub, the really contesting Defendants. Their contention was that the property belonged to Sarat Kumari, who was seised of it absolutely, and not to Guru Charan, at the time of his death. One of the issues in the case raised at the instance of the heirs of Bani Madhub, as between themselves and the heirs of Moni Madhub, was whether the latter were entitled to any declaration or relief, and if so, then whether they could obtain such declaration without giving up the benefits received by them Henderson, J, who heard the case by his judgment pronounced on the 20 April 1903 held that the property belonged absolutely to Guru Charan Sen at the time of his death, decreed the claim of the Plaintiffs in that suit and declared the heirs of Moni Madhub Sen, the Plaintiffs in the present action, entitled to a

$\frac{1}{3}$rd share in the property. The heirs of Bani Madhub appealed from that decision and the Appellate Court on the 22nd February 1904 upheld the judgment of Henderson, J., except so far as it related to the heirs of Moni Madhub. That portion of the judgment of the lower Court was upset on the ground that the action being virtually one of ejectment, the heirs of Moni Madhub were not entitled to get decree for possession as against their co Defendants, or any other decree.

The heirs of Moni Madhub thereupon, brought this action on the 11th November 1904, against the heirs of Bani Madhub and Chooni Lall. Bodilly, J., before whom the case came on dismissed the suit on the question of limitation delivering the following judgment:—

BODILLY, J.—This is an action brought by the Plaintiffs to obtain a declaration of the share in certain property, which he alleges to be joint family property, for partition, mesne-profits and other reliefs.

For the purpose of this judgment, it is only necessary that I should very briefly deal with the facts as they have been very fully dealt with in the judgments of Mr. Justice Henderson and of the Court of Appeal to both of which I shall have later to refer, and they are not of importance in deciding the point. I now, have to consider, which is in the nature of a preliminary objection, that no action will lie, inasmuch as from the pleadings it appears, that the action is barred by the Limitation Act.

One Guru Charan Sen died in the year 1872 leaving a widow, and three sons, Bani Madhub Sen, Moni Madhub Sen and Chuni Lal Sen. The present Plaintiffs are the descendants of Moni Madhub, and the Defendants are the widow and the descendants of the other two brothers.

Guru Charan was, during his lifetime, the owner of considerable immoveable property in this city and elsewhere, but he got into pecuniary difficulties and it is alleged, that for the purpose of protecting his property from the hands of his creditors, he dealt with his properties in various ways, which are very particularly dealt with in the judgment of Mr. Justice Henderson in the suit of Govind Chunder Sen *v.* Srimutty Nettomoni Dasi and in the appeal from that judgment to the Court of Appeal. That was a suit by the descendants of the youngest brother, Chuni Lal Sen, in ejectment in respect of the properties now in dispute and for a declaration as to their rights and shares. The Plaintiffs succeeded and were held entitled to a five-sixth share. In that suit the present Plaintiffs were made Defendants and in their written statement they supported the claim of the Plaintiffs and asked that a declaration should be made in their favour, that they were also entitled to a share in the disputed properties. The learned Judge made a decree in their favour declaring that they were entitled to $\frac{1}{3}$ share in the disputed properties. This portion of the decree was, however, set aside by the Court of Appeal on the ground, that inasmuch as the action was one in ejectment and not a partition suit, relief could not be given as between two co-Defendants and their Lordships said that the present Plaintiffs must, if so advised, bring a separate action to establish their

SM. INDRA BIBEE v. JAIN SARDAR AHIRI.

the expiration of every six months and to take a receipt from me of all papers and documents and other things and of all moneys that might be made over and paid to me by my said attorney. And I also authorise my said attorney to appear for me in the High Court of Judicature at Fort William in Bengal in all its several jurisdictions Insolvent Court, Small Causes Court and Police Courts of Calcutta and other places, in the offices of the Board of Revenue of the Presidency Commissioner and other Commissioners and the Commissioners of Police Calcutta and elsewhere and the Municipality of Calcutta and other places and Collector or Collectors of Calcutta and other places Registrar and Sub Registrar of Assurances of Calcutta and other places and to attend to the registration of any document or documents for me and in my name as such administrator as aforesaid. And also for me and in my name as such administrator as aforesaid to sign Warrants of attorney, Retainers, and Vakalatnamas and to appoint Barristers, Attorneys, Vakils, Pleaders, and Muktears. And also to sign plaints written statements verifications thereto, petitions, affidavits tabular statements and other papers and writings which may become necessary. And I also authorise my said attorney to represent me as such administrator as aforesaid in any action or other proceedings which he may consider necessary to institute and to appear for me in any action which may be instituted against me as such administrator as aforesaid and to defend the same or if he shall be advised or think proper to suffer judgment to be had or given against me by default or otherwise. And also to enter into make sign seal execute deliver acknowledge and perform any contract agreement deed, writing or thing that may in the opinion of the said attorney be necessary or proper to be entered into made signed sealed executed delivered acknowledged or performed for effectuating the purposes aforesaid or any of them and for all or any of the purposes of these presents to use the name of me the said Jain Sirdar Ahiri as such administrator as aforesaid. And generally to do execute and perform any other act deed matter or thing whatsoever which ought to be done executed or performed or which in the opinion of my said attorney ought to be done executed or performed in or about any concerns engagements and business of every nature and kind soever in connection with the estate of the said Sitab Chand Ahiri, deceased, as fully and effectually to all intents and purposes as I myself could do if I were present and did the same in my proper person it being my intent and desire that all matters and things respecting the same shall be under the full management and direction of the said attorney. And for the further better and more effectually doing effecting executing and performing the several matters and things aforesaid, I hereby give and grant unto my said attorney full power and authority from time to time to appoint one or more substitute or substitutes to do execute and perform all or any such matters and things as aforesaid and the same substitute or substitutes at pleasure to remove and to appoint another or others in his or their place or stead and all and whatsoever my said attorney or his substitute or

SM. INDRA BIBEE v. JAIN SARDAR AHIRI.

substitutes shall do or cause to be done in or about the premises I as such administrator as aforesaid for myself my heirs and assigns covenant with the said Bisseswar Das Pagulia his executors and administrators to allow ratify and confirm. And it is further my intent and desire that this power-of-attorney shall continue to be and remain in force until the money due to Bisseswar Das Pagulia is fully paid and satisfied. In witness whereof the said Jain Sirdar Ahiri hath hereunto set and subscribed his hand and seal this fifth day of August one thousand eight hundred and ninety-eight."

Mr. S. P. Sinha (with him *Mr. Acharya*) for the Appellant cited the following authorities: *Bennett* v. *Cooper* (2), *In re Parkinson* (3), *Abbott* v. *Stratton* (4), Desai's Registration Act (3rd Edn.), p. 111, Ghose on Mortgage, p. 230, Holmwood's Registration Act, p. 163, *Najibulla* v. *Nusir* (1) did not apply

Mr. A. Chaudhuri (with him *Mr. Mehta*) for the 2nd Respondent contended that the document in its terms did not create a charge and that the provisions of the Stamp and Registration Acts (secs. 21, 49 and 80) not having been complied with the instrument could not operate as a charge.

Mr. A. N. Chaudhuri for the 1st Respondent not called upon.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—The only question we have to decide upon this appeal is whether the power-of-attorney of the 5th of August 1898 created a charge on the properties generally referred to in it, securing to the applicant's husband, whose representative she now is, certain moneys which she says were advanced for the purposes of the estate. I am doubtful, looking into the language of the document, whether it constitutes an equitable charge, seeing that any money to be received by the attorney in whose favour the power was given was to be paid not to himself but into the Bank not in his own name but in the name of the person giving the power. I will, however, assume in favour of the Appellant that the document did constitute an equitable charge in favour of the person to whom the power was given, but even then, the want of registration in compliance with the provisions of the Registration Act is fatal to the Plaintiff's case. It is quite clear under sec. 17 of that Act that if the document was one which purported to affect, or to create any interest in immoveable property, it was bound to be registered. Sec. 49 says that "No document required by sec. 17 to be registered shall affect any immoveable property comprised therein, . . . unless it has been registered in accordance with the provisions of this Act." When we look into the circumstances of this case, it appears that the document in question has not been registered in compliance with the provisions of the Act. It was admittedly stamped only with the stamp required for a power of attorney and not for a document creating an equitable charge and it was, apparently, so presented to the registering officer. If it was an equitable charge

(1) I. L. R. 7 Cal. 196 (1881).
(2) 9 Beavan 252 (1846).
(3) 13 L T 26 (1865).
(4) 3 Jo. and Lat. 609 ; 9 Ir. Eq Rep 233 (1846)

SM. INDRA BIBEE *v.* JAIN SARDAR AHIRI.

it is quite clear that it ought to have been entered in Book I, and certain particulars which are compulsorily required by sec. 21 of the Act relating to immoveable property ought to have been furnished. Sec. 21 says that "No non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same." That was not the case here—there was no such description—and in point of fact the document was entered not in Book I, which is a register of non-testamentary documents relating to immoveable property but was entered in Book IV which is a Miscellaneous Register. The case of *Najibulla Mulla* v. *Nusir Mistri* (1) is akin to the present. But, to my mind, it is sufficient to say that the document was not registered in accordance with the provisions of the Act and, therefore, under sec. 19, it could not affect any immoveable property comprised therein. I, therefore, think that the view taken by Mr. Justice Chitty is quite correct and this appeal must be dismissed with costs

HARINGTON, J.—I agree. I will only add the observation that the fact that the parties accepted the document with an endorsement showing that it had not been registered in Book I, and the fact that no leave was obtained under sec. 90 of the Probate and Administration Act lead to the conclusion that the parties did not intend to create a charge by the document which was executed. For these reasons I think the appeal should be dismissed.

FLETCHER, J —I also agree.

(1) I. L. R. 7 Cal. 196 (1881).

Mr. G. K. Ghose, Attorney for the Appellant.

Messrs. Bonnerjee and Haldar and *Mr. M. K. Bose*, Attorneys for the Respondents.

A. N. C. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION.

No. 33 OF 1907.

MACLEAN, C. J.
MITRA, J.
WOODROFFE, J.
1907.
20, December.

RAJESHWAR MULLICK,* Plaintiff, Appellant,
v.
GOPESWAR MULLICK and another, Defendants, Respondents.

Hindu law—Debutter—Hereditary shebaitship—Shebaitship, validity of disposal by Will—Usage—Family custom.

Held *by* MACLEAN, C. J., *and* MITRA, J. —*In the absence of any local usage or family custom and where no case of necessity or clear benefit to the idol has been made out, a* shebait *of a private* debutter *is not entitled to dispose of his office of hereditary shebaitship by his Will.*

MANCHARAM *v.* PRANSANKAR (1) *dissented from.*

Held *by* WOODROFFE, J.—*That the question of usage did not affect the matter and that the office of shebaitship could not be alienated by Will.*

This was an Appeal from the judgment and decree of Chitty, J., dismissing the Plaintiff's suit.

The suit was for the construction of the Will of Lalit Mohan Mullick, deceas-

(1) I. L. R. 6 Bom. 298 (1882).

*REPORTER'S NOTE —For judgment of lower Court, vide 11 C. W. N. 782.

RAJESHWAR MULLICK v. GOPESWAR MULLICK.

ed, and for ascertainment of the rights of the parties thereunder, for a declaration that the Plaintiff was entitled to the turns of worship of the Thakur. Sree Sree Radha Gobind Jew, which was of the said Lalit Mohan Mullick and to the custody of all jewels, articles, etc, belonging to the said Thakur, established by one Chitra Dassee by an *ekrarnama*, dated the 13th Jaista 1227 with a postscript thereunder, dated the 17th Falgoon 1228.

The facts of the case together with arguments of Counsel and the judgment of Chitty, J., dismissing the Plaintiff's claim have already been fully reported and will appear from 11 C. W. N, p. 782.

The Plaintiff appealed against the decision of the lower Court.

Mr. Garth (with him *Messrs. B. Chakravarti* and *B. K. Lahiri*) for the Plaintiff-Appellant pressed the points relied upon in the lower Court.

Mr. Sinha (with him *Mr. B. C. Mitter*) for the Defendant-Respondent, Gopessur Mullick, not called upon to reply.

The JUDGMENTS OF THE COURT were as follows :—

MACLEAN, C. J.—The question which arises on this appeal is a very short one; and, I think it may be properly stated thus, whether Lalit Mohan Mullik, who was the *shebait* of a certain idol was entitled to deal with it by his Will as he purported to do.

It appears that the endowment of the idol was created many years ago by the Will of one Chitra Dasi, and eventually the said Lalit Mohan became the *shebait*. He purported to bequeath by this Will the shebaitship after his death, first to his widow, and then to his nephew, Rajeswar Mullick, the present Plaintiff. Lalit Mohan died; and, Rajeswar now brings this suit to have it declared that he is entitled to the shebaitship. He is opposed by his brother, Gopeswar Mullick, who says that Lalit Mohan had no power to bequeath the shebaitship by his Will. That is the whole question in the suit.

No doubt, there are cases and authorities for the proposition that a *shebait* may by an act *inter vivos*, alienate the shebaitship; but I think I am fairly stating the result of those cases when I say that such alienations are not regarded with much favour, and that somewhat special circumstances must exist to support them. I need not go through the authorities which I think substantiate that proposition. But all of them relate to alienations *inter vivos*, and with the exception of one authority, to which I will refer in a moment, there is none for the proposition that a *shebait* can by his Will bequeath the shebaitship. On principle I do not see how he can do so; for, the question at once arises, what has he to bequeath or alienate under his Will? A *shebait* is a manager or a *quasi* trustee for the benefit of the idol. His office endures only for his life: his Will only comes into operation on his death. What is, there then for him to alienate by his Will? Nothing. In the case of *Mancharam* v. *Pransankar* (1), on which the learned Counsel for the Appellant relies, the alienation no doubt was by Will: but the learned Judges seem to have proceeded on the view, that because in certain cases there may be an alienation by a *shebait* by act *inter*

(1) I. L. R. 6 Bom. 298 (1882).

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN.

rights and that the present Defendants would be at liberty to raise any defence that might be available against them and which were not available as against the Plaintiffs in the former suit

The Plaintiffs' present action is to establish those rights. After the case had been opened by the Counsel for the Plaintiffs, Mr. S. R. Dass, the Counsel for the Defendants, Mr. C. R. Dass raised a preliminary objection that inasmuch as by para. 22 of the plaint, it is admitted that the Plaintiffs were dispossessed on 18th January 1892; and as the present action was not started until 14th November 1901, more than twelve years had elapsed from the dispossession and the bringing of the action and the claim is barred by sec. 9 of the Limitation Act.

Mr. S. R. Dass, on behalf of the Plaintiffs, in answer to the objection, says that inasmuch as the judgment of Mr. Justice Henderson was given in favour of the present Plaintiffs on 20th April 1903, that there was a satisfaction of the Plaintiffs' present cause of action at that time, and that having regard to the decision of the Privy Council, in the case of *Mussamat Ranee Surnomoyee* v. *Soshee Mukhee Burmonia* (1), when that decision was reversed a new cause of action arose at the date of the reversal, and alternatively, he says that, even if a new cause of action did not arise, still the statute did not run against his clients during the time the decree in their favour remained unreversed, which was not, until 22nd February 1904, and that, therefore, he is in time.

Mr. S. R Dass has cited in his argument several cases in addition to the one I have named above and noticibly amongst them, are the case of *Bassu Kuar* v. *Dhum Singh* (5), and the case of *Dindoyal Paramanick* v. *Radha Kissori Dabee* (6) and several others, but I think that they, are all distinguishable from the present case and I will deal with them briefly later on, as I think, they should be only dealt with as being subsidiary to the first point and only arising in case I am wrong in the decision, to which I have come in respect of that point. The point is, was the decision of Mr. Justice Henderson a decree in a suit between two parties to the suit who would be bound by his decree. I do not think it was A decree is defined in sec. 2 of the Civil Procedure Code as being "the formal expression of an adjudication upon any right claimed" "when such adjudication" "decides the suit" and a decree holder is said to be "any person in whose favour a decree or order capable of execution has been made."

The Court of Appeal having held that inasmuch as the suit, in which the decree was passed, was a suit in ejectment, Mr. Justice Henderson's judgment cannot stand, it being a decree as between two co Defendants, they have held, in my opinion, that the decree is not a valid decree and is one, that Mr. Justice Henderson had no jurisdiction to make, and that it is not merely a question of his wrongly having adjudicated as between the parties, for in the case that he had before him, being one in ejectment, the mere fact that one Defendant raises an issue in his written statement against another Defendant, does not make

(1) 12 M. I. A. 244 (1868)

(5) I. L. R. 11 All. 47 P. C. (1888).
(6) 8 B. L. R. 536 (1872).

LAKHAN CHUNDER SEN v. MODHU SUDAN SEN.

it a "suit" as between those parties which the Court has jurisdiction to try, and therefore in my opinion, the decree was *ultra vires.*

The cases in *Mussamat Ranee Surnomoyee* v. *Soshee Mukhee Burmonia* (1) and *Bassu Kuar* v. *Dhum Singh* (5) that have been quoted by the learned Counsel for the Plaintiff, in my opinion, do not apply to this case, even if I am wrong in the conclusion to which I have just come, for the question in both these cases which are the leading cases in point, was—did the decree or order for the time being in force, "satisfy" the Plaintiff's cause of action?

In the case in *Mussamat Ranee Surnomoyee* v. *Soshee Mukhee Burmonia* (1), the facts are shortly these :—The Plaintiff was a zemindar and she granted *putni* taluks to the Defendants who failed to pay their rents, and consequently she put up the taluk for sale under the regulation then in force, the purchase price greatly exceeded the amount of the rent due and she was paid in full the amount of the rent due. The sale was eventually set aside on the ground of irregularity and she had to refund the amount of the purchase-price to the purchaser, she then sued to recover the arrears of rent and it was held that the cause of action accrued at the time, the sale was set aside and that she could not have sued for the rent before, as she had chosen to adopt the procedure under the Bengal Registration Act VIII of 1819 and although the sale was held to be morbid, owing to an irregularity still until it was set aside and she held the proceeds of it and "she was in the position of a person whose claim had been satisfied and that the suit might have been successfully met by a plea to that effect?"

In the case reported in *Bassu Kuar* v. *Dhum Singh* (5), the same principle is, I think, applied. The Defendant in that case owed money to the Plaintiff on an account stated, and an arrangement was come to between them, that the Defendant should sell certain land to the Plaintiff, and in respect of the purchase-price, should give credit for the amount due from him to the Plaintiff.

The Defendant refused to complete his bargain and a suit for specific performance having been brought, failed, although it succeeded in the Court of first instance. In an action for the money due on the account stated instituted after the decree in the suit for specific performance had been set aside, the Defendant desired to avail himself of the defence of the statute of limitation, but unsuccessfully, for the Privy Council held that whilst the contract was in existence between the parties, the Plaintiff was in a position of a person whose claim was satisfied and he could not, during that time, have sued to recover the money.

There are other cases that have been cited to me, but they do not in my opinion, vary the principle that has been laid down by the Privy Council in these two cases, *i.e.*, that it is only where as between the two parties to a suit the claim has been satisfied in such a way that a plea to that effect would be a bar to the action, that the statute of limitation ceases to run.

(1) 12 M. I. A. 244 (1868).
(5) I. L. R. 11 All. 47 P. C. (1888).

5) I. L. R. 11 All. 47 P. C. (1888).

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN.

In the present case there was, in my opinion, no such satisfaction. All, Mr. Justice Henderson did, was to make a declaration as to the nature of the Plaintiff's rights but no execution could have issued on such declaration and the Plaintiff was not in the position of a decree-holder within the provisions of sec. 2 of the Code of Civil Procedure. He might have brought an action for partition as he has done now, and the fact, that he had obtained the declaration from Mr. Justice Henderson could not, in my opinion, have been pleaded in bar of such suit, and therefore it does not come within the principle of the cases relied upon by the Plaintiffs.

The second point raised by the Plaintiffs as to there being a period between the time of the decision of Mr. Justice Henderson and its reversal by the Court of Appeal, during which the statute did not run, depends upon the same principles and must fail on the same grounds.

I, therefore, hold that this action is barred by the Limitation Act and must fail. The Defendants who appear, will have costs on scale No. 2, including the reserved costs

From the above decision the Plaintiffs preferred this appeal.

Mr. Garth (with him *Messrs. S. R. Das* and *A. N. Chaudhuri*) for the Appellants. If the period between the date of the judgment of Henderson, J., and that of the appellate Court reversing the judgment so far as we are concerned, be excluded, then we are in time. We were declared entitled to a ⅓rd share by the judgment of Henderson, J., and so long as that judgment stood our claim to a share in the property was satisfied,—the question before the Court being substantially the same as the question of our claim now: *Mussamut Ranee Surnomoyee* v. *Soshee Mukhee Burmonia* (1), *Dindoyal Paramanick* v. *Radha Kissori Dabee* (6), *Bissu Kuar* v *Dhum Singh* (5), *Subbarau Nayudu* v. *Yagana Pantalu* (7), *Surjiram Marwari* v. *Barhamdeo Persad* (8) I was not sleeping upon my claim Can it be said that I was not prosecuting my claim *bond fide*? *Pran Nath Roy Chowdhury* v. *Rookea Begum* (2). As long as Henderson, J.'s judgment remained in force I was precluded from raising that question in another suit *Gobind Ch. Koondoo* v. *Taruck Ch. Bose* (9), *Shadal Khan* v. *Aminullah Khan* (10) Any attempt to do so would have been met with the answer that while that judgment stood every one was bound by it. It was not until I was freed by the appellate Court judgment that I could start a fresh litigation.

Mr. Sinha (with him *Messrs. C. R Das* and *B. C. Mitter*) for the Respondents.—To bring the case under sec 14 of the Limitation Act *bond fide* prosecution of the claim in a Court which is unable to entertain it has to be shown. In the present case the Court was competent to entertain it. Moreover the benefit of sec. 14 cannot be claimed unless it is expressly pleaded *Jogeshwar Roy* v. *Raj Narain Mitter* (11). It must be shown that the result of the Appellate Court

(1) 12 M. I. A. 244 (1868).
(2) 7 M. I A. 357 (1859).
(5) I. L. R. 11 All. 47 P. C. (1888).
(6) 8 B. L. R. 536 (1872).
(7) I. L. R. 19 Mad. 90 (1895).
(8) 1 C. L. J. 337 at p 343 (1905)
(9) I. L. R. 3 Cal. 145 (1877).
(10) I. L. R. 4 All. 92 (1881).
(11) I. L. R. 31 Cal. 195 at p. 201 (1903).

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN.

judgment was the creation of a new obligation or a new right. [*Huro Pershad Roy* v. *Gopal Das Dutt* (12), *W. Sheriff* v. *Deno Nath Mookerjee* (13), *Burna Moyi Dassi* v. *Burna Moyi Chowdhurani* (14), *Mahomed Majid* v. *Mahomed Ashan* (15)] In this case a new cause of action did not arise on the reversal of the judgment of Henderson, J. That judgment was not a satisfaction to their claim since it did not give them all that they wanted. The plaint must contain demand of relief (secs. 48 and 50), and a Defendant cannot claim a relief. It is only in a set off that a Defendant can be said to prosecute a claim *Hafizunessa Khatum* v. *Bhyrab Ch. Das* (16), *Issuree Dassee* v. *Abdool Khalak* (17).

Mr. Garth in reply.

C. A. V.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The only question we have to deal with on this appeal is whether the suit is barred by limitation. The facts of the case, so far as are material, are as follows : It appears that in the year 1896, the sons of one Chuni Lall Sen, instituted a suit in this Court, being Suit. No, 882 of 1896 against, amongst others, the present Appellants or their predecessors in-title and the present Respondents or their predecessors-in-title, and the object of that suit was to have their shares ascertained in certain property, for possession, an account and incidental relief. The present Appellants are the sons and heirs of one Moni Madhab Sen, who was an original Defendant in that suit, but died during its pendency, and the present Appellants were brought on the record as party Defendants in the place of their deceased father In that suit, an issue was raised as between themselves and the sons of Bani Madhub Sen, who were the really contesting Defendants in that suit and who are the Respondents on the present appeal, as to whether the sons and heirs of Moni Madhub Sen were entitled to a ⅓ share in the premises scheduled to the plaint in that suit ; and they supported the case of the Plaintiffs. It would appear from para. 17 of the written statement in the present suit that this issue was actually invited by and raised at the instance of the heirs and representatives of Bani Madhab Sen, the present Respondents. The position of the present Appellants in the previous suit was the same as that of the Plaintiffs in that suit In that suit the present Appellants and their mother, Sreemutty Munjuri Dasi, were declared entitled to a ⅓ share in the scheduled property and entitled to obtain possession of the share to which they were held to be so entitled. That suit was a long and expensive one, and was fought out with the result I have stated, the Plaintiffs in that suit being declared entitled to ⅙ of the scheduled properties. By the decree in that suit which is dated the 20th of April 1903, it was expressly declared that the present Appellants were jointly entitled to one-third part or share of the property in dispute and the present Respondents were to deliver to them "quiet

(12) I. L. R. 9 Cal. 2[illegible] P. C. (1882).
(13) I. L. R. 12 Cal. 253 (1885).
(14) I. L. R. [illegible] Cal. 191 (1895).
(15) I. L. R. 23 Cal. 205 (1895)
(16) 13 C. L. R. 214 (1883).
(17) I. L. R. 4 Cal. 115 (1878).

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN.

possession of the shares of the said premises to which they have been declared entitled as aforesaid." No doubt, in strictness the present Appellants ought to have been transferred from the category of Defendants and joined as co-Plaintiffs. But, as now appears, the issue I have referred to, as to the rights of the present Appellants to a ⅓ share of the scheduled property, was at the invitation of the present Respondents decided in that suit. The present Respondents or their predecessors-in-title appealed against that judgment, and on the 22nd of February 1904 the Appellate Court confirmed the decree in the main but set aside the decree so far as it related to the present Appellants. Whether the appellate Court would have arrived at that conclusion if it had then known, as this Court now knows, that the question as to the right to the one third share was raised and decided in the previous suit at the instance of the present Respondents or their predecessors-in-title, is, to say the least, (I say so because I was a party to the judgment) probably open to doubt. But no doubt the decree was reversed and we must deal with the matter on the footing of that reversal. In this state of circumstances, the learned Judge in the Court of first instance held that the suit was barred: and the Plaintiffs in the present suit have appealed. Their case is that their rights must be taken to have been suspended between the 20th of April 1903, the date of the decree in the first suit, and the 22nd of February 1904, the date of the reversal of that decree, and it is conceded that if this period be excluded on the ground that their rights were so suspended, the present suit is within time. It is also contended that sec. 14 of the Limitation Act covers the present case. As to the latter point, we feel grave doubt whether the case falls within that section, but it is unnecessary to decide that point, as we think the present Appellants are entitled to succeed upon the other point.

It is clear that under the decree of the 20th of April 1903, the present Appellants with others were declared entitled to ⅓rd share in the property and that the present Respondents were ordered to deliver up quiet possession to them of this share. It is perfectly true that that decree was passed in a suit which *quâ* the position of parties may be said not to have been properly framed. No doubt if the attention of the Court, when it passed that decree, had been called to this, it would, in the circumstances, have transferred the present Appellants from the category of Defendants into that of co-Plaintiffs. It seems to us, however, that this was a decree which, so long as it stood undischarged, was susceptible of execution at the hands of the present Appellants, and whilst that decree existed, it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit. We think therefore, in these circumstances that the right of the Plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and the 22nd of February 1904, and that the case falls within the principle laid down by the Judicial Committee of the Privy Council in the cases of *Mus-*

LAKHAN CHUNDER SEN *v.* MODHU SUDAN SEN.

samat Runee Sarnomoyee v. *Soshee Mukhee Burmonia* (1) and of *Pran Nath Roy Chowdhury* v. *Rookea Begum* (2). It is conceded that at the time of the institution of the first suit, the Plaintiffs' claim was not barred.

In this connection the language of Lord Eldon in *Pulteney* v. *Warren* (3), has some application: "If there be a principle, upon which Courts of Justice ought to act without scruple, it is this; to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases." This view was approved of by the House of Lords in the *East Indian Company* v. *Campion* (4).

For these reasons, we are unable to concur in the view taken by the learned Judge in the Court of first instance. The appeal must be allowed with costs both here and in the Court below and the case must be remitted to be tried out on the merits if, after the contest which took place in the previous suit, the present Respondents think that there are still any merits to be discussed.

Babu Subodh Chandra Mitter, Attorney for the Appellants.

Babus Sarat Chunder Dutt and *Ramesh Chunder Bose*, Attorneys for the Respondents.

J. C. M.

A. N. C.

(1) 12 M. I. A. 244 (1868).
(2) 7 M. I. A. 357 (1859).
(3) 6 Vesey 92 (1801).
(4) 11 Bligh 187 (1837).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 382 OF 1905.

BRETT, J. SHARFUDDIN, J. 1907. Heard, 7 and 8, January. Judgment, 16, January.	MATHURA NATH CHATTOPADHYA and anr., Defendants, Appellants, *v.* SIB CHANDRA BOSE, Plaintiff, Respondent.

Fishery—Independent julkar—Proof—Navigable river—Survey map—Map for private purposes—Comparative value.

Unless a person can establish his right to a fishery independent of his right to his estate he can have no title to any such right in a navigable river or any part thereof lying outside the boundaries of his estate.

What evidence is necessary to prove the grant of an independent right of fishery in a navigable river discussed.

Upon the documentary evidence it was held that the lower Appellate Court was in error in finding that Plaintiff had proved an independent julkur.

The presumption of law is that in the absence of evidence to the contrary, survey maps prepared for public purposes by responsible officers of Government are entitled to more reliance than maps prepared for private purposes in a private suit.

This was an appeal preferred on the 9th of March 1905, against the decree of L. Palit, Esq , District Judge of Zillah Faridpur, dated the 13th of January 1905, modifying that of Babu Amrita Lal Mukerjee, Munsif, 2nd Court, at Chikandi, dated the 13th of May 1903.

The suit out of which the present

MATHURA NATH CHATTOPADHYA *v.* SIB CHANDRA BOSE.

appeal arose was brought by the Plaintiff to recover possession of his share (one anna) of fishery rights in a certain portion of a river. The Plaintiff obtained a decree and four sets of Defendants preferred four appeals to the lower Appellate Court. The Plaintiff's case was that the portion of the river which was the subject-matter of the suit was part of the river known as Nadi Narikora *alias* Shore Nadi Narikora, of the *jalkar* rights in which the Plaintiff and his co-sharer were the proprietors. The defence was that the *jalkar* in suit appertained to *jalkar* mehals Ariel Khan. The case which was for decision before the District Judge will appear from paras. 4, 5 and 6 of his judgment which were as follows:—

"The main contention on behalf of the Appellants is that the Plaintiff and his co-sharers have not a right of fishery, strictly so called, *i.e.*, a *profit a prendre in alieno solo*, derived (this being a case of the right of fishery in a navigable river) by a grant from the State or by prescription; but that whatever right of fishery they had was one of predial or territorial fishery, dependant on their ownership of the subsoil and confined to the limits of such ownership. It is further contended that the right of the Defendant, on the other hand, is based on an absolute right of fishery in the whole river (which is a navigable one) created by a grant from the State, such right subsisting even if the river changes its course and flows over lands belonging to private individuals.

"I need not discuss in this case the question as to how far the grant by Government of the right of fishery in a navigable river (the bed of which belongs to the Government) continues to be operative when the river alters its course and flows over land which is the private property of others, because, in this case, it is ground common to all the parties in these appeals that such a grant is not affected by any such change in the course of the river. All the parties in these appeals are agreed that the right of fishery acquired in a navigable river, independently of the ownership of the bed of the river, by grant or by prescription, is a right which continues no matter whether the river has changed its course so as to flow over the private property of other people. That being so, it is not necessary to enter into a discussion of this question.

"The questions that have to be considered are (1) Is the Plaintiff's *jalkar* right in Nadi Narikora an independent right of fishery in a navigable river, or is it a merely predial or territorial right confined to that portion of the river, which flows over his land; and (2) what is the situation and extent of Narikora Nadi in which the Plaintiff has right of fishery?"

The other facts appear from the judgment.

Babus Lal Mohan Das, Surendra Chandra Sen, Dr. Priya Nath Sen and *Babu Girija Prossunno Roy Chowdhury* for the Appellants.

Babus Nil Madhub Bose and *Harendra Narain Mitra* for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The Plaintiff Respondent as part proprietor in two zemindaries, Pergunnah Mahabatpur Bander Khala Mouzah Mohul

MATHURA NATH CHATTOPADHYA v. SIB CHANDRA BOSE.

Chur Haya Hissa 8 annas Mudafat Bhowani Churn Rai, bearing Touzi No. 21 of the Dacca Collectorate and No. 5577 of the Faridpur Collectorate, and Pergunnah Mahabatpur Bhander Khala Mouzah Mohal Chur Haya Hissa 8 annas Mudafat Raj Kumar Rai, bearing Touzi No. 17 of the Dacca Collectorate and 5574 of the Faridpur Collectorate, brought this suit to recover possession of a *jalkar* or right of fishery in a stretch of river which appears to be about 15 or 16 miles in length and which he described as *jalkar* Nari Kora Nadi otherwise known as Sore Nadi Nari Kora—alleging that it appertained to his zemindaries Nos 17 and 21, that he and his co-sharers had all along been in possession of it till the 30th December 1899, when they were dispossessed by an order of the Criminal Court under sec. 145, Cr. P. C, declaring the principal Defendants to be in possession and confirming them in possession. The other shares in the *jalkar* were alleged to belong to the *pro formâ* Defendants as part proprietors with the Plaintiff in the two zemindaries.

The Principal Defendants denied the title set up by the Plaintiff. They alleged that Nari Kora Nadi never formed a part of any main or navigable river but that it was a branch merely of the Puddabati, and that this branch had dried up. They contended that the *jalkar* in suit was included in their independent *jalkar* mehal, bearing Touzi No. 504 in the Dacca Collectorate and No 6301 in the Faridpur Collectorate, that its name was Ramkristo Jalkaria taluk, that it was entered as a separate estate in the Touzi Roll, bearing a sadar jama for Rs 319 13-10 2, and that it covered the Ariel Khan river and portions of the Padma and Bhubaneswar rivers. They stated that the *jalkar* claimed by the Plaintiff extend over 15 or 16 miles of the Ariel Khan river, and was not included within the boundaries of the Plaintiff's two zemindaries.

A large number of issues were framed but for the purpose of this appeal the 2nd and 3rd issues only are of importance. The findings on the other issues have not been contested. The decision of the 2nd issue depends on the decision of the 3rd issue. For the present therefore it is only necessary to discuss the 3rd issue. It is framed as follows: "whether the Plaintiff has his alleged title to the disputed *jalkar*." The Plaintiff's title to Nari Kora *jalkar*, if such a *jalkar* be in existence at present, is not denied by the principal Defendants. Nor is the right of the principal Defendants to the independent *jalkar*, Ram Kristo Jalkaria, denied by the Plaintiff. The main questions requiring determination for the decision of the issue were (1) what was the nature of the Plaintiff's *jalkar*? Was it merely a territorial right of fishery confined to the limits of the Plaintiff's zemindaries, and as such one which would be lost should the stream in which it existed have dried up or have been diverted to a bed outside the limits of the zemindaries? Or was it a franchise or incorporal right of fishery, the subject of an independent grant from Government, which gave them a right of fishery in a stream or river wherever the channel of the stream or river might shift to, and which right was independent of any title to the bed of the stream or the adjacent soil? (2) If the Plaintiff has a

MATHURA NATH CHATTOPADHYA v. SIB CHANDRA BOSE.

right of fishery in a portion of the river over which the right in suit is claimed, does his right extend over the whole of the portion of the river in which it is claimed in the suit, or if only over a portion, then over what portion?

In support of their claim the Plaintiff relied first on the result of certain resumption proceedings taken by the Collector of Faridpur in 1860—the result of which was that the *jalkar* which the Collector then proposed to resume was released by order of the Divisional Commissioner dated the 15th June 1861: also on certain judgments in suits in which the Plaintiff's father, the predecessor-in-title of the *pro forma* Defendants, and the predecessors in-title of some of the principal Defendants were parties (Ex. 25, 26, 10, 20 and 21 in the Court of the Munsif). They also examined 13 witnesses to prove that the reaches of the river in suit formed the Nari Kora *jalkar*.

The principal Defendants examined 23 witnesses to prove that the portion of the river in which the Plaintiff claims the right of fishery form a portion of the Ariel Khan river, that it was included in the fishery mehal which was settled with the ancestors of the principal Defendants, and that therefore the Plaintiff had no right to it. They also adduced documentary evidence and relied on the survey maps to support their case.

The Munsif found that the portion of the river in suit was the Nari Kora river and that the Plaintiff had made out his title to the right of fishery claimed in that portion of the river. He accordingly gave him a decree for *khas* possession against the principal Defendants with costs.

On appeal the judgment and decree of the Munsif were confirmed by the District Judge with this modification that it was to be stated in the decree that Plaintiff's right was confirmed to one anna share only and the case map was ordered to be made part of the decree in order to show distinctly the limits of the Plaintiff's *jalkar* and so to avoid future disputes.

Against the judgment and decree of the District Judge on appeal the principal Defendants have appealed to this Court. There are in all three appeals, No. 382 of 1905 by the Defendants Nos. 1 and 2, No. 891 of 1905 by Defendant No. 12 and No. 959 of 1905 by Defendant No. 22. They have been heard together and the same arguments apply to all.

In dealing with the appeal to his Court the District Judge has noticed in his judgment that the decision of the case must depend on the determination of the two points which we have already mentioned in this judgment as arising under the 3rd issue framed in the Court of first instance, and we think that in paras. 4, 5 and 6 of the judge's judgment as printed in the paper-book of the appeal he has set out clearly and correctly the case which was before him for decision.

In the first point he has come to the conclusion that the Plaintiff, has established his title to an independent *jalkar* right in the river Narikora, and on the second he states that it being admitted on behalf of the Appellants that an independent right of fishery in a navigable river is not effected by a change of the

course of the river, the Plaintiff has succeeded in establishing his title to the *jalkar* in suit.

On behalf of the Appellants it has been urged that the evidence on which the District Judge has relied is not such as in law could support his finding that the Plaintiff had established his title to an independent *jalkar*, that he has not given proper consideration to the right set up by the Defendants or properly understood the evidence on which it is based, that in estimating the value as evidence of the maps which were filed by both parties in the suit he has erred in law in drawing a presumption favourable to the accuracy of a map prepared for private purposes in a private suit in preference to the survey maps prepared under the authority of the Government, that he has suggested reasons for distrusting the accuracy of the survey map of 1859 60 which it is impossible to support or justify, and that he has been misled in dealing with the evidence by the value which he has attached to that document.

Neither from the judgment of the Court of the first instance nor from that of the Court of the first appeal have we been able to ascertain whether the stretch of river in which the Plaintiff in his suit claimed rights of fishery lies within the limits of the two estates of which he is a part proprietor. That stretch of river seems to be 15 or 16 miles in length and the case for the Defendants as presented to us has been that a considerable portion of that stretch of river lies outside the territorial limits of the Plaintiff's estates Unless then the Plaintiff could establish that he had a right to the fishery independent of his right to his estates it is clear that under the law he could have no title to any such right in a navigable river or any part of a navigable river lying outside the boundaries of his estates. In the case of *Prosunno Coomar Sircar* v. *Ram Coomar Paroey*.(1) and in the Full Bench case of *Hori Das Mal* v. *Mahomed Jaki* (2) it is clearly laid down what evidence is necessary to prove the grant of an independent right of fishery in a navigable river.

Where fishery mehals, that is to say, rights of fishery in navigable rivers independent of the estates through which they pass, have been granted by Government, and where separate estates paying separate revenue to Government have been created it is usual to find some entry of such estate in the papers prepared at the time of the decennial settlement. So far as the independent right of fishery claimed by the contesting Defendants is concerned they have produced a copy of the entry relating to it in the Mahalwari Register of 1857-60 and this entry shows that for the *jalkar* the revenue payable to Government was Rs. 317-13-10½.

The Plaintiff however has produced no such document and in support of his title he has relied on the following evidence which the District Judge has accepted as sufficient to establish his title to an independent grant of fishery in a navigable river either inside or outside the territorial limits of his estates.

The first document is Ex. 25, a judgment in suit No. 15 of 1854 instituted

(1) I. L. R. 4 Cal. 53 (1878).
(2) I. L. R. 11 Cal. 434 (1885).

MATHURA NATH CHATTOPADHYA *v.* SIB CHANDRA BOSE.

by Ananda Mohun Pal and others against the father of the Plaintiff and others for recovery of possession of fishery rights in Narikora river on the allegation that it was a branch of the Padmabati river, and to have set aside an order passed under Act IV of 1840 declaring the Basu Defendants (predecessors of the present Plaintiff) to be in possession. The Basu Defendants claimed the *jalkar* as included in Pargana Mahabatpore Banderkola, the revenue for the *jalkar* being Rs 8-8. The suit was dismissed This judgment is relied on as establishing the title of the Plaintiffs to the *jalkar* and as proving that even then the *jalkar* was claimed as an independent *jalkar*. The District Judge has accepted it as proving these two facts.

We are unable to agree with the District Judge that this document can be accepted as proving that the *jalkar* was claimed as an independent *jalkar*. Even from the statement of the case as given in the judgment of the District Judge it is clear that the Defendants pleaded that the *jalkar* was one held in connection with their zemindari, and in our opinion the only possible meaning of this expression is that it was one dependent on the zemindari and included within it. The fact that the revenue of the fishery was separately set out in the settlement of the estate made by Government with the predecessors in-title of the Plaintiffs, would be no indication that the *jalkar* was separate or independent from the estate. In determining the Government revenue to be fixed for an estate the officers of Government had to take into consideration the profits from all sources in each estate which the proprietor was then deriving and to assess the revenue on the basis of those profits: and in cases where profits were derived from fisheries or other such like sources of income within the estate it is not unusual to find that the Government revenue is calculated on all separately, the total making up the revenue for the whole estate. The mere separate specification of the amount of revenue calculated on the basis of the profits realised from fisheries within the estate could not be taken to be proof that there was a separate grant of a fishery independent of the estate. Nor is it reasonable to suppose that a person having independent rights to a fishery irrespective of his estate would consent to have his separate estate in that fishery and the revenue due in respect of it amalgamated with his rights and the revenue of his landed estate. Further, if any such amalgamation of two separate estates had been made we should expect that some official record of the same would have been prepared which the Plaintiff could have produced in support of the rights he claims in the present suit. We think then that the document relied on neither proves the assertion of an independent right by the Plaintiff's predecessors in-title nor that they had such a title.

It is also clear from the judgment of the District Judge that from that judgment the boundaries of the *jalkar* in dispute in that suit could not be clearly ascertained.

Further in that suit the predecessors of Defendant No. 42 put in an objection claiming that the *jalkar* was a portion of their *jalkar* Ariel Khan. The suit was

MATHURA NATH CHATTOPADHYA *v.* SIB CHANDRA BOSE.

dismissed, but that was no decision as between the Defendants in that suit and the predecessors-in-title of Defendant No. 42 with regard to the title set up by the latter. The decision in that suit cannot be held therefore to amount to a decision in favour of the title set up by the predecessors-in-interest of the Plaintiff as against the claim advanced by the predecessors of Defendant 42.

It can only be held to determine that the Plaintiffs in that suit failed to establish their title as against the Defendants in that suit.

The next documents on which the District Judge relies are the map Ex. 34 prepared for the purposes of that case and the survey map of 1859, and on these documents, which are on the face of them contradictory, he arrives at a conclusion which is not supported by the latter, *viz.*, that with the exception of *thak halka* 1904 in the Revenue Survey Map the whole channel of the Ariel Khan river between the Ganges and the junction of that *halka* with the river Narikora had dried up. In fact he holds that in two years, *i e*, between 1857 and 1859, the bed of a large river like the Ariel Khan had entirely disappeared for a distance of some 10 or 15 miles. This is in our opinion a finding which is not supported by the survey map.

The next documents relied on by the Plaintiffs were exhibits 23 and 24, the orders passed by the Collector of Faridpur and the Divisional Commissioner in the proceedings taken under Reg. II of 1819 for the purpose of resuming the *jalkars* described as Narikora *alias* Ariel Khan and Nadi Moynakata *alias* Keskabpur Khal" and settling them with other parties. In those proceedings the predecessors of the Plaintiff who were Defendants put in objections claiming the *jalkar* as appertaining to their two estates Mudafat Raj Kumar and Mudafat Bhobani Churn Roy in Pargana Mahabatpur Bunder Kola, while the claimants Guru Prosad Roy and others claimed the *jalkars* as appertaining to their estate Pargana Vikrampur. The Collector in his *robakari* dated 2nd April 1861 directed the resumption of the *jalkars*, but on appeal the Divisional Commissioner on the 15th June 1861 set aside the order of the Collector and released the *jalkars* from the claim of Government.

These documents are relied on, and have been accepted by the District Judge as proving that the *jalkar* claimed in the present suit was then released as a *jalkar* belonging to the Defendants.

It is to be observed that in those proceedings the *jalkars* are described as in portions of the river extending from the west of the river Padma up to the east of Ariel Khan. This description is hardly consistent with the case of the Plaintiffs which the District Judge has accepted that the upper portion of the Ariel Khan river had dried up between 1857 and 1859, but rather favours the case of the contesting Defendants.

Nor is it consistent with the case of the Plaintiff that the *jalkar* was an independent *jalkar*. It "was claimed as appertaining to estates of the Defendants," *i. e.*, the predecessors of the present Plaintiff, and the papers referred to in the *robakari* of the Commissioner show that the *jalkar* jama was mentioned in them in the schedules and kismuts ap

pertaining to the estates and in the *chowhaddi milani* papers. This certainly goes to support the opposite conclusion, namely, that the *jalkar* was then released not as an independent *jalkar* but as a *jalkar* dependent and appertaining to the Defendants' estates.

The Plaintiffs next relied on the judgments of the original and appeal Courts in two suits, No. 221 of 1861 and No. 50 of 1862 (Ex. 19 and 21 in the Munsif's Court). The first was instituted by the predecessors of Defendants 1 and 2 against the predecessors of the Plaintiff and the latter by the proprietors of Bikrampur. Both were for recovery of possession of portions of a *jalkar* and for setting aside an order under Act IV of 1840. The predecessors of Defendants 1 and 2 claimed the *jalkar* as a portion of their *jalkar* Ariel Khan. Both suits were dismissed. The District Judge in accepting these documents as supporting the Plaintiff's title in the present suit, at the same time remarks that "the exact extent of the river in dispute in these suits cannot be accurately ascertained from the documents filed:" and, though he appears to hold that suit No. 50 of 1862 covered no portion of the land in dispute in the present suit, he adds that he thinks suit No. 221 of 1861 probably related to a portion of the river in dispute in this suit. This can hardly be accepted as a distinct finding in favour of the present Plaintiff.

Lastly the Plaintiff relied on the judgment in the suit No. 710 of 1867 instituted by the predecessors of the present Plaintiff and his co-sharers. This was apparently the outcome of the previous litigation and was also dismissed.

At most these judgments can be accepted as proving that the predecessors of the Defendants Nos. 1 and 2 failed to recover possession from the predecessors of the Plaintiff of certain *jalkars* which may or may not have formed portions of the *jalkar* now in dispute, and failed. There is nothing to show that the portion of the river in which the *jalkars* were then claimed lay outside the limits of the Plaintiff's estates or that their predecessors claimed them by virtue of any grant which gave them a right of fishery in a portion of a navigable river irrespective of whether it was included in their estates or not. In fact the only possible inference to be drawn from those papers is that the portions of water in which the fishery rights were claimed lay within the Plaintiff's estates and were claimed by them as appertaining to those estates.

The fact too that the *jama* for the *jalkars* was only Rs. 8-8 supports the inference that the right of fishery only extended over water within the estates of the present Plaintiff and was not an independent right of fishing in a navigable river extending, as it must have then extended if the Plaintiff's case were true, over some 10 miles or more, or, as now claimed, over 15 or 16 miles.

In 1899 proceedings were taken under sec. 145, Cr. P. C., in the Magistrate's Court regarding the *jalkars* in dispute in the present suit and an order in favour of the contesting Defendants was passed.

There can be no doubt that in the present suit the onus lay on the Plaintiff to prove his title. The title which he has essayed to prove is that the *jalkar*

which he claims is the subject of an independent grant from Government. The documentary evidence on which he has relied entirely fails to support any such title and we are of opinion that the District Judge has erred in law in holding that they support such a title. The inference which he has drawn from the document is one of law and not one merely of fact and we are unable to accept the contention of the learned pleader for the Respondents that the present appeal is concluded by those findings.

In dealing with the documents relating to the resumption proceedings in 1861 the District Judge has misstated the findings of the Divisional Commissioner. There is no finding that the *jalkar* was an independent *jalkar* in a navigable river under which the predecessors-in-title of the Plaintiffs had a right of fishery in that river outside the limits of their estates and wherever the channel might shift to. The description of the *jalkar* given in those proceedings and the pleadings leaves in our minds no doubt that the *jalkar* which the Revenue authorities then sought to resume was included within the territorial limits of the present Plaintiff's estates, and was claimed by their predecessor as appertaining to those estates. It is in our opinion impossible to hold that in one estate paying revenue to Government two distinct estates were included, one involving a territorial right and the other a franchise or incorporal right of fishery wholly independent of the territorial right. The grounds on which the District Judge has held that there was such an amalgamation of rights are insufficient in law, and he has been misled by the opinion which he formed of the legal effect of those documents.

We also are of opinion that the Judge was in error in stating that in the different suits in which the Plaintiff's predecessors-in-title were concerned in 1857 and from 1861 to 1867 the title which they put forward was that the *jalkar* was independent of their estates and that that claim was upheld in every Court. The judgments in those suits which are relied on by the Plaintiff clearly prove that the right claimed throughout was one appertaining to the zemindaries and that it was regarded as such by the different Courts. There is no suggestion in any of them of an independent grant.

In dealing with the maps we are also of opinion that the District Judge has fallen into serious error. He relies entirely on the map prepared in Suit No. 15 of 1851. The map is a rough one prepared by an amin. In notes attached to it, there is a statement that the description of the different places cannot be relied on, and that it is to be used only for the purposes of that suit. Yet the District Judge has relied on that map and the description and names which are given in it of the different rivers and streams in preference to the survey map of 1859-1860. The learned pleader for the Respondents admits that he cannot support one at least of the District Judge's reasons for distrusting the survey map, which is that "Government was about that time trying to ignore the *jalkar* Narikora and Moynakata and resume it as the property of Government." It is impossible to believe that the officers of Government, responsible for the preparation of the survey maps,

would intentionally have misstated facts and misnamed rivers to support proceedings which the Revenue officers were to institute two years afterwards. The presumption of law certainly is that in the absence of evidence to the contrary, survey maps prepared for public purposes by responsible officers of Government are entitled to more reliance, than maps prepared for private purposes in a private suit, and we are of opinion that the District Judge erred in law in placing greater weight as evidence on the map prepared in the Suit No. 15 of 1854. Further it is to be observed that the amin's map prepared in that suit was not drawn to scale and there is nothing to prove, even if the various rivers and streams are correctly named in it, that the map is any indication of the respective size and importance of each. It is admitted that Ariel Khan has all along been a large river running out of the ganges and it seems to us impossible to hold in the face of the evidence afforded by the survey map that the Ariel Khan river disappeared and dried up for 10 or 15 miles between 1857 and 1859 and that the river Narikora took its place for that distance.

The survey map corrected up to 1875 which seems to have been filed by the Defendants, but which is not noticed by either of the lower Courts, goes to support the inference to be drawn from the survey map of 1859-1860.

Whether the *thak halka*, 1902, as alleged by the Defendants covered the whole of the water in which the fishery rights of the Plaintiff were admitted by Government seems very doubtful, in view of the subsequent litigation, but we are of opinion that the only possible inference to draw from the survey maps is that the river Narikora was a branch stream, only running through the estates of the Plaintiff. If the fishery claimed in the present suit runs through the Plaintiff's estates and can be held to be identical with the fishery claimed in the previous suits the Plaintiff may be able to establish his right to it. But in determining this question the rights which the Defendants have under the independent fishery mehal, which admittedly they hold, will have to be taken into consideration. If that independent right of fishery be held by the Defendants to give them fishery rights in the Ariel Khan river from its junction with the ganges to the point noted in the Mehalwari register and if the Ariel Khan river has changed its course so as to pass through the estates of the Plaintiff, the question will then arise for determination whether the stretch of river in which fishery rights are claimed in the present suit forms a part of the Ariel Khan river and whether as such the Defendants are entitled to rights of fishery in it.

We hold therefore that the findings of the lower Courts that the Plaintiff has established that he had an independent right of fishery in the river Narikora, which would entitle him to the enjoyment of that right in a navigable river outside the territorial limits of his estate is not supported by the evidence and that the only legal inference which can be drawn from the documentary evidence filed in the case is that at most the Plaintiffs' predecessors had a *jalkar* in the waters of the Narikora so far a

MATHURA NATH CHATTOPADHYA *v.* SIB CHANDRA BOSE.

those waters lay within the ambit of their estate.

Under these circumstances it is in our opinion necessary that the appeal should be remanded to the lower Appellate Court for re-hearing subject to this finding.

It will be for the Judge to determine on the evidence what part, if any, of the reach of river in which fishery rights are claimed in this suit lies within the territorial limits of the Plaintiffs' estate and, having determined that point, to come to a conclusion whether the Plaintiff has a right of fishery in that portion of the river irrespective of the rights which the contesting Defendants have under the Ramkristo *jalkar* mehal which is admittedly an independent right of fishery in certain portions of the river including certainly a portion of the river Ariel Khan. It will be necessary in order to determine this question to decide what is the extent of the Defendants right of fishery and whether if the river or a portion of it, over which the Defendant has the right, has changed its course and now flows through the estates of the Plaintiff, the Defendant has under his grant a right to follow the river into its new course and to exercise rights of fishery in it to the exclusion of the Plaintiff.

We accordingly direct that the appeals be remanded to the lower Appellate Court in order that the Judge may arrive at distinct findings on these points, and then dispose of the appeals. Costs will abide the result.

S. C. S. *Case remanded.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 1234 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1907.
16, December.

DWARKA NATH MANJI and ors., Petitioners,
v.
THE EMPEROR, Opposite Party.

Bengal Embankment Act (II B. C. of 1882), sec. 76—Offence under—Adding to embankment.

Sec. 76 of the Bengal Embankment Act (II B. C. of 1882) prohibits not only the construction of new bundhs *but adding to old* bundhs *so as to obstruct the flow of water.*

This was a rule granted on the 12th of November 1907, against an order of Babu A. C. Das, Deputy Magistrate of Contai, dated the 27th of June 1907, convicting Petitioners under sec. 76 of Act II of 1882 and sentencing them each to pay a fine of Rs. 2).

Babu Sasi Sekhar Bose for the Petitioners.

No one for the Opposite Party.

The facts material to the report appear from the judgment.

The JUDGMENT OF THE COURT was as follows:—

This is a rule calling upon the District Magistrate of Midnapur to show cause why the conviction of and sentence passed on the Petitioners should not be set aside.

The charge against the Petitioners was that they had built a new embankment in a certain prohibited area, that is, on an area which a Government notification has declared must be left unoccupied for spill purposes and within which no embankments were to be erected. The

THE

Calcutta Weekly Notes

Vol. XII.] MONDAY, MARCH 2. 1908. [No. 16

Contents.

NOTES

WE ARE GLAD TO NOTICE THAT SIR LAWRENCE Jenkins, the Chief Justice of Bombay, has been appointed to be a member of the Council of the Secretary of State for India in the place of Sir John Edge. Sir Lawrence Jenkins won the golden opinion of the profession during the period that he served as a puisne Judge of the Calcutta High Court and he has thoroughly maintained his reputation as a fair, conscientious and sound judge as the Chief Justice of Bombay. During his tenure of office on the bench of the Calcutta and the Bombay High Courts he was always anxious to be in touch with the Indian community. We believe that the experience of the Indian people that he has so gained he will turn to good account in the Council of the Secretary of State.

THE RESIGNATION OF MR. JUSTICE GEIDT, WHICH IS announced in last Saturday's issue of the *Gazette of India* and which is to take effect from the 12th of April next, will be greatly regretted. Mr. Justice Geidt was raised to the High Court Bench with a very good record of service as a District Judge behind him. Although he is retiring long before his full term of office yet for nearly five years that he has been on the Bench he has won the good opinion of the profession. His unfailing courtesy, his kindliness of manner, and his desire to do justice between the parties and spare himself no pains to come to a right decision made him a deservedly popular judge. We believe we are expressing the opinion of the profession that they are sorry to lose him and that he carries with him their good wishes.

THE CASE OF *Nagendra* v. *Anandrao*, REPORTED AT p. 561, I. L. R. 31 Bom. deserves more than passing notice. In that case a mother was appointed guardian of her minor son. On a subsequent application made to the successor in office of the learned Judge, this order was cancelled on the ground that the order was one which ought not to have been made. The questions arose before Mr. Justice Davar of the Bombay High Court whether after once an order has been made appointing a guardian under the Guardian and Wards Act, the judge has any power to vary, alter, modify or set aside his own orders, and whether, when such an order is cancelled, the age of minority of the minor in respect of whom the order was made should be extended to 21 years under sec. 3 of the Indian Majority Act. His Lordship held on a consideration of the English practice, that a judge sitting in Chambers has power to vary, alter, modify or set aside the order in question when he is satisfied that the order is one which ought not to have been made, and which should, in the interests of justice, be cancelled in that way. Further that such an order having been cancelled, the minor would be just in the same position in which he would have been if the guardian had not been appointed at all, that is to say he would attain the age of majority on the completion of the eighteenth year and not the twenty first.

THE CASES IN I. L. R. 3 ALL. 598, I. L. R. 12 Cal. 612, I. L. R. 21 Bom. 281, I. L. R. 31 Bom. 80 and 4 C. L. J. 412 which express a contrary view were all distinguished on the ground that in all these cases the removal of the guardian appointed or the cancellation of the order of appointment of guardian was made on other grounds than that the original order appointing the guardian was one which ought not to have been made. In other words his Lordship's decision proceeds on the principle that the minor should not be affected in any way by the appointment of a guardian when that appointment is set aside on the ground that it ought not to have been made at all.

IT IS ALWAYS TO THE INTEREST OF A MINOR THAT A guardian should be appointed of his person and property, as he is himself unable from immaturity of age and want of experience and sufficient understanding to take care of himself or his property. So in the majority of cases in which appointment of guardians is sought to be cancelled, the question as to the propriety of the original order appointing

the guardian will resolve itself into a consideration of the question whether the guardian appointed was one who ought to have been appointed, and not that whether any guardian should have been appointed at all. Of course, it is conceivable that in some cases the question may arise whether any order of appointment of a guardian ought to have been made at all. For instance when an application is made for the appointment of the guardian of a minor who is of 19 years age and the application is granted and a guardian is appointed. In such a case it is reasonable to hold that on the cancellation of this appointment the minor should be in the same position just as if the appointment was never made. But in the case under notice when the order for the appointment of a guardian was made, the minor was under 18 years of age. So in this case the question as to the propriety of the appointment related to the *personnel* of the guardian appointed. If in such a case the subsequent cancellation of the appointment restores the minor to the position, as regards the attainment of majority, in which he was before the order appointing the guardian was made, it is difficult to see why the minor's position will be different when the appointment of a guardian is cancelled on account of unfitness or misconduct of the guardian or any other cause.

A EXECUTED AN USUFRUCTUARY MORTGAGE IN FAVOUR of B and placed him in possession of the property mortgaged. At the proper time A tendered the amount due under the mortgage and asked to be restored to possession B did not accept the tender, whereupon A after depositing the amount in court under sec. 83 of the Transfer of Property Act instituted a suit under sec 62 of the Act for recovery of possession of the mortgaged property. This suit was decreed in favour of A and it was decided in that suit that the tender was proper and that B had illegally refused to accept the tender and deliver up possession of the property to A. After A had got possession of the property in execution of this decree, he brought an action against B to recover mesne profits from him from the date of the deposit in court to the date of recovery of possession. The question arose whether A could maintain such a suit. The High Court of Bombay Chandavarkar and Heaton, JJ., held in *Rukhmini Bai* v. *Venkatesh*, 31 Bom 527, that the suit was barred either under sec. 13 or sec. 43, C. P C.

THIS DECISION PROCEEDS UPON THE GROUND THAT after the tender and deposit of the money due under the mortgage, the mortgage was not extinguished. The position of the mortgagee remained almost the same, with only this difference that he became liable from the date of the tender or deposit to account for profits received by him. After the tender or deposit, the mortgagee did not become a trespasser, so the mesne profits to which A was entitled did not fall outside the mortgage suit but were recoverable in the suit for redemption which the mortgagor brought. Their Lordships observed. "The profits derived by the mortgagee after a proper tender made or after the amount due has been deposited in court are profits for which he has to account to the mortgagor in virtue of a liability tacked on, so to say, by the statute to the mortgage contract, and as such a claim to them by the mortgagor is one arising from and connected with his right to redeem or recover possession of the property It is all one cause of action which might and ought to be alleged by the mortgagor in his suit to recover possession (Expl. II, sec 13, C. P. C) The Appellant having failed to ask for mesne profits in the previous suit, his present claim is barred either under that section or under sec. 43 of the same Code." A recent decision of their Lordships Mookerjee and Holmwood, JJ., in *Satyabadi Behera* v. *Musst. Harabati* reported at p 122, 5 C L J. affirms the same principle. There the mortgagor, on the refusal of an usufructuary mortgagee of a tender validly and properly made, brought a suit for redemption. In that suit the mortgagor stated that he would bring a separate action for recovery of the profits received by the mortgagee after refusal of his tender. When this action was subsequently brought it was held by their Lordships that the action was barred under sec. 13, Expl. II of the Civil Procedure Code.

THE MARRIAGE OF HINDU WIDOWS ACT OF 1856 was one of the earliest Acts of the Indian Legislature which recognised the principle that if certain Hindus believe that a "certain established custom is not in accordance with a true interpretation of the precepts of their religion and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom in accordance with the dictates of their own consciences" they should be at liberty to do so and the Civil Courts and the legislature should safeguard their rights and interests when the departure from such customs is not opposed to "good morals" or "public welfare." Embodying this principle Act XV of 1856 was passed at the instance of the great Indian social reformer Pundit Iswar Chandra Vidyasagar. Every one who is familiar with his life and career, his early poverty and struggles for the acquisition of knowledge, his wide culture and liberal views, his services to the cause of modern Bengalee literature of which he has been rightly styled the father, his researches in Sanscrit learning, his simplicity of life and force of character, his wide charity and sympathy for suffering humanity and his self-denying work in the cause of education and social reform,

will give him a place amongst the great men of the world. *Vidyasagar* was a title that was given him for his vast learning but it came to signify that great personality which by the virtues of the head and heart stood out in bold relief amongst the *savants* of India.

ALTHOUGH *Vidyasagar* WAS BROUGHT UP IN THE school of orthodoxy, he had the far sight to see that Hindu Society had long ceased to be a living and growing organism and that its life blood was being sapped by some parasitic customs which though running counter to the precepts of the ancient sages have in comparatively recent times acquired an overgrown importance in Hindu society which at times override the dictates of humanity and the primal moral laws which form the back bone of the Hindu, and, in fact, of all the later religions which may be traced to that one fountain head. If Hindus are to save themselves from decay they must relax in suitable cases the iron rigour of the customs when they militate against the moral laws or bar the progress of the community. It is a cruel wrong to force a life of celibacy and asceticism on a childless girl widow for the rest of her days. In the better class of Hindu homes it is possible to train them to a life of austerity. But amongst Hindus in the lower strata of society this is hardly possible. Every successive census goes to show the comparative numerical decline of the Hindu population in Bengal. It is known to every one who has a knowledge of rural Bengal that the chief cause of this decline is marriage difficulties amongst the common Hindu population due to scarcity of girls and the high caste fees demanded in consequense. The widows amongst these classes are lost to society, if not morally, surely, as mothers There is a growing feeling in Bengal that amongst the Hindu labouring classes widow marriage should be largely encouraged. But the real obstacle to the way is that Brahmins do not take the lead and show the way.

THE EXAMPLE SET BY MR JUSTICE MOOKERJEE, therefore, deserves the highest praise and will, we are sure, add a great impetus to the cause of social reform in Hindu society. No doubt the dictates of humanity and parental affection have induced Dr. Mookerjee to remarry his widowed daughter of tender years. But the moral courage that he has shown in this matter can only be realized and appreciated by those who have any idea of the amount of prejudice and blind unreasoned opposition that one has to overcome amongst one's own relations and in one's own society to perform even such an obvious act of paternal duty. Dr. Mookerjee is an orthodox Hindu and the event is bound to have far-reaching consequences. Hindu society cannot live and thrive discarding from its fold the best men of the community and sooner or later it is sure to get reconciled to the reforms that the enlightened and the thoughtful amongst them consider essential to its vitality.

Reviews.

A NEW GUIDE TO THE BAR. *By LL. B., Bar-at-Law. Third Edition. Sweet and Maxwell, Ld. London. Price 5s.*

The Inns of Court in London are a unique institution which enjoy the privilege of calling to the English Bar students after they have passed through certain formalities known as keeping terms and passed certain examinations intended for testing their general knowledge of the law. English Barristers-at-Law are the most privileged section of the legal profession within the limits of the British Empire and this handbook will show how easy it is for a man of some education to enter their rank. The fees for joining any of the Inns of Court and of getting called to the English Bar are undoubtedly heavy but the object of the high fees is justifiable on the ground of prevention of undue congestion in the profession. But all the same the profession is getting overcrowded. Although the standard of legal studies and general education required of a barrister is not very high yet it is a well known fact that it is only men gifted with natural intelligence, capacity for hard work and sound education who make any headway in the profession. The regulations and the question papers which are to be found in this Guide book will give an idea of the qualifications required of students to get called to the Bar. Those who have not the advantage of a university education will therefore do well to attend the lectures and classes which are held in the Inns of Courts and to study law on the lines prescribed by the Council of Legal Education. If the means of the student permit he should work in a barrister's chamber and in a solicitor's office for qualifying himself for the profession of a practising barrister. Information regarding the expenditure of time and money for obtaining such necessary training is to be found in the book. Some people join the Inns of Courts, even on the eve of their life, for acquiring the status of a titular barrister. To them also this guide-book will furnish useful information.

THE TRANSFER OF PROPERTY ACT. *By Trikamlal R. Desai, B A., LL.B., Vakil, High Court, Bombay. "Lawyer" Office, Girgaon. 1908. Price Rs. 1.*

Mr. Desai has compiled several handbooks intended for law students. The present is an addition to their number. The various sections of the Transfer of Property Act naturally present great difficulties to students who are not already grounded on the principles of the law of transfer. The commentarie

appended to the sections should be of assistance to students in understanding those principles. The forms of conveyance, and the appendices at the end of the book furnish information on a variety of matters which also should prove useful. Altogether this is a useful compilation.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI AND SHARFUDDIN, JJ. CRIMINAL REVISION No 2 OF 1908. RAJENDRA CHANDRA SHAHA AND OTHERS, Petitioners *v.* THE EMPEROR at the prosecution of MAHABIR SINGH 5th Februray 1908.

Indian Penal Code, secs 147 and 353—Charge—Finding of the common object.

A constable named Mohabir Singh was patrolling a bazar in Backergunge on the 6th June last when he found certain persons walking about there carrying lathies of more than the length authorised by an order under sec. 114, Cr P. C. of the District Magistrate He seized the lathi of one of them Rajendra Chandra Shaha and then certain persons shouted *Bandemataram* and a number of people assembled They slapped the constable, pulled at his coat and pursued him in the direction of the zemindar's Kutchery The Deputy Magistrate found the Petitioners guilty under secs. 147 and 353 I P C. On appeal to the Sessions Judge the conviction was upheld but the sentences were modified with respect to some of the accused This rule was issued to set aside the conviction and sentences or to reduce the sentences.

Their Lordships observed :

"The learned pleader for the Petitioners contends that seeing that the Petitioners have been found not guilty under sec 353 I P. C., they should not have been found guilty of rioting and further that there is no finding in the judgments of the Lower Courts as to what was the common object of the accused persons We think however that it is very clear that the accused assembled for the purpose of committing an assault upon the constable and that they did commit such assault. . . .

We have examined the charge drawn up by the Magistrate against the accused and find that the object of the assembly is there stated to be to beat the constable. It does not say that the object of the accused was to beat the constable in the execution of his duty, but it says *simpliciter* that the object was to beat him. That being so, it appears to us that there is nothing wrong in the charge. . . .

The pleader for the Petitioners next asks us to consider the sentences and to judge as to whether they are not unduly severe. . . .

We admit the force of this contention, and while affirming the conviction of the accused, we reduce the sentences passed on each of them to one of rigorous imprisonment for the period already undergone. The rule is made absolute to this extent only.

Babu Brojendra Nath Chatterjee for *Babu Abinash Chandra Guha* for the Petitioners,

Mr. Orr, Deputy Legal Remembrancer for the Crown.

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J. and DASS, J. APPEAL FROM ORIGINAL DECREE No 317 OF 1906. SRINATH GHOSE AND OTHERS, Appellants *v* MOKUND RAM CHAKRABARTI. 20th February 1908.

Revocation of probate by one of the executors—Locus standi.

One Bhagwan Uria of Baliaghatta died executing a Will by which he gave away his properties to charity and appointed eight gentlemen of the locality as executors. Probate was taken by all the executors proving the Will in common form. Two years after one of the executors applied for revocation of the probate alleging that the will was a forgery and that he did not apply for probate or sign the *vakalatnama* for filing application for probate and that his name was forged to the *vakalatnama* and application by the other executors. The District Judge allowed him to produce evidence to prove that the Will was a forgery and revoked the probate of the Will. The other executors appealed to High Court and it was contended on their behalf that the Petitioner for revocation had no *locus standi.* He was not a person "interested" in the estate of the deceased and not entitled to "citation" under sec. 69, Probate Act He being one of the executors only of the Will could only come in if the Will was genuine L R. 1 P and D 316. Williams on Executors 10 th Edition P 458 cited It was argued on behalf of the Respondent that he was entitled to "citation" under secs 16 and 17 of the Act if he had not joined in the application for probate and therefore could come in under sec. 50 of the Probate Act.

Held:—That the Petitioner had no *locus standi* to apply for revocation. He could only get his name, expunged from the category of executors :

Babus Harendra Narain Mitra and Khetra Mohan Sen for the Appellants.

Babu Ram Charan Mazumdar for the Respondent.

A. T. M. *Appeal decreed with costs: Revocation order cancelled.*

BALAI DEY *v.* THE EMPEROR.

why the conviction of and sentences passed on the Petitioners should not be set aside.

The Petitioner No. 1 has been convicted under secs. 225 and $\frac{353}{114}$, the Petitioner No. 2 under secs. 225, and 353 and the Petitioners Nos. 3 and 4 under sec. 225 of the Indian Penal Code. The Petitioners Nos. 1 and 2 have each been sentenced to pay a fine of Rs. 50 and each of the Petitioners Nos. 3 and 4 a fine of Rs. 30.

The learned pleader who appears on their behalf states that his clients have committed no offence, because the persons whom they rescued had not been legally arrested by the *daffadar* who was the complainant in this case. The *daffadar* appears to have arrested one Radha Nath Dey, against whom a complaint of theft had been made by one Jadu Bagdi. But he was apparently not justified in arresting Radha Nath Dey, because, under sec. 39, cl. 2 of the Act VI of 1870, B. C., he was only entitled to arrest a person for theft committed in his presence. It is clear that the theft in the present case had been completed before he came up, and the offence is not a continuing one, as contended by the Deputy Magistrate. Therefore the *daffadar* had no right to arrest Radha Nath Dey. In these circumstances he was not engaged in the lawful execution of his duty when the Petitioners came and rescued Radha Nath Dey and threatened to beat the complainant.

We therefore set aside the convictions and sentences and direct that the fines, if paid, be refunded.

The rule is made absolute.

B. C. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM OUDH].

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
19, November.

RAJA GOKULDAS and ors., Appellants,
v.
SHETH GHASIRAM, Respondent.

Mortgage decree—Construction—Future interest—Interest to date of realisation.

A mortgage decree directed payment of mortgage money and cost of the suit with future interest to the date fixed for payment.

Held, *on a construction of the decree—That the decree-holder was entitled to interest until realization.*

MAHARAJA OF BHARATPUR *v.* RAM KANNO DEI (1), and RANI SUNDAR KOER *v.* RAI SHAM KRISHEN (2) *followed.*

Appeal from a decree of the above mentioned Court of 30th July 1904, reversing a decree of the Court of the Civil Judge of Narsingpur, dated 4th November 1903.

On 18th September 1896, the Appellants in their suit No. 57 of 1896, against the Respondent in the Court of the Civil Judge of Jubblepore obtained a conditional decree for sale of certain mortgaged properties under secs. 86 and 88 of the Transfer of Property Act IV of 1882 in terms following:—"It is hereby ordered that the Defendant is indebted to the Plaintiffs in the sum of Rs. 20,457-4-0 for principal and interest on the mortgage mentioned in the plaint, and in the

(1) 5 C. W. N. 137: S. C. L. R. 28 I. A. 35; I. L. R. 23 All. 181 (1900).
(2) 11 C. W. N. 249: S. C. L. R. 34 I A 9 (1906)

RAJA GOKULDAS *v.* SHETH GHASIRAM.

further sum of Rs. 1,106-10-0 for costs and that upon the Defendant paying to the Plaintiffs or into Court the amount so due with future interest at 0-7-0 per cent. per mensem, from the date of the suit, *viz.*, 22nd July 1896, on or before 18th March 1897, the Plaintiffs shall deliver up to Defendant, or such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the Defendant free from all incumbrances created by the Plaintiffs or any person claiming under him or under whom he claims, and shall if necessary put the Defendant in possession of the property ; but that if the payment is not made on or before the said 18th day of March 1897, the mortgaged property as detailed below or a sufficient part thereof shall be sold, and the proceeds of the sale (after paying thereout the expenses of the sale) paid into Court, and applied in payment of what is due to the Plaintiffs, and the balance, if any, paid to the Defendant or other person entitled to receive the same. If the decree is not satisfied from the sale proceeds the balance will be recoverable from the Defendant's person and other property."

The Respondent did not pay the amount under that conditional decree which was made absolute on 25th June 1898 in the following terms:—

"Whereas it appears to the Court that the Defendant in this suit has not paid into Court or to the Plaintiffs the sum of Rs. 20,457-4-0 and Rs. 1,106-10-0 and interest at 7 annas per cent. per mensem from 22nd July 1896, which by the conditional decree passed by this Court on 18th September 1896, he was required to pay on or before the 18th day of March 1897, it is hereby ordered that the mortgaged property as detailed below be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the Plaintiffs and that the balance, if any, be paid to the Defendant or other persons entitled to receive the issue"

That decree was on 13th July 1898, transferred to the Narsingpur District for execution. The transfer order certified that on 12th July 1898 there was due to the Appellants, after deducting Rs. 5,000 paid, the sum of Rs. 18,322-7-6

On 21st September 1898 the Appellants took out execution and claimed Rs 18,484-1.

On 22nd December 1898, the then Civil Judge of Narsingpur ordered that form C be submitted to the Collector for sale of some of the mortgaged property, and the case was struck off. On 12th August 1899, the Appellants for a second time applied for execution and claimed Rs. 19,279 4 9. Form C was again ordered to be sent to the Collector and the case was again struck off the file.

On 6th April 1901, the Appellants made a further attempt to execute the decree, claiming Rs. 20,719-2-3. Form C was sent to the Collector, as the same did not appear to have been sent to him as ordered in 1898 and the case was struck off. On 24th August 1903, the Respondent made an application to the Court of the Civil Judge of Narsingpur complaining that the Appellants had wrongly calculated future interest

RAJA GOKULDAS *v.* SHETH GHASIRAM.

on the decretal amount from the date of the suit to the date of the execution. It was urged that in the absolute decree there was no order to pay future interest; and that under the conditional decree the Appellants were entitled to future interest only up to the date which was fixed for payment by the Court *viz* 18th March 1897. An account of the amount due was given and it was contended that only Rs. 11,581-14 0 was due under the decree to the Appellants.

The Appellants in their reply, however, contended *inter alia*, that they were entitled to future interest at 7 annas per cent. per mensem up to realization of the debt. Among the points raised for the determination of the Court was: 1. (*a*) what is meant by the expression future interest? (*b*) Cannot Plaintiffs get interest beyond 18th March 1897. The Civil Judge delivered his judgment on 4th November 1903 and held that the Appellants, Decree-holders, were entitled to interest at 7 annas per cent. per mensem from the date of the suit to realization. The material part of the Civil Judge's judgment is as follows:—

"Future interest" clearly means interest payable after the decree. The decree passed under sec. 88 Transfer of Property is the real decree in this case. It clearly awards future interest from the date of the suit. It does not say that this future interest is to be paid up to the date fixed for payment of the decretal amount, *i.e.*, 18-3-1887. (1897) or up to realization; but as laid down by the Full Bench ruling of the Allahabad High Court in *Bakar Sajid* v *Udit Narain Singh* (3) and by their Lordships of the Privy Council in ***Rameswar Koer*** v. ***Mehdi Hossein Khan*** (4) and ***Maharaja of Bharatpur*** v. ***Ram Kanno Dei*** (1) there is nothing either in the decree or in law which would prevent the decree holders from getting interest at 0-7-0 per cent. per mensem, from the date of the suit to the date of realization.

"Upon principle and apart from authority, statutory or otherwise it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid. The 18-3-1897 is only named in the decree as the date on which payment is to be made, and after which if payment is not made, the property is to be sold.

"It is not named with any special reference to interest.

"In the absence of any express direction as to date up to which interest is to be paid the decree is rather ambiguous on the point.

From that decree the Respondant appealed to the Court of the Divisional Judge, Nerbudda Division, but the appeal was transferred to the Court of the Judicial Commissioner, Central Provinces. The Additional Judicial Commissioner who heard the appeal delivered his judgment on 30th July 1904, and allowed the appeal holding that upon a proper construction of the decree as framed, no interest after the 18th March 1897 ran on the decretal sum or any part thereof. The judgment after a lengthy review of decisions on secs,

(1) 5 C. W. N. 137 : s. c L. R. 28 I. A. 35; I. L. R. 23 All. 181 (1900).

(3) I. L R. 21 All. 361 (1899).

(4) L. R. 25 I. A. 179, s c. I. L. R. 26 Cal. 39 (1898).

RAJA GOKULDAS v SHETH GHASIRAM

86 and 88 of the Tranfer of Property Act, continues as follows :—

"I need not however pursue this discussion further, because even if I adopt the dictum of the Allahabad High Court in the Full Bench case of *Bakar Sajjad* v. *Udit Narain Singh* (3) it cannot affect the decision of the present case, because, as I read the decree before me, there is no ambiguity whatever.

"The decree was drawn up by the late Mr. Madhub Chander Banerji, one of the best, because one of the most careful of Civil Judges who have sat on the bench in the Central Provinces. In the record before me I find several instances of this Judge's minute attention to detail in the discharge of his judicial work, and I should find it impossible to believe, that in decreeing future interest he should have left the period for it ambiguous in his decree. But it seems to me clear from the position of the passage directing its payment that it was introduced as an item for making up the amount which was payable on or before the 18th March 1897, to secure redemption; and that its precise figure, with respect to the 18th March 1897, was not worked out to cover the case of payment being made before that date. But there is not one word in the decree to show that the Judge contemplated affairs beyond that date, and meant to give future interest after the 1st March 1897. It is quite possible—indeed probable, that he did not overlook the equities of the subsequent period; but it is even more probable that he left the matter to be dealt with when the almost certain claim for extension of period of grace should be made; for the view that extensions of time can be given only in the cases of foreclosure and not in the cases of sale decrees is a much more recent interpretation of the law which has not even yet been generally adopted.

"Assuming that the interpretation was ambiguous, the ambiguity seems to be swept away by Mr. Banerji's own interpretation as set out in the order absolute. (Here the material portion of the absolute decree is set out).

"It seems to me clear that had the future interest been intended to continue beyond 18th March 1897, it would have been made clear here. But sale is ordered to pay what is due to the Plaintiffs and not what on date of payment may have become due. What is due, is stated in the order absolute as already shown.

"I therefore hold that upon the proper construction of the decree as framed no interest after the 18th March 1897 runs on the decretal sum or any part thereof.

"It is immaterial that the Judge might have decreed otherwise had he foreseen the delay in realisation. It is equally immaterial that executing Courts and the Plaintiffs have hitherto misconstrued the decree. The decree must be construed according to its language and if the Plaintiffs' legal advisers did not detect the defect in it and foresee the loss it was likely to cause, that is no reason why some other and more equitable interpretation should be put on it. The order of the lower Court appealed against is reversed and execution of the decree must proceed upon the construction of it which is laid down in this judgment, *viz.*, that no interest accrues

(3) I. L. R. 21 All. 361 (1899).

RAJA GOKULDAS *v.* SHETH GHASIRAM.

on any part of the decretal sum after the 18th day of March 1897."

Appellants, thereupon, applied to the Court of the Judicial Commissioner for leave to appeal to His Majesty in Council. On failing to obtain such leave they petitioned His Majesty in Council for special leave to appeal and having obtained the same brought the present appeal to His Majesty in Council.

Mr. C. W. Arathoon for the Appellants submitted that the Judicial Commissioner's judgment was wrong and that that of the Court of first instance was right. That the point under consideration was finally decided in the cases of *Maharaja of Bharatpur* v. *Ram Kanno Die* (1) and *Rani Sundar Koer* v. *Rai Sham Krishen* (2). By the first of these decisions the Full Bench ruling of the Allahabad High Court *Bakar Sajjad* v. *Udit Narain Singh* (3), was upheld, whereas in this case the Judicial Commissioner had expressly dissented from it. That according to the above mentioned Privy Council rulings Appellant was entitled to interest to date of realization. He pointed out that the learned Judge who made the decree Mr. Madhub Chunder Banerji, had himself when he transferred the decree for execution to Narsingpur added interest to a date long after the 18th March 1897.

LORD ROBERTSON intimated that their Lordships were agreed that Appellants' contention was right.

No one for the Respondent.

(1) 5 C. W. N. 137 : s. c. L. R. 28 I. A. 35 ; I. L. R. 23 All. 181 (1900).
(2) 11 C. W. N. 249 : s. c. L. R. 34 I. A. 9 (1906).
(3) I. L. R. 21 All. 361 (1899).

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—Their Lordships have examined the decisions of this Board relied upon by the Appellants [*Maharaja of Bharatpur* v. *Ram Kanno Dei* (1)], *Rani Sundar Koer* v. *Rai Sham Krishen* (2), and find that they fully sustain the contention of the Appellants. They will therefore humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Additional Judicial Commissioner reversed with costs and the order of the Civil Judge restored.

The Respondent will pay the costs of the appeal.

Solicitor: *Messrs. T. L. Wilson & Co.* for the Appellants.

Respondent did not appear.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL CIVIL JURISDICTION

No. 62 OF 1907.

MACLEAN, C. J.
STEPHEN, J.
WOODROFFE, J.
1907.
19, December.

SHAHEBZADAH MAHOMED KAZIM SHAH and ors., Defendants, Appellants,
v.
ROBERT SAVI HILLS, Plaintiff, Respondent,
and
SHAHEBZADAH FATTEH MAHOMED SHAH and ors, Defendants, Respondents.

Partition—Mortgage of undivided share—Allotment of property on partition—Charge for owelty money—Priority.

(1) 5 C. W. N. 137 : s. c. L. R. 28 I. A. 35 ; I. L. R. 23 All. 181 (1900)
(2) 11 C. W. N. 249 : s. c. L. R. 34 I. A. 9 (1906).

SHAHEBZADAH MAHOMED KAZIM SHAH *v.* ROBERT SAVI HILLS.

In the absence of any suggestion or evidence that the partition of a joint estate was unfairly or improperly made to defeat claims of creditors, the sharers thereof, who have to receive sums of money by way of owelty from a co-sharer under a partition decree creating a charge on the allotment made to him, have priority over the mortgagees of his undivided share in the joint estate.

The fact that the mortgagor co-sharer entered into possession of the allotment made to him, before paying the owelty-money for which there was a charge created, did not alter or affect the position.

This was an appeal by Defendants Shahebzadah Mahomed Kazim Shah, Shahebzadah Wally Mahomed Shah and Shahebzadah Mahomed Karim Shah against the judgment and decree of Mr. Justice Harington, dated the 12th December 1906, holding that the Plaintiff and the Defendants, Tarit Bhusan Roy, Nandalal Roy, and Jasodalal Roy, referred to in this report as the Roy Defendants, were entitled to priority in respect of their mortgage and further charges over the charges in favour of the Defendants, Appellants, created by the decree dated 8th August 1904 in suits Nos. 698 of 1907, 211 of 1903 and 825 of 1903 of this Court.

One Shahebzadah Mahomed Bahram Shah, descendent of the late Tipoo Sultan of Mysore, died in 1898 leaving a widow and five sons and among other immoveable properties, the premises Nos. 52, 52-1 and 52-2, Park Stret. The above premises were purported to be vested in the Official Trustee under certain trusts and conditions contained in certain deeds of trust and settlement dated 29th July 1899 and 7th September 1893; but after the death of the said Bahram Shah, three several suits (Nos. 698 of 1904, 211 of 1903 and 525 of 1903) were filed in the Original Side of the High Court by the heirs of Bahram Shah, for a declaration that the said deeds of trust and settlement were void and inoperative in law, for partition of the said premises 52, 52-1 & 52-2 Park Street and other reliefs. Those three suits were afterwards, by consent, consolidated and a consent decree passed on the 8th August 1904, by which the said deeds of trust and settlement were declared to be void and the heirs of Bahram Shah were declared to be entitled to their respective shares in the said premises Nos. 52, 52-1 and 52-2 Park Street and the Defendant Shahebzadah Fatteh Mahomed Shah, one of the heirs of Bahram Shah, was ordered to pay Rs. 37,000 to the Defendant Shahebzadah Mahomed Kazim Shah and Rs. 9,500 jointly to the Defendants Shahebzadah Walli Mahomed Shah and Shahebzadah Mahomed Karim Shah, other two heirs of Bahram Shah, and also to pay his costs in the said suits and the said sums of money and the said costs were made a charge on the said premises 52-2 Park Street, which were allotted to the said Shahebzadah Fatteh Mahomed Shah for his share of and in the said trust properties. The said Shahebzadah Fatteh Mahomed Shah, pursuant to the said decree, entered into possession of the said premises No. 52-2 Park Street but did not pay the said sums of Rs. 37,000 and Rs. 9,500 respectively nor the said costs, which amounted to about Rs. 4,000 and were due to the Defendant Radhicanath Ganguli who acted for him.

SHAHEBZADAH MAHOMED KAZIM SHAH v. ROBERT SAVI HILLS.

The Defendant Shahebzadah Fatteh Mahomed Shah, before the decree in the said three suits, raised large sums of money, from various parties, on the mortgage of his undivided $\frac{7}{40}$th share in the said premises Nos. 52, 52-1 and 52-2 Park Street, a list of such encumbrances is given below :—

(1) On the 29th January 1902 (Mortgage) from the Roy Defendants, Rs. 10,000 repayable on the 29th January 1903 with interest at 18 per cent. and costs as between attorney and client.

(2) On the 2nd June 1902 (Further charge) from the Roy Defendants, Rs. 3,000 repayable on the 29th January 1903 with same interest and costs as above.

(3) On the 22nd September 1902 (Further charge) from the Roy Defendants, Rs. 5,000 repayable on the 22nd September 1903 with same interest and costs.

(4) On the 30th December 1902 (Mortgage) from Munshi Abdul Jalil, for Rs. 5,000 repayable on the 30th November 1903 with interest at 15 per cent and costs as between attorney and client.

(5) On the 13th April 1904, (Mortgage) from Robert Savi Hills, Rs. 3,000 repayable on the 13th October 1904 with interest at 12 per cent. and costs (including the mortgage of another item of property, not material to this report).

On the 10th April 1905 the said Robert Savi Hills obtained an assignment in his favour of the mortgage dated 30th December 1902 from the said Munshi Abdul Jalil.

Robert Savi Hills filed this suit (No. 461 of 1906) on the said mortgages dated the 30th December 1902 and 13th April 1904, for an account and sale and other reliefs, making all persons having any interest in the said premises 52-2 Park Street (also those interested in another item of property, not material for this report) parties Defendants to his suit.

The Roy Defendants filed a written statement in which, among other things, they submitted that they were not bound by the terms of the said consent decree dated 8th August 1904 and that inasmuch as the Defendants Shahebzadah Mahomed Kazim Shah, Shahebzadah Walli Mahomed Shah and Shahebzadah Mahomed Karim Shah had full notice of the mortgage and the further charges in their favour, the said mortgage and charges were a first charge on the said premises No. 52-2 Park Street and that the said consent decree having been brought about subsequent to the said mortgage and further charge, the Shah Defendants abovenamed were estopped from asserting any claim in priority over the said mortgage and further charge.

The judgment of Harington, J., allowing the claim of the Roy Defendants is as follows :—

HARINGTON, J.—The Plaintiff in this suit claims as against the Defendant Shahebzadah Fatteh Shah an account of what is due to him on two deeds, one dated 13th April 1904 by which the Defendant mortgaged his undivided 7-40th share in 52, 52-1 and 52-2 Park Street and 1 Russa Road in favour of the Plaintiff and another dated 10th April 1905, under which there was assigned to the Plaintiff, a mortgage which had been created by the Defendant on his share of the Park Street property in favour of one Munshi Abdul Zalil.

SHAHEBZADAH MAHOMED KAZIM SHAH v. ROBERT SAVI HILLS.

The mortgagor Defendant does not dispute the Plaintiff's claim, but the second, third and fourth Defendants (the Shahs) claim priority over the Plaintiff's mortgage for two sums of Rs. 37,000 and Rs. 9,500 respectively payable as owelty money which, under a decree for the partition of the joint properties, had been declared a charge on the share allotted to the mortgagor. The fifth, sixth and seventh Defendants (the Roys) claim under a mortgage dated the 29th January 1902 on the Park Street properties.

The Defendant No. 8 claims priority in respect of his costs as attorney on the ground that the mortgaged property represents the fruit of his exertions in certain proceedings, and that he has therefore a prior claim in the nature of a salvage lien thereon.

The ninth Defendant entered appearance but filed no written statement and did not appear on the hearing.

The Roy Defendants (Nos. 5, 6 and 7) waive their right to call upon the Plaintiff to redeem them and ask for a decree on their mortgage. The Plaintiff concedes that they are entitled in priority to him. They have proved their mortgage and must have a decree, and be declared to be entitled to be paid in priority to the Plaintiff.

All the parties concede that the Defendant No. 8 is entitled to a first charge in respect of so much of his claim for costs as can be shown to have been incurred in preserving the mortgaged property, and in getting rid of certain deeds of trust, which stood as a barrier between the mortgagees and their security.

An account must, therefore, be taken and it must be ascertained what sum represents costs incurred by Defendant No. 8 in the proceedings necessary to set aside the trust deeds and the sum so found payable to Defendant No. 8 must be paid in priority to all the mortgages.

The real question which has been fought is whether the sums of Rs. 37,000 and Rs 9,500 which have been declared a charge on the house No. 52-2 Park Street allotted to the mortgagor on partition are to be postponed to the Plaintiff's mortgage or are to take priority over it.

The property comprised in the Plaintiff's mortgage was the Defendant's undivided 7 40th share in Nos. 52, 52-1, 52-2 Park Street and No. 1 Russa Road. On 8th August 1904, a decree in the partition suit was made by consent of parties under which No. 52-2 Park Street was allotted to the mortgagor. But the mortgagor was ordered to pay Rs. 37,000 as owelty money to the Defendant No. 4 and Rs. 9,500 to the Defendants Nos. 3 and 4 jointly. These sums were, under this decree, declared to be a charge on No. 52 2 Park Street.

For the Shah Defendants, it is argued that the Plaintiff's mortgage attaches to the share is which allotted to the mortgagor, that that share is not 52-2 Park Street, but 52 2 Park Street burthened with the charges for owelty created by the decree, that to allow the Plaintiff to enforce his security against 52 2 Park Street in priority to the Shah Defendants will be to give him a much larger security, than he is entitled to under his mortgage, and that inasmuch as the share which is allotted to the Defendant is 52-2 Park Street subject to charges fo'

SHAHEBZADAH MAHOMED KAZIM SHAH *v.* ROBERT SAVI HILLS.

owelty, charges for owelty must have priority over the mortgages.

For the mortgagee, it is contended that the owelty could only become a charge on 52-2 Park Street by virtue of the agreement between the parties to the partition suit, and that no arrangement between the parties can create a charge having priority over the encumbrances existing previous to the partition. If the parties in a partition suit could make such an arrangement, it would be always open to them to destroy a mortgagee's security by agreeing that an exaggerated value should be placed on the mortgagor's share, subject to a large sum for owelty, which they could call on the mortgagee to redeem, before enforcing his security against the partitioned share. But for the agreement, the owelty would rank as only a simple debt. It must, therefore, be postponed to the mortgage.

I agree with the proposition that no agreement between the parties to the partition suit, even though embodied in a decree of this Court, can affect the rights of the mortgagee who is no party to the proceedings. But I do not agree with the argument that the persons to whom the owelty is payable under a decree are in no better position than simple creditors. They are in a much stronger position: they are judgment-creditors in possession of property allotted to their debtor, and they are not bound to give him possession until they are paid. The decree, if made in the ordinary course, after contest, would direct the delivery of possession and the payment of owelty. Until payment, the Shahs could remain in possession subject, of course, to the mortgagee's right to enforce his mortgage against the mortgagor's 7-40th share of the whole property. Now in this case, the Shah Defendants have given possession without getting payment. They have chosen to surrender the security which they had for enforcing the payment of owelty and they have done so by making an arrangement by which they affect to create a charge on property, comprising the mortgagor's 7-40th share. But this they cannot do, so as to affect the incumbrances already existing on it. Having given up possession, they would be, but for the agreement, in the position of ordinary judgment creditors, entitled to execute their decree for owelty money against the mortgagor's property, whatever it was, by attachment and sale. But that sale would be subject to any incumbrances created by the mortgagor.

It is true that this gives the mortgagee a more ample security than he would otherwise have had, but if the mortgagor's co sharers choose to give the mortgagor a share greater than that to which he would be entitled on partition, and to give him credit for the money which they have agreed to accept, as consideration for allowing him to have that larger share, it is not open to them to complain, if they find that that share is called on to satisfy incumbrances before the debt to them is discharged.

If it had been possible to separate the portion of 52-2 Park Street which represents the 7-40th share, belonging to the mortgagor, from the excess portion which he gets on payment of owelty, and if the Shah Defendants claimed to charge the owelty on that excess portion only, there would have been more force in the

ingenious argument presented by Mr. Buckland (for the Shah Defendants).

But this is not what the Shah Defendants seek to do; they claim to charge their owelty on the whole of 52-2 Park Street, that is to say, they claim, by their consent decree, to have created a charge over the property representing 7-40th share, in priority to the mortgages previously existing upon it. This they are not entitled to do.

In the result, therefore, the sum which is found due to Defendant No. 8 on the account I have directed to be taken, must have priority over all other charges The usual mortgage decree must be made in favour of the Roy Defendants who are entitled to priority over the Plaintiff in respect of their mortgage of 29th January 1902. Next an account must be taken of what is due to the Plaintiff under the two deeds of 13th April 1904 and 10th April 1905, and in default of payment, a sale must be directed.

The Shah Defendants are likewise entitled to a mortgage decree in respect of the sums they claim as owelty: but such sums must be paid after the other charges have been satisfied.

The Plaintiff must have his costs, and the Defendants who have proved their charges are entitled to add their costs to their mortgage claims. But if it be found on taxation, any extra costs have been occasioned by the trial of the issue between the mortgagees and the Shah Defendants as to the priority of the charges for owelty, those costs must be borne by the Shah Defendants.

Costs will be on scale No. 2.

Mr. S. R. Dass (for the Roy Defendants).—Each of us gets costs on scale No. 2 against the mortgagor.

HARINGTON, J.—Yes.

Mr. S. K. Mullick (for the Defendant, Radhicanath Ganguli).—The parties agreed that the solicitor was entitled to the costs of the three suits, asks that no account be taken.

HARINGTON, J.—Liberty to all parties to apply and if they all agree to the sums payable, these sums may be directed to be paid instead of the account being taken.

Mr. J. Camell.—I appear for the Plaintiff and ask that my costs be taxed as between attorney and client as provided for in the deed.

HARINGTON, J.—The usual order as to costs on taxation.

The Defendants, Shahebzada Mahomed Kazim Shah, Shahebzada Wallie Mahomed Shah and Shahebzada Mahomed Karim Shah appealed against the above judgment.

Mr. Sinha (with him *Mr. P. L. Buckland*) for the Defendants, Appellants.

Mr. Garth (with him *Mr. S. R. Das*) for the Roy Defendants, Respondents.

Mr. Hyam for the Plaintiff, Respondent, R. S. Hill.

[The Defendants, Respondents, Shahebzadah Fatteh Mahomed Shah and Radhicanath Ganguli did not appear.]

The JUDGMENT OF THE COURT is as follows:—

MACLEAN, C. J.—The question in this appeal is whether or not, in the circumstances I am about to state, the present Appellants, to whom two sums of Rs. 37,000 and Rs. 9,500 have been awarded by way of owelty on partition,

SHAHEBZADAH MAHOMED KAZIM SHAH v. ROBERT SAVI HILLS.

are entitled to priority over certain mortgagees whom I will refer to as the Roy mortgagees, on a portion of the property which was partitioned.

The facts lie within a very narrow compass and are as follows :—

A suit was instituted some time in 1901, to set aside a certain trust-deed. To that suit all the parties either interested under the trust or who would be interested if the trust-deed were set aside, were parties ; and some of them apparently were minors. The result of that suit was that the trust-deed was set aside and, upon that decree being passed, the minors ceased to have any further interest in the estate. By the decree in that suit, which is dated the 8th of August 1904, all the parties who, upon the trust-deed being set aside, become entitled to the property in certain shares, agreed amongst themselves to have it partitioned The estate at the time was vested in the official trustee ; and under the decree, the official trustee was ordered to convey to Fateh Mahomed Shah, the mortgagor to the Roy mortgagees, the house premises No. 52-2, Park Street in Calcutta. By the same decree it was ordered and decreed "with the like consent (*i.e.* of all the parties interested in the properties) that Fateh Mahomed Shah (the mortgagor) should pay to the present Appellants two several sums of 37,000 and 9,500 rupees, as in the decree directed, and it was declared with the like consent that the said two sums of Rs. 37,000 and Rs. 9,500 respectively formed a charge upon the premises No. 52-2 Park Street alloted to Fateh Mahomed Shah, and that the allotments made to the various parties (including the mortgagor) should stand charged with the respective incumbrances and charges created by them respectively over their respective shares and interests in the aforesaid properties."

The mortgages under which the Roys claim are dated (1st) the 29th of January 1902, (2nd) the 2nd of June 1902 and (3rd) the 2nd of Setember 1902 ; and, they were mortgages to secure an aggregate principal sum of Rs. 18,000 with the interest at 18 per cent. per annum with quarterly rests. The security was the share of the mortgagor in the various properties which had not then been partitioned. The result of the partition proceedings was to give the mortgagor the house, No. 52-2 Park Street, subject to the charge for the two sums of Rs. 37,000 and Rs. 9,500, and the question now is, as between the present Appellants and the Roy mortgagees, whether the Appellants are entitled, in respect of those sums, to priority over the Roy mortgagees. The learned Judge in the Court of first instance has held that they are not ; and consequently they have appealed.

It is quite clear that after the partition was effected, the mortgagee was entitled to regard his mortgages as attaching to the house No 52-2 Park Street, in substitution for the security on the mortgagor's undivided share in the property generally. The security was shifted, as the result of the partition, from the undivided share of the mortgagor on to the property directed to be conveyed to him under the decree.

This is not disputed.

Then arises the question of priority. To determine that question it becomes necessary to ascertain what was the

substituted property which the mortgagor took under the partition. It is clear that all he took was the house No. 52-2 Park Street, subject to the charges of Rs. 37,000 and Rs. 9,500 in favour of the Appellants; and it can only be upon that, that the Roy mortgagees can rank as mortgagees, that is, upon No. 52-2 Park Street subject to the charges created by the decree. But it is said that this was a consent decree. That does not seem to me to make any real difference unless the Roys can shew that the partition effected was either the result of fraud, or unfair or improper as against the mortgagee who was not a party to the partition proceedings.

Undoubtedly a person who advances money upon a mortgage of property which the mortgagor holds in an undivided share must be taken to take it subject to the liability of the property to be subsequently partitioned. Now, what is the attitude of the Roy mortgagees in this suit? Do they approbate or do they reprobate the partition proceedings? If we look at pragraph 2 of their written statement they ask that their mortgage may be regarded as the first charge upon the premises, No. 52 2 Park Street, "if it is shown that the partition was fair and proper." There is absolutely nothing to shew, nor have we heard any argument that it was unfair or improper.

The Plaintiff then have come into Court upon the footing of adopting the partition proceedings; and if they adopt these proceedings, their mortgage can only be on the interest of their mortgagor under the partition.

That interest has been already stated This concludes the matter.

A point was made that the Appellants must be taken to have surrendered their security, because the possession of the house No. 52-2 Park Street, had, in accordance with the decree, been handed over to the mortgagor by the Official Trustee. I am unable to appreciate that argument; I can not see why, if the mortgagor were put into possession by the Official Trustee, and in accordance with the decree, the Appellants have lost their right to the charge which is specifically created by that decree in their favour.

There is one argument of *Mr. Garth* which I ought to notice. It is said that, if a transaction of this sort can stand, the result may be that co-sharers may on a partition, knowing that one of them has mortgaged his share, so arrange matters that he should get no portion of the immoveable property on the partition, but receive the whole of his share in cash, the effect of which would be to defeat the rights of his mortgagee. We are not dealing with that case now; there is no suggestion that this partition was unfair or improper; at any rate, there is no evidence of it. If such a case arise as *Mr. Garth* suggests, I dare say, the Court will be able to deal with it satisfactorily.

The appeal must succeed. The Appellants must have, as between themselves and the Roy mortgagees, who must pay them, the costs of this appeal and also the extra costs which have been occasioned by the raising of the present point in the Court of first instance and which they were ordered to pay.

Mr. Sinha's clients, the Defendant Appellants, must in the first instance pay

the plaintiff's costs and may add them to their security.

STEPHEN, J.—I agree. I would add that it is quite plain that the Appellants' claim which is a charge upon the property, constitutes a deduction from the *corpus* of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of first instance is based.

WOODROFFE, J.—I agree with the judgment of the learned Chief Justice.

Mr. M. N. Mitter, Attorney for the Appellants.

Messrs. Gregory and Jones, S. S. Banerjee and *K. D. Bhunjo*, Attorneys for the Respondents.

P. R. C. *Appeal Allowed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 3442 OF 1907.

MACLEAN, C. J.
COXE, J.
1908.
Heard,
14, February.
Judgment,
17, February.

In the matter of NABIN CHANDRA DAS GUPTA, Petitioner.

Legal Practitioners' Act (XVIII of 1879), secs. 13 and 14—Pleader—Unprofessional conduct—Refusal of brief for political reasons—Right to refuse—Reasons for refusal if must be stated—Right to move High Court to quash proceedings when called upon to show cause.

A pleader is not bound to accept a brief offered to him, nor to state his reasons for refusing to accept it.

A pleader having refused a brief offered to him was subjected to stringent examination to disclose his reasons, and on its *appearing that his reasons were political, proceedings were started against him under the Legal Practitioners' Act and he was called upon to show cause why he should not be reported to the High Court for unprofessional conduct. Without waiting to show cause the pleader at once moved the High Court to quash the proceedings,*

Held—*That he was entitled to do so.*

That there was no rule of procedure to justify the examination to which he was subjected.

This was a rule granted on the 5th of December 1907, against the proceedings taken against the Petitioner under secs. 13 and 14 of the Legal Practitioners' Act.

Sometime before the Pujas one Doorga Charan Shaha went to the Petitioner, who is a first-grade pleader practising in the Courts of the Bhola Sub-division, and offered to engage him as a pleader in a certain suit which was proposed to be instituted in the second Munsif's Court against the Indian Rivers Steam Navigation Company. The Petitioner refused to accept the case but a suit was instituted and the Petitioner was again approached and offered to be engaged, but refused to do so. Thereafter in connection with an application made by the Plaintiff to the District Judge of Backergunj for transfer of the suit, the District Judge directed the Munsif to take the statements of some pleaders of Bhola, including the Petitioner, as to why they had refused to act in the case. In his statement the Petitioner stated that he refused to accept the Plaintiff's brief on the ground that he did not like to serve those men who acted against

the cause of the country. On receipt of the statement the Judge again directed the Munsif to ascertain for what reasons the Petitioner thought that the Plaintiff had acted against the cause of the country. Another statement was taken from the Petitioner, who said he refused to accept the Plaintiff's brief because in the first place the latter was dealing in English cloths; and secondly, he had made coloured, and even false, reports to the authorities against those who were attempting to exercise social control over him for selling foreign cloths. Thereafter on the 24th November the District Judge, J. D. Cargill, Esq., directed the 2nd Munsif at Bhola to call on the Petitioner to show cause why his conduct should not be reported to the High Court and notice was accordingly served on him to show cause. The Petitioner thereupon moved the High Court and obtained this rule.

The District Judge in the course of his explanation stated: "The fact of the matter is that the Plaintiffs in the case dealt in English cloth, and, therefore, they were boycotted and 'controlled socially' as the pleader puts it. One result was that at Bhola no pleader would take up this case. This District is a hot-bed of Swadeshi enterprise of a questionable type, and this is not the first occasion on which trouble of a similar nature has arisen. If persons who do not deal exclusively in country goods cannot on that account obtain proper legal assistance which appears to be the case at present—this fact causes them great harassment and expense, even if it is not tantamount to a denial of justice. I am of opinion that a pleader acts improperly when he refuses to accept a brief from a man merely because their political views differ, such views not being relevant in the case. The facts as I have said are simple, but the principle at issue is one of considerable importance affecting as it does in a very intimate manner the administration of justice."

Dr. Rash Behari Ghose (with him *Dr. Preonath Sen* and *Babu Gunada Charan Sen*) for the Petitioner.—The only question is whether a pleader who refuses to accept a brief from a person who deals in *bilatee* cloth is guilty of professional misconduct.

[THE CHIEF JUSTICE.—Is there any rule of etiquette or law in this country compelling a pleader to take a brief?]

Dr. Rash Behari Ghose did not know of any. As regards barristers, Mr. Woodroffe when Advocate-General gave it as his opinion that a barrister "is not bound to accept a brief tendered to him with his fee if not specially retained on behalf of the person desiring his services. He is . . . . as free to refuse a brief sent to him as a solicitor is to decline a client." *Vide* correspondence published in 7 C. W. N. xcv, xcvi.

Further draws attention to the fact that the charge in this case was preferred not by the person who sought to engage the pleader but the District Judge of Backergunge himself. Reads his explanation.

[THE CHIEF JUSTICE.—But do'nt you come too soon?]

Your Lordships have all the facts before you. Besides this Court has interfered before. See *In re Siddeshwar Boral* (1).

(1) 4 C. W. N. 36 (1899).

IN THE MATTER OF NABIN CHANDRA DAS GUPTA.

Babu Ram Charan Mitter in showing cause said.—The Petitioner is crying before he is hurt.

He does not care to answer the charge, but comes up directly before a higher Court to have proceedings set aside. He ought to have answered the charge.

[THE CHIEF JUSTICE.—It is an odd charge.]

Submits that if the right of a pleader to refuse a brief at his will and pleasure were established as a general rule, a serious miscarriage of justice may happen when as in this case the pleaders all refuse. A pleader or a doctor holds out to the public that he is open to engagement on receipt of a certain fee. If he is free and yet refuses to accept an engagement he is guilty of unprofessional conduct.

[THE CHIEF JUSTICE.—Can you compel a doctor to attend a patient?]

No; but pleaders are under your disciplinary jurisdiction.

Then, again, it would be a serious matter if those who dealt in foreign clothes were in circumstances like the present to be without professional assistance.

Dr. Ghose in reply cited the unreported judgment in *The matter of Peari Lal Roy and others, Pleaders*, decided by Petheram, C. J. and Tottenham, J. on the 26th April 1888. In that case also the High Court was moved directly the District Judge, Mr. Posford, instituted proceedings against the Petitioners under sec. 14 of the Legal Practitioners' Act and a similar objection was raised, *viz.*, that instead of shewing cause, as they were called upon to do, they had come up directly to the High Court. The High Court quashed the proceedings as in the opinion of the learned Judges, "the setting of the machinery of the Court in motion in the way it was done in that case was absolutely without jurisdiction," and "there was no power in the District Judge to use the machinery of the Court and the forms of the Court, and the seal of the Court, and his own judicial signature in the way he did" and "all the proceedings that were taken in the matter were absolutely void."

THE CHIEF JUSTICE intimated that the rule would be made absolute and the reasons given on Monday.

The JUDGMENT OF THE COURT was delivered by

MACLEAN, C. J.—This is an application under sec. 15 of the Charter Act (24 and 25 Vict.; C. 104).

The Petitioner is a first-grade pleader practising in the Courts of Bhola, in the District of Bakergunge.

The Plaintiff in a certain suit which was proposed to be instituted in the Munsif's 2nd Court of Bhola wished to engage him as his pleader. The Petitioner, for reasons which he gave, declined to act as such The suit was instituted: the offer was renewed, and again declined by the Petitioner.

On an application to the District Judge of Backergunge to transfer the suit, the latter directed the Munsif to take a statement from the Petitioner as to the reasons for his refusal to act in the case. This was done: but the District Judge required fuller reasons to be given, and a further statement was taken from the Petitioner on the 25th September 1907. He gave his reasons, which were ap-

parently based upon political grounds. The Petitioner was then called upon to show cause on the 10th December last why his conduct in refusing to accept the brief in the above case should not be reported to this Court as unprofessional conduct within the meaning of sec. 13 of the Legal Practitioners' Act (Act XVIII of 1879). He now applies to have those proceedings set aside. Sec. 13 authorises this Court to suspend or dismiss "any pleader or muktear who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or for any other reasonable cause."

The charge against the Petitioner is that he was guilty of professional misconduct within the meaning of the section. The proceedings appear to me to have been very irregular. The Petitioner was within his rights in declining to accept the brief, if he did not wish to do so. It is not suggested that there is any rule or professional etiquette amongst the vakil Bar which required the Petitioner to accept the brief. Nor do I understand under what procedure he was subjected to the somewhat stringent examination which he had to undergo. He was not bound to give his reasons. It is idle to say the case falls within sec. 13. The only objection taken against the rule is that it is premature, and that the Petitioner ought to have waited to see the result of the application against him. I do not take this view: I think he was entitled to come at once. The preceedings were entirely mistaken and the rule is made absolute.

Rule made absolute.

[CRIMINAL APPELLATE JURISDICTION.]

APPEAL No. 904 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard, 6 and 10, January.
Judgment, 13, January.

KABIRUDDIN and others, Accused, Appellants,
v.
THE KING EMPEROR.

Indian Penal Code (Act XLV of 1860), secs. 99, 100, 147 and 148—Rioting—Right of private defence, where the parties of the complainant and accused engaged in a free fight, and when the accused knew that they would be resisted in their acts—Jury, misdirection in the charge to.

When a body of men go out armed to exercise a right or a supposed right, knowing that they will be resisted by another body of men, in their act, and when the former is engaged in the exercise of that right or supposed right, the latter resisting, a free fight ensues between the rival parties in defiance of the remonstrances of Police constables present on the spot with the result that a man is killed and others wounded, questions of right and who are the aggressors and who are the defending party do not arise for consideration.

In re KALI BAIPARI (18) *followed.*

No person has the right to take the law into his own hands for the protection of his person or property, if there is a reasonable opportunity of redress by recourse to the public authorities.

The right of self help when it causes or is likely to cause damage to the person or property of another person must be restricted and recourse to public authorities must be insisted on.

(18) 1 C. L. R. 521 (1878).

KABIRUDDIN *v.* THE KING-EMPEROR.

This was an appeal preferred on the 20th of November 1907, against the decision of H. W. C. Carnduff, Esq., Sessions Judge, Patna, dated the 30th of September 1907, convicting and sentencing the Appellants under secs. 147 and 148, I. P. C.

Mr. Norton (with him *Babu Monmotha Nath Mukherjee*) for the Appellants.

Mr. P. L. Roy (with him *Babu Joy Gopal Ghosha*) for the Crown.

The JUDGMENT OF THE COURT was as follows :—

RAMPINI, J.—This is an appeal by twelve persons who have been convicted by the Sessions Judge of Patna of offences under secs. 147 and 148, I. P. C. and sentenced to terms of imprisonment varying from 1 to 2 years. The trial was held with the assistance of a jury, who unanimously found the accused guilty. The verdict of a Jury can only be set aside on the ground of misdirection in the charge by the Judge to the Jury, which "has in fact occasioned a failure of justice." The alleged facts of this case are set out by the Judge as follows :— "On the morning of the 10th March Fakira Dhari, one of the Chowkidars of Iswa, saw a mob collected on the Pathari pyne, and learnt that they were Chero people come to throw up an *alung* on the western side, taking earth from the then dry channel in order to do so; also that the Iswa people intended to contest the others' right to do anything of the kind. He at once went to the Surmera out-post and gave information to the writer constable who was there alone, and could do no more than record a *ancha* on hearing what he and another chowkidar, Budhua, who had come almost simultaneously with similar information, had to say. Budhua was sent off to Shaikhpura in Monghyr to give formal information to the head constable, Narul Nabi, who had gone there to attend a Police co operation meeting while two constables, Rajkumar and Suraj Nath, were deputed to accompany Fakira back to the pyne and avert a riot, if possible. On reaching the place they found some 500 Chero people armed with *lathies* and swords, among them being about 200 labourers, excavating the earth, and most prominent of all, Kabiruddin directing operations (from horse back eventually), but himself unarmed. At the same time a slightly smaller *Gahar*—300 or 400 are the figures suggested—was seen coming from the Iswa side led by Sahdeo Singh of Iswa, also on horse back, armed and shouting "Jai Mahabir." The Police implored the Chero people first, and then the Iswa people, and then both together to desist and await the arrival of the sub inspectors: but remonstrances were in vain, the two armies ranged up, and free fight ensued and lasted for a short time, after which the rioters on both sides dispersed. It was then noticed that one of the Iswa men had been so severely wounded as to be unable to move from the spot where he had fallen. This man, Mahar Singh, the Chero people are said to have made an attempt to carry away, and the Iswa people, according to the Police, also tried to remove him altogether, but the constables very properly refused to let him be taken out of their sight, and they were present with him when he died in a hut hard-by about a quarter of an hour later.

The Judge has then discussed the evidence very carefully and left the jury to make up their minds as to the facts. He then goes on to say: "I now come to deal with the question of right, title and possession as to which a mass of evidence has been laid before you. First, there is the oral evidence. On the Iswa side a number of witnesses swear that the Pathari pyne lies entirely in Iswa, that it has always been repaired and maintained by the maliks of Iswa, and that the people of Chero have never had, nor exercised any right to interfere with it in any way. On the other hand, the Chero witnesses allege that the Chero people have regularly excavated earth from the pyne so as to erect *alung* along the western side, and it is argued, on the strength of certain admissions by Iswa witnesses as to the slope of the land, that, without such an *alung*, Chero could never grow a rice crop, as all the water would flow off their lands during the rainy season. Then Iswa produces a *thakbust* map of 1843, which seems to show that the northern branch at any rate of the pyne, 1, the so called Pathari pyne is in Iswa while Chero produces a similar map and *khesra*, and the counsel for the defence asks you to gather from it that in 1843 the pyne was in Chero. Next the prosecution rely upon certain partition proceedings in 1907 between Iswa and Kalyanpur; but to these Chero admittedly was no party. Chero again file a number of old *rubakars* or decrees regarding a pyne apparently in their locality: but these relate to a dispute between Chero and Iswa, and I can not myself see that the identity of the pyne referred to in them with the so-called Pathari pyne has been established. Next there are Treasury *chalans* showing that Musst. Fasiban, the Chero malika, has paid into the Treasury at Patna in the years 1884, 1889, 1892, 1894, 1896, 1897, and 1901, sums of money on account of "Bandheri" and the "Sakri Band," and lastly, each side has produced *gilandazi* papers and evidence in support thereof, while the defence have called a *beldar* who swears that he has repaired the pyne at the expense and on behalf of Chero.

"The task of deciding what, in the result, is established by this conflict of evidence would, I think, be a difficult one, and, in the view I take of the law, it is not necessary for you to attempt an adjudication. In a word, I am clearly and strongly of opinion that, if the case of a free fight deliberately engaged in by the parties is true, it is wholly immaterial what their rights were or are. This brings me to an exposition of the law of rioting.

"An assembly of five or more persons is an unlawful assembly if the common object of the persons composing it is, by means of criminal force or show of criminal force to any person, to enforce any right or supposed right. And an assembly, which was not unlawful when it assembled, may become an unlawful assembly. Whoever intentionally uses force to any person without that person's consent in order to the committing of any offence, or intending by the use of such force to cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other. Whenever force or violence is used by an unlawful assembly, or by

KABIRUDDIN v. THE KING-EMPEROR.

any member thereof, in prosecution of its common object, every member of it is guilty of rioting under sec. 147 of Indian Penal Code. And if any person so guilty is armed with a deadly weapon or any thing, which, used as a weapon of offence, is likely to cause death, he is liable to severe punishment under sec. 148.

"In order, then, to convict any one of the accused under sec. 148, you must be satisfied:

"(1) That he was one of five or more persons assembled with a common object; (2) that the common object was forcibly to assert the supposed right of Chero to take earth from *Pathari Pyne*; (3) that in prosecution of that common object force or violence was actually used, and 4) that he was armed with a deadly weapon.

"As I have already told you, it is a question of fact whether a sword or a *lathi* is a deadly weapon, and that is for you to decide I have also told you in the case of Kabir and I repeat it now once for all, that even if you find point (4) above not proved, it will be open to you to convict under the minor sec. 147, should you find the other essentials proved.

"Now, apart from the *alibi* pleaded by some of the accused, the defence is that the Chero people were not asserting any right, but were merely maintaining undisturbed the exercise of a right, and taking the necessary precautions to protect themselves from aggressive interference; and the learned counsel has cited a number of rulings drawing the distinction referring, in particular, to one of 1875 and another of 1897: *Shanker Singh* v. *Burmah Mahto* (1) and *Panch Kauri* v. *Queen-Empress* (2). Now, even if the soundness of these decisions be accepted unquestioned, and I cannot help thinking that the case of 1897 goes dangerously far in the direction of allowing the subject to take the law into his own hands, the present case seems to me to be readily distinguishable. And here I ought to remind you that, where the right of private defence is set up, the onus shifts on to the accused, and it is for them to prove the plea.

'In laying down the law I rely, first, on the clear language of sec. 141 (4), which refers to an actual right as well as a supposed one; and, then, on a long series of rulings which begin with the *Queen* v. *Jealall* (3) and ends with *Anant Pandit* v. *Madhusudan Mandol* (4). There can, I tell you, be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of the right of private defence. If the accused—it was held by the Judges at Allahabad not many years ago, see *Queen-Empress* v. *Peary Dutt* (5)—were determined to vindicate their supposed rights and engaged in a fight with men

(1) 23 W. R. Cr. R. 25 (1875).
(2) I. L. R. 24 Cal. 686 (1897).
(3) 7 W R. Cr. R. 34 (1867).
(4) I. L. R. 26 Cal. 574 (1899).
(5) I. L. R. 20 All. 459 (1898).

KABIRUDDIN *v.* THE KING-EMPEROR.

equally determined to vindicate theirs, no question of private defence can arise. It comes to this simply, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner. Here you must remember that the occurrence took place on the 10th March, six months after the last rains had ceased and three months before the next rains were expected. There would, therefore, be no pressing necessity for the erection of an *alung*. On the contrary, not only was there plenty of time to seek the protection of the police at the out-post a mile distant but the police were on this spot—if you believe them—trying to prevent a breach of the peace: there was plenty of time to ask the Magistrate at Barh to issue an order under sec. 144 of the Code of Criminal Porcedure so as to enable the Chero people to put up the *alung* before the rains: there was time, indeed, to bring a suit to establish the right. And what was there to prevent them waiting until the settlement officer arrived and went into the matter on the spot with a view to the record of rights contemplated? If you find that the accused well knew that the right was disputed and would be forcibly contested by Iswa, that they nevertheless went in anything like the numbers asserted to exercise the right in the teeth of opposition, that there was no necessity or justification in the patent facts for their taking the earth and throwing up the *alung* at the time in question, and that they joined battle in the face even of police remonstrance on the spot, then you should, without hesitation, convict all who participated of rioting."

Mr. Norton for the Appellants contends that in this passage in the Judge's charge there is a flagrant misdirection on a point of law and that therefore the conviction of the Appellants cannot stand. He urges that the Judge should not have told the jury that when two bodies of armed men go out to fight a pitched battle, defying the representatives of the law that are present and urge them to desist from fighting, the questions of right and who are the aggressors are immaterial, but on the contrary that the Judge should have directed the jury to find (1) who were in the possession of the pyne about which the fight took place (2) by what right they were in possession and (3) who were the aggressors and the attacking party at the time of the occurrence. In support of his contention he has cited and relied on the following cases *Queen* v *Sohun* (6), *Queen* v. *Mitto Singh* (7), *Queen* v *Sicher* (8), *Birjoo Singh* v. *Khub Lall* (9), *Shanker Singh* v. *Burmah Mahto* (1), *Ganouri Lal Das* v. *Queen-Empress* (10), *Mohu Sheikh* v. *Queen-Empress* (11), *Panch Kauri* v. *Queen-Empress* (2), *Anant Pandit* v. *Madhusudan Mandol* (4), *Poresh Nath Sircar* v. *Emperor* (12), *Bepin Behari Guha* v. *Pranakul Majumdar* (13), *Queen-Empress*

(1) 23 W. R. Cr. R. 25 (1875).
(2) I. L R 24 Cal 686 (1897).
(4) I. L. R. 26 Cal. 574 (1899).
(6) 2 W. R. Cr. R. 59 (1865).
(7) 3 W. R Cr. R. 41 (1865)
(8) 7 W. R. Cr R. 112 (1867).
(9) 19 W. R. Cr. R. 66 (1873).
(10) I. L R. 16 Cal. 206 (1889).
(11) I. L. R 21 Cal. 392 (1894).
(12) I. L R. 33 Cal. 295 (1905).
(13) 11 C. W. N. 176 (1906).

KABIRUDDIN *v.* THE KING-EMPEROR.

v. *Narsang Pathabhai* (14) and *Queen-Empress* v. *Peelimutha Tevan* (15).

Mr. Roy for the Crown on the other hand has replied that the Judge's charge contains no misdirection, that the Judge has correctly laid down the law, and that, as no failure of justice has in fact taken place in consequence of the alleged misdirection, the conviction of the Appellants according to sec. 537, C. P. C., should not be set aside. He relies on the cases of *Queen* v. *Nowabdee* (16), *Queen* v *Jeolall* (3), *Queen* v. *Mana Sing* (17), *Re Kali Baipari* (18), *Queen-Empress* v. *Pray Dutt* (5), *King Emperor* v. *Kaliji* (19), *Emperor* v. *Kadhu Singh* (20) and an unreported case *Jairam Mohton* v. *Emperor* (21).

There appears to me to be no necessity to discuss these cases at length. They lay down no general rule. Further, they have all been considered and commented on from time to time by the different Benches of this Court and the facts of each case distinguished. They undoubtedly appear to be conflicting; and Mr Norton has suggested that if we do not agree with the law as laid down in the cases he has cited, we should make a reference to a Full Bench. But we see no reason and consider it unnecessary to do so. The law of the Penal Code, however apparently variously interpreted in different sets of circumstances, remains the same and we are bound to apply it to the circumstances of the present case according to our lights. I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case, when both parties armed themselves for a fight, to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle, killing one man and wounding others. In such a case, as said in the exactly similar case of *Re Kali Baipari* (18) where both parties are armed and prepared for battle, and it is not shown that they were acting within the legal limits of the right of private defence, it does not matter which is the first to attack. In the present case the Appellants, if they had any right of private defence which in the circumstances in my opinion they had not, did not act within the legal limits of such right. They did not restrict themselves merely to the use of such force as was necessary to resist trespass. On the contrary, they far exceeded their right, if they had any, for they killed a man and inflicted serious injuries on others. As has been said in the unreported case of *Jairam Mohton* v. *Emperor* (21):—"The right of private defence of property is a restricted right. Sec. 99 of the Indian Penal Code expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and

(3) 7 W. R Cr. R 34 (1867)
(5) I. L R 26 All 459 (1898).
(14) I. L. R. 14 Bom. 441 (1890).
(15) I. L. R. 24 Mad 124 (1900).
(16) Gap. No. W. R. Cr. 11 (1864).
(17) 7 W. R. Cr. R. 103 (1867).
(18) 1 C. L. R. 521 (1878).
(19) I. L. R. 24 All. 143 (1901)
(20) I L. R 24 All. 298 (1902).
(21) Decided by Mitra and Caspersz, JJ., on the 15th July 1907. Unreported.

(18) 1 C. L. R. 521 (1878).
(21) Decided by Mitra and Caspersz, JJ., on the 15th July 1907. (Unreported).

KABIRUDDIN *v.* THE KING EMPEROR.

It, also, lays down that the right of private defence in no case extends to doing more harm than is necessary for the purpose of defence. Secs. 100 to 105 make the right depend on the circumstances of each case. No man has the right to take the law into his own hands for the protection of his person or property, if there is a reasonable opportunity of redress by recourse to the public authorities. Referring to *Hyde* v. *Graham* (22) Holloway, J., in Madras High Court proceedings, 8th January 1873, says:—'The natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country (like this). . . .' The right of self-help, when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities must be insisted on. If a person prefers to use force in order to protect his property, when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in this part of India. The country would, in the language of Holloway, J., "be deluged with blood," if an offender who could get relief by recourse to law were allowed to take the law into his own hands."

(22) 1 H. and C. 593 ; 8 Jur. N. S. 1229 (1863).

For these reasons, I am of opinion that there was no misdirection in the charge to the jury by the Sessions Judge, and I would accordingly dismiss the appeal.

SHARFUDDIN, J.—This is an appeal by the present Appellants who have been convicted and sentenced as mentioned by my learned brother in his judgment. The trial was held with the assistance of a jury whose unanimous verdict was that all the accused were guilty.

The facts of the case have been fully discussed by the learned Sessions Judge in the heads of his charge to the jury and also dealt with by my learned brother. I need not therefore repeat them.

It has been urged on behalf of the Appellants that there has been misdirection in the charge on a point of law namely, that "in the case of a free fight deliberately engaged in by the parties it is wholly immaterial what the rights were or are." And that the misdirection has been further amplified by the learned Sessions Judge by directing the jury "that there can be no right of private defence either on one side or the other, when both parties are evidently aware what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and the accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of their right of private defence."

Mr. Norton, Counsel for the Appellants, contends that the above amounts

KABIRUDDIN v. THE KING-EMPEROR.

to a misdirection inasmuch as the learned Sessions Judge was bound to place before the jury the evidence as to possession; and that this omission has caused a miscarriage of justice, for, if the jury had found possession of his clients even for a few hours before the occurrence, they had a right to defend their possession against any aggression by the other side.

The Indian Penal Code deals with the right of private defence in secs. 96 to 106 Under sec. 97 "every person has a right subject to the restrictions contained in sec. 99, to defend his property or that of any other person against any act which is an offence falling under the definition of offences mentioned in that section. One of the restrictions under sec. 99 is that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities." By the above restriction an accused cannot set up this right with regard to properties in his possession, if he has time to invoke the protection of the authorities. In cases of sudden fights where there has not been any preparation by either side, a man, no doubt, is within the law, if in defending his property he causes such bodily injuries to the aggressive party as are allowed by the sections of the Penal Code which deal with the right of private defence.

If the facts of the present case disclose a state of things which clearly goes to show that the accused had full knowledge of the fact that they would be opposed by the other side, their duty, as required by law, would be to have recourse to the protection of the authorities, provided there was time enough to do so. If there was time, they had no right to go to the scene of occurrence and thus invite the other side to come and attack them. The occurrence is said to have taken place on the 10th March 1907, when, the Pathari pyne was quite dry. The accused had gone to the place to repair the embankment of the said pyne, which embankment is situated on the Chero side of the pyne. Chero is the village to which the accused belong. The opposing party belong to the village, Iswa. On the date of the occurrence, there was no pressing necessity to throw up any earth on the Chero side of this pyne—the next rainy season being some months after the occurrence.

From facts proved in the case and accepted by the Jury it is clear that the Chero people were fully aware that they would be attacked by the Iswa people. The Chero people numbered about 400 or 500 including about 200 labourers. They were armed with sword and *lathies* and were led by Kabiruddin on horse back, who had only a whip in his hand. On the appearance of such a large body of men, the Iswa people also began to collect their forces. In the meanwhile two Chowkidars started for the Thana, which is only 4 miles from the scene of occurrence and only a mile from Chero, to give information of a likelihood of a breach of the peace. On receipt of the information two Police constables arrived on the spot before the fighting had commenced. In spite of the remonstrances of these two constables, fighting began and there was a regular combat. This fighting commenced on the Iswa people trying to cross the pyne.

KABIRUDDIN *v.* THE KING EMPEROR.

On the above facts it is clear that the Chero people had full knowledge that they would be opposed by the Iswa people and this is evidenced by the fact of their having gone fully armed and in such large numbers. An assembly of such a large body of men indicates that they had not gone to the spot for any peaceful purpose. They knew quite well that they would be attacked and they went to the spot to meet force by force. The law does not delegate to any private individual the functions of those public servants who are specially charged with the protection of life and property, and the apprehension of offenders. In the present case there having been no pressing necessity for repairing the embankment and there being ample time to seek protection of the authorities, the Chero people had no right to assemble, as they did, and court an attack by the Iswa people.

It is contended on behalf of the Appellants that inasmuch as the Chero people had arrived on the spot admittedly a few hours before the Iswa people, the former had a right to defend the continuance of a state of things which, if altered, would have disturbed the *status quo ante*, and that the Chero people, having arrived there first, were maintaining their right of possession. The common object mentioned in the charge is to support a supposed right to take earth from the Pathari pyne. The question, therefore, is as to whether the Chero people had gone to the spot to defend a right or to assert it. It is clear that that they had gone to assert that right, or otherwise there would have been no necessity of going to the place in such a large body and so armed. It is contended on behalf of the Appellants that they having arrived on the spot first had the right to remain there and if disturbed in that right they were entitled to set up the plea of the right of private defence. I cannot accept the above proposition, as such an enunciation of law would be dangerous to the peace of the country. It would justify a regular race between two factions as to who should arrive first.

In the above circumstances I am of opinion that the learned Sessions Judge was right in telling the Jury, that if they found (*a*) that there had been a premeditated fight between the parties; (b) that the remonstrances of the two constables were ineffectual; (*c*) that there was no pressing necessity to repair the pyne; and (*d*) that there was ample time to seek the protection of the authorities—it was immaterial as to which of the parties was in possession.

One of the common objects mentioned in sec. 141, I. P. C. is—"by means of criminal force or show of criminal force to any person to take or obtain possession of any property or to deprive any person of the enjoyment of the right of way or of the use of water or other incorporal right of which he is in possession or enjoyment, or to enforce any right or supposed right." The expression "to enforce any right or supposed right" suggests an opposing party and hence I find that the accused have been charged with rioting with the common object, to wit, to assert by force or show of force a supposed right.

Our attention has been drawn by counsel on both sides to various authorities in support of their respective contentions.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MARCH 9, 1908. [No. 17

Contents.

NOTES.

MR. K. G. GUPTA IN HIS REPORT ON THE RESULTS OF his enquiry into the Fisheries of Bengal has proposed that legislation should be undertaken, and for the present, he says " it will be sufficient to establish short close seasons and to prevent the destruction of fry and young fish of a few specified varieties only. Something must also be done to put a stop to the practice of erecting dams and other obstructions right across water courses and river channels, which seriously interfere with the passage of brood fish and fry from the sprawning grounds and are great obstacle to navigation."

LEGISLATION IN THIS DIRECTION WE THINK WILL serve a very useful purpose and having regard to the rapid decrease in fish supply in recent years legislation is urgently required. But in undertaking legislation, unnecessary interference with private rights should be guarded against. In this country the right to fishery in large navigable rivers belongs to private individuals. Ghose and Gordon, JJ. in delivering their judgment in the case of *Satcowri* v. *The Secretary of State for India in Council* I. L. R, 22 Cal. 252, discussed the earlier cases on the point and observed as follows:—Upon the cases we have just referred to, it may be accepted as law on this side of India that the bed of a tidal navigable river is vested in the Crown; and that the right of *julkur* (fishery) in such river, as also the bed of the river itself may be granted by Government (whether it be in the exercise of their prerogative as the Crown or as representing the public) to private individuals to be held by them as private property, subject, of course, to the right of navigation and such other rights which the public has in such rivers."

WE INVITE ATTENTION TO THE DECISION OF THE Privy Council in *Raja Rai Bhagwat Dayal Singh* v. *Debi Dayal Sahu*, at p. 393 of this number. Their Lordships have reversed the decision of the Calcutta High Court reported at p. 408 of Vol. VIII of this journal. The Calcutta High Court had held that although the English rule against champerty and maintenance does not apply in this country the agreement in that case could not be given effect to as being opposed to public policy and as promoting gambling in litigation. The stipulation in the agreement which was considered specially open to criticism was that out of the price of Rs 52,600 agreed upon only Rs. 600 was to be paid down and the balance was payable in the event of success in the suit and in proportion to the extent of such success. A very similar agree ment came up for consideration before the Privy Council shortly afterwards in the case of *Lal Achal Ram* v. *Raja Kazim Husain*, 9 C. W. N. 477. In that case the Judicial Committee held that there was "nothing extortionate or unreasonable in the terms of the bargain in the case," "no gambling in litigation" and "nothing contrary to public policy" and their Lordships were further of opinion that so long as the sale deed stood and was not, repudiated by the transferor, it could not be challenged by a stranger to the deed.

IN THE PRESENT CASE THE QUESTION HAS BEEN dealt with even more "squarely" by the Judicial Committee. Their Lordships hold that the agreement in this case was champertous. But that was not enough to avoid such a transaction in India. Lord Robertson gave the reason in the course of the argument that "society in India makes it inexpedient to apply the law of champerty there." This may be so But we venture to suggest an additional reason. Lawyers in England of the present day are themselves in doubt as to whether the law of champerty as established by a long course of decisions in that country is wholly justifiable in principle. Their Lordships

were further of opinion that the stipulation which made the payment of the consideration money contingent on the success of the suit did not add any darker complexion to the transaction and it was not contrary to public policy and void as such. Lord Robertson very pertinently asked in the course of the argument, "can you show me any form of an agreement of this class which would not be a gamble in litigation." It was further laid down, as in *Achal Ram's case*, that the transaction could not be challenged by persons not parties to it.

A QUESTION WHICH VERY NATURALLY ARISES OUT of these cases and which by a coincidence forms the subject-matter of the next decision reported in this number (*Munshi Basiruddin* v. *Mahomed Jalish* at p. 409) is whether a *benamdar* stands in the same position as the transferee in the two cases mentioned above. In *benami* sales and mortgages also, the question may be said (in the language of the Judicial Committee) to be one between assignor and assignee. A *benami* sale, considering the nature of the transaction is, no doubt, no sale, when the question arises between the *benamdar* and the beneficial owner. But if to hold property *benami* be not altogther wrong and illegal, it is difficult to see why third parties should not respect the arrangement made between the owner and the *benamdar* by mutual agreement, so long as such agreement does not operate in fraud of the rights of such third parties. We think that the present law relating to *benami* transactions in so far as it treats such transactions as not merely voidable at the instance of the parties themselves, but as void to the whole world is unsatisfactory and stands in need of reconsideration. It would simplify matter much if *benami* transactions were looked at in the same light as any other transaction of a voidable character. At present the law holds out inducements to the raising of false pleas in defence in suits for possession or the like brought by a purchaser, where the plea that the Plaintiff is a *benamdar* is a good defence even when raised by the verlest trespasser.

THE CASE OF *Howatson* v. *Webb* REPORTED IN (1908) 1 Ch. p. 1 shows the risk that an educated man undergoes in signing a deed without reading it. In this case the Defendant, a Solicitor, was requested by H to execute certain deeds and on his asking what these deeds were he was told by H that they were deeds transferring a certain property. The Defendant on the faith of the representation, without himself examining the deeds signed them. One of the deeds so signed was a mortgage between the Defendant as the mortgagor and another person and contained the usual covenant by the Defendant (mortgagor) for payment of principal and interest. In an action by a transferee of the mortgage for payment of the mortgage debt, the Defendant pleaded that he executed the mortgage-deed on a misrepresentation as to its contents, and believing it to be a deed of transfer and he never intended to execute the personal covenant for the payment of the mortgage debt and so the covenant was not binding upon him. It was contended on behalf of the Defendant that the whole deed was inoperative as he never intended to execute such a deed or at any rate if the deed as a deed of mortgage stood good, the personal covenant contained in it must fail, as the Defendant never thought of undertaking any personal liability and he was never told nor had he any reasonable ground for thinking that the deed which he executed contained any personal covenant.

THE SECOND CONTENTION COULD NOT OF COURSE hold good. The deed, such as it was, was indivisible and if it was good at all it was good in all respects. As to the first contention the question was whether the Defendant who was an educated man could avail himself of the plea of *non est factum* in this particular case. The Court held that the Defendant could not avoid the deed on such a plea and that it was his duty to examine the deed before signing it and as he did not do so, he ought to suffer the consequence of his own negligence as against an innocent third party, the Plaintiff in this case being a transferee of the mortgage deed. Farwell L. J., asked :—"Whether the old cases on misrepresentation as to the contents of a deed were not based upon the illiterate character of the person to whom the deed was read over, and on the fact that an illiterate man was treated as being in the same position as a blind man. . . . and whether at the present time an educated person who is not blind is not estopped from availing himself of the plea of *non est factum* against a person who innocently acts upon the faith of the deed being valid."

A TESTATOR BEQUEATHED CERTAIN PROPERTIES TO A legatee. In describing the properties he stated to the following effect: "I give all the properties to C which have been granted to me by my father under a codicil to his Will, namely, the properties X, Y, Z." It appeared that another property, K., was also given to the testator by the codicil of the father's Will but there was no evidence in the case whether the testator knew at the time he executed his Will that under the codicil to the father's Will this property K also was granted to him. After the death of the testator the question arose what properties the legatee was to get—that is to say whether he should get only the properties which the testator obtained under the codicil or whether he should get only the properties that were enumerated, *viz.*, the properties X, Y, Z.

THE SOLUTION OF THE QUESTION PRIMARILY DEPENDS upon the intention of the testator; and in the absence of reliable evidence as to the intention the Court must have to look to the contents of the Will and the surrounding circumstances. Now what was the leading description of the properties sought to be bequeathed? Did the testator intend to bequeath all the properties he obtained under his father's codicil, or did he intend to give the properties he enumerated. The principle for the guidance of Courts in arriving at the intention of the testator, in such cases may be stated thus—where there is a complete general description of the property comprised in a transfer, followed by an imperfect enumeration, the latter cannot be read as restricting the former. *Traveds* v. *Bhendel* (1877) 2 Ch. D. 436. But this rule also does not solve the difficulty. It assumes that of the two descriptions, one is complete and the other is imperfect. But the real question is which is the complete description and which the incomplete or imperfect description? Suppose A in a deed stated that he gave all the properties which he purchased from B *viz.*, properties X, Y, Z, and it appeared that the property Z was not purchased by A from B. In this case without strong reasons the Court will not hold that the property Z was also comprised in the gift. Or suppose numerous properties were purchased by A but in the enumeration some of the properties so purchased were not included. Then in such a case it would probably be held that the general description should prevail over the enumeration, because where the general description is numerous it is reasonable to suppose that in enumerating them some of the properties may have been left out through mistake or oversight.

BUT IN THE RECENT CASE OF *Brocket, in re Dawes* v. *Miller* reported at (1908) 1 Ch. 185 it was held that the enumeration should prevail over the preceding general description. The learned Judge held that the enumeration of the properties was the leading and the complete description. The learned Judge observed "Now the present is not a case in which there has been a complete description of the thing intended to be given by name with a subsequent misdescription as to some particular connected with it, but in the present case we have two perfectly distinct descriptions of the subject matter of the gift, each complete in itself and they are connected by the advert "namely" which means "by name" or "that is to say," and there is no other connection between the two descriptions. The first description is a general collective description, and in this sense uncertain. An enquiry and investigation, with, I suppose, some possibility of error, are necessary to ascertain the particulars of the real estate referred to. The second description is more definite and specific." The learned Judge goes on to observe that the mere fact that a second description by enumeration and specification was added showed that the first description which preceded it was not considered by the executant of the deed to be complete and accurate; as otherwise why should he add it unless to make certain what was more or less observed before.

IT IS DIFFICULT TO LAY DOWN A HARD AND FAST rule for the construction of deeds containing more than one description of the properties dealt with, where the two descriptions conflict with each other in some respects. The decision in a particular case will be more or less influenced by the particular facts of the case and the language of the deed. In all these cases the Court's duty is to infer the real intention of the grantor, guided by certain general principles which though not infallible lead to correct results in the majority of cases.

WE INVITE ATTENTION TO THE CASE OF *Mohesh Chandra Saha* v. *The Emperor* reported at p. 416 of this issue. In this case, their Lordships did not adopt the interpretation which was placed in *Deputy Legal Remembrancer* v. *Upendra Kumar Ghosh*, 12 C. W. N. 140 upon sec. 350, Cr. P. C. In this connection we may refer our readers to an article which appeared at p. lxxiv of the current volume.

RECENT CASES UNDER THE BENGAL TENANCY ACT.

INSTALMENT DECREE.—An instalment decree cannot be made in a suit for rent under sec. 210, C. P. C., but the High Court refused to set aside such a decree upon an application for revision under sec. 622, C. P. C., as it was only an error of law: *Sibh Narain* v. *Baikuntha Nath*, 11 C. W. N. 857. The reason of the decision is that sec. 210, C. P. C., speaks of a suit for money and a suit for rent is not a suit for money. It may be pointed out here that sec. 546, C. P. C., has been held to be applicable to rent decrees although that section speaks of a decree for money *and not a decree for rent; Bunku Behari* v. *Syama Charan*, I. L. R. 25 Cal. 322. Further secs. 210 and 546, C. P. C., are not among the sections which have been made applicable to rent suits. However it seems that a Court has jurisdiction to pass an instalment decree when the order is passed upon consent.

RAIYAT.—A person who was originally a raiyat may afterwards convert himself into a tenure-holder so far as third persons are concerned. *Mohesh* v. *Manbharan*, 5 C. L. J. 522.

NON-OCCUPANCY RAIYAT.—It has now been definitely settled by a Full Bench that under the Bengal Tenancy Act the right of a non-occupancy raiyat is not heritable. *Mohunt Lukhan* v. *Jainath*, 11 C.

W. N. 626: S. C. I. L. R 34 Cal. 516; 5 C. L. J. 457. It may however be noted here that the Judges composing the Full Bench were not unanimous. Whatever may be the view of the majority as to the question of law, as a matter of fact, we seldom find a landlord anxious to eject the heir of a raiyat in this country

EJECTMENT.—Their Lordships of the Judicial Committee have reversed the decision of the High Court in the case of *Surendra* v *Hari Mohun*, 9 C. W. N. 87: S. C. I. L. R. 31 Cal 174 and have held that the question whether the erection of an indigo factory within the limits of land let out for agricultural purposes generally will render the land unfit for the purposes of the tenancy is essentially a question of fact. *Hari Mohun* v. *Surendra*, 11 C. W. N. 794: S. C. I. L. R. 34 Cal. 718; 6 C. L J. 19.

ENHANCEMENT.—The fact that the tenant has been exonerated from certain liabilities under a previous contract cannot give validity to a stipulation to pay rent at an enhanced rate exceeding 2 annas in the rupee. *Probol Chandra* v. *Cherag Ali*, 11 C W. N. 62. One suit for enhancement of rent under sec. 30 and increase of rent under sec 52 is maintainable. *Sarada* v *Iswar*, 11 C. W. N. 1154.

UNDER-RAIYAT.—The case of *Arip Mondul* v. *Ram Ratan*, 8 C. W. N. 479 has been explained in the case of *Jamini* v. *Rajendra*, 11 C. W. N. 519 and it has been held that the heir of an under-raiyat has only the right to remain in possession of the land until the end of the agricultural year but has no right to inherit.

HOLDING OVER—In a suit for ejectment under sec. 49 of the Act it was held that mere delay in the institution of the suit is no reason for the dismissal of the suit on the ground that the Defendant was allowed to hold over. *Ratan Lal* v. *Farshi*, I. L. R. 34 Cal. 396 The expression "holding over" means that the relation of landlord and tenant continues with the assent of both parties, and the overt acts, by which the relation may be continued, are either the receipt of rent by the landlord or his assenting to the continuance of the tenancy by other acts or words. *Ibid* Per Mitra and Caspersz, JJ.

ADDITIONAL RENT.—A landlord is entitled to recover additional rent where the rent was settled having reference to the area and not a consolidated rent. *Raj Kumar* v *Ram Lal*, 5 C. L. J. 538.

INTEREST.—The distinction between sec. 59 of the Contract Act and sec 55 of the Bengal Tenancy Act has been explained in the case of *Mohim Chandra* v. *Kalitara*, 11 C. W. N. 939; under sec. 59 of the Contract Act the Court may have regard not only to the debtor's express intimation but also to circumstances implying that the payment is to be applied to the discharge of some particular debt; but under the Bengal Tenancy Act the debtor must declare the year or the years and the instalment to which he wishes the payment to be credited. Where a landlord receives a certain sum of money as rent he cannot apply it to interest as the word "rent" does not necessarily include *interest*. *Bhagabati* v. *Basanta Kumari*, 11 C. W. N. 110.

A landlord is entitled to recover interest at a rate higher than 12 per cent. from a person who purchased it from the original tenant who had stipulated in his kabuliyat to pay such interest. *Tiluk* v. *Jasada*, 11 C W. N. 215.

To stop interest on rent running in a case governed by the Bengal Tenancy Act a tender of rent which is improperly refused need not be followed by a deposit of rent in Court under sec. 61 and such a tender, if kept good, is sufficient to stop interest running from the date of tender. *Kripasindhu* v. *Annada Sundari*, 11 C W. N 983, C. p. *Jagattarini* v. *Nabagopal*, I. L R 34 Cal 305: S. C. 6 C. L. J. 273.

"Rent" in cl. (*c*) of sec. 179 does not exclude interest. *Bejoy Chand* v. *S. C. Mookerjea*, 11 C. W. N. 1105.

SUBLEASE.—A sublease by a raiyat for a term exceeding nine years is invalid even against the raiyat *Basaratulla* v. *Kusirunnessa*, 11 C. W. N. 190. A raiyat who sold his holding and took an under-raiyati lease has been held to be not competent to maintain a suit for recovery of possession of the land against the landlord. *Rajani Kant* v. *Ekkari*, 11 C. W. N. 811.

COMMON MANAGER.—A regular suit lies to cancel an appointment of a common manager on the ground of its invalidity. *Indu Bhusan* v. *Annapurna*, 6 C. L. J. 216.

The case of *Fajlal Ali Chowdry* v. *Abdul Majid Chowdry*, I. L. R. 14 Cal. 659 laying down the procedure for the appointment of common manager for several estates has been followed in the case of *Saradindu* v. *The Collector of Rangpur*, 11 C. W. N. 1143 and it has also been held that a co-owner who has opened a separate account in the Collector's register or makes separate collection for his share is nevertheless liable to have his share taken over by a common manager, although the dispute may not have extended to his share. His remedy is to have his share demarcated by metes and bounds.

RECORD-OF-RIGHTS—By the operation of sec. 9 of Act III, B C. of 1898 the Civil Court is precluded from adjudicating on a question as to whether certain lands were rent free or not when such question was decided in a proceeding under Chap. X before the passing of Act III of 1898. *Nabin Chandra* v. *Radha Kishore*, 11 C. W. N. 859.

Art. 14 of Sch. II of the Limitation Act has no application to an order rejecting an objection under sec. 103A. *Ram Gulam* v. *Bishnu*, 11 C. W. N 48. An entry in a record-of-rights raises a rebuttable presumption *Abdul* v. *Jogesh*, 11 C. W. N 153; see also *Kali* v. *Pratap*, 5 C. L J. 92; and such entries should not be lightly discarded *Kali* v. *Pratap*, 5 C. L. J. 92.

The decision of a Settlement Officer before Act III, B. C. of 1898 in a settlement proceeding under sec. 104 (2) has the effect of a decree under sec. 107 although it will not operate as *res judicata*. *Mohim* v. *Kalitara*, 11 C. W. N. 1028.

A settlement holder is bound by the terms of his settlement to recognise intermediate tenure-holders mentioned in the settlement papers: *Tapanidhi* v. *Pitambar*, 5 C. L. J 67.

APPEAL.—Sec. 153 applies to a suit for rent brought by a co-sharer landlord who is a separate landlord *Bhabotarini* v. *Ekabbar*, 5 C. L J. 235.

A suit for *Phulkur* rent is a suit for rent and sec. 153 applies to it. 6 C. L. J. 668.

INCUMBRANCE.—Sec. 167 has no application to a sale in execution of a rent decree of a portion only of a tenure or holding; *Ramkinkar* v. *Akhil Chander*, 11 C. W. N. 350; nor does it apply to a sale in execution of a decree for rent of two or more tenures or holdings where one decree is obtained; but one suit for the rent of two or more holdings or tenures is maintainable. *Hridoy* v. *Krishna*, 11 C. W. N. 497: s. c. I. L. R. 34 Cal. 298.

SALE-PROCEEDS.—Under sec 169 the landlord is entitled to be paid out of the sale-proceeds the amount of rent due in respect of the tenure between the institution of the suit and the date of sale, in priority to the mortgagee of the tenure. *Prabal* v. *Jadupati*, I. L. R. 34 Cal. 724: s. c. 6 C. L. J 26.

POSSESSION.—The rule laid down in *Umatul* v. *Nemai*, 6 C. L. J. 592 that a person who has made a payment under sec. 171 is entitled to be placed in possession of the tenure upon application to the executing Court has been fully discussed in the case of *Ram Narain* v. *Lal Das*, 12 C W. N. 55: s. c. 6 C. L. J 595 where it has been held that an executing Court cannot order delivery of possession as against a stranger.

RECOGNITION.—The question as to whether the withdrawal of money deposited under sec. 171 has the effect of recognising the person making the deposit as a tenant is discussed fully in the case of *Thomas Barclay* v. *Syed Hossein*, 6 C. L J. 601. As to when a landlord is bound to recognise a transferee see *Baishtab Charan* v. *Akhil Chandra*, 11 C. W. N. 217.

SALE.—The High Court did not interfere with an order setting aside a sale under sec. 174 when the deposit fell short owing to a miscalculation of an officer of the Court. *Sheikh Fakir* v. *Biraj*, 11 C. W. N. 116.

SUIT FOR RENT AGIANIST SOME OF SEVERAL JOINT TENANTS.—Joint tenants are jointly and severally liable for rent, so a suit for rent against some of several joint tenants is maintainable. *Jogendra* v. *Nogendra*, 11 C. W. N. 1026.

LIMITATION.—Art. 2 (*b*) of Sch. III which applies to a suit by the sole landlord of an entire tenure or holding also applies to a suit for rent by a co-sharer landlord. *Jogendra* v. *Nagendra*, 11 C. W. N. 1026.

Art. 3 of Sch. III has no application to the case of dispossession by a landlord in the capacity of an auction-purchaser. *Mahomed* v. *Hirendra*, 5 C. L. J. 650.

CURRENT INDIAN CASES.

ABDUL RAHAMAN *v.* BHAGWAN DAS, I. L. R 29 All. 582. *Right of privacy, invasion of.*

A right of privacy is more substatially and materially invaded in this country by apertures which would permit a person to look on without being observed than by the existence of an open surface where the presence of a looker-on would at once be conspicuous and could easily be guarded against.

NAJINUDDIN AHMAD *v.* ALBERT PUECH, I. L R. 29 All. 584 *Civil Procedure Code, sec. 522—Appeal against a decree upon an award.*

Where a Court passed a decree without allowing to the parties the time prescribed by law for filing objections to the award, *held* that an appeal lay.

EMPEROR *v.* TULA, I. L R. 29 All. 586. *Indian Penal Code, sec. 211.*

A person should be given an opportunity of proving the charge which he had brought before he is prosecuted under sec. 211, I P. C.

MOSHAN *v.* MAKBUB, I L. R. 29 All. 589. *Court of Wards—Power of sale.*

Case where it was held that the discretion of the Court of Wards in selling a property could not be questioned by a Civil Court.

RAM SUKH *v.* RAM SAHAI, I. L. R. 29 All. 591. *Civil Procedure Code, secs. 314, 316.*

Even though a sale has become absolute on being confirmed under sec. 314, C. P. C., the Court may hold its hand and refuse to grant a certificate if before the certificate is granted the decree under which the property was sold is no longer subsisting.

THAMMAN *v.* MAHARAJA OF VIZIANAGRAM, 29 I. L. R. All. 593. *Adverse possession.*

Pessession by a third person during the continuance of a lease will not ordinarily be adverse.

GHASITI *v.* ABDUL SAMAD, I. L. R. 29 All. 596. *Civil Procedure Code, sec. 310A*

An appeal does not lie from an order refusing to restore an application under sec. 310A, C. P. C. dismissed for default.

EMPEROR *v.* BUDH LAL, I. L. R. 29 All. 598. *Indian Penal Code, sec. 411.*

Circumstances under which a managing member of a joint family was convicted under sec. 411, I. P. C: The key of the room where the stolen property was found was found with the accused.

NIADAR MAL *v.* RAUNAK, I. L. R. 29 All. 608. *Suit to set aside sale on the ground of fraud.*

A suit to set aside a sale on the ground of fraud is not maintainable when the ground was decided against the Plaintiff in a proceeding under sec. 108, C. P. C.

UMED *v.* JAS RAM, I. L. R. 29 All. 614. *Transferability of a holding.*

A judgment-debtor cannot raise the question that the property sold is not saleable when he did not raise any objection in execution having had opportunity to do so or who did not appeal against the order of sale if he could have preferred an appeal.

RAM NARAIN *v.* UMRAO, I. L. R. 29 All. 615. *Limitation Act, Sch. II, Art. 29.*

Art. 29 of Sch. II of the Limitation Act applies to a suit for damages on account of an unlawful attachment before judgment.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM OUDH.]

LORD MACNAGHTEN. SIR ANDREW SCOBLE. SIR ARTHUR WILSON. 1908. 4, February.	MIRZA MAHOMED REZA BEG, Appellant, *v.* MIAN HAMIDUDIN SHAH and others, Respondents.

Special leave to appeal—Custom—Concurrent findings—Substantial question of law—Alleged insufficiency of evidence.

This was an application for special leave to appeal to his Majesty in Council under the circumstances following:—

On 19th May 1900 the Appellant and the Respondents purchased from one Wahid Ali certain immoveable properties situate in the town of Bahraich for Rs. 20,000 and were duly placed in possession thereof. Wahid Ali was the head of a Mahomedan foundation known as Takia Mansove Shah and died on 20th April 1904. On 22nd September 1904 the Respondent Mian Hamidudin Ali Shah instituted a suit in the Court of the Subordinate Judge of Bahraich to recovor possession from the vendees of the said property sold to them. He alleged first that the said property was held by the vendor in trust for the said foundation; and secondly that on the death of the vendor the said property vested in the Plaintiff as trustee on his election as head of the foundation in place of the vendor deceased. In answer to that suit the vendees denied that the vendor held the property in trust or that it was ever dedicated to the use of the foundation, and also denied that the Plaintiff was validly appointed as head of the said foundation so as to give him a right to sue. On 30th January 1905 the Subordinate Judge delivered judgment in favour of the Plaintiff on both the matters raised in defence, and decreed delivery of possession of the property claimed. On appeal by the Appellant against that decree the Court of the Judicial Commissioner of Oudh on 16th January 1907 made a decree affirming the decree appealed from. On 15th February 1907 the Court of the Judicial Commissioner of Oudh dismissed the Appellant's application for leave to appeal to this Majesty in Council on the ground that the further appeal raised no substantial question of law.

Mr. De Gruyther for the Appellant:—Both Courts in India are in error in law first in presuming in the absence of evidence that properties purchased by the head of a foundation in his own name are purchased from trust funds or if purchased from private funds permanently dedicated to the use of the foundation; secondly, in finding that a grant of loan to a Fakir in his name is not personal to the grantee; and thirdly, in finding on the evidence, admitting it to be true, a valid succession by custom to the headship of the foundation, the election in the present instance only having been made by the Fakirs of the foundation, previous elections having been made by the principal residents of the town; and the evidence now adduced of the custom set up being insufficient in law in proof thereof.

Application refused.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 1504 OF 1907. MAHADEV LAL, Petitioner *v.* DHOMRAJ MAISRI, Opposite Party. 24th January 1908.

Indian Penal Code, secs. 417 and 511—The offence of attempt at cheating—Whether committed.

The facts are shortly these:—

The accused arranged a contract for the delivery of goods to the complainant's firm by Messrs. Birkmyre Brothers for whom he had no authority to act. The contract was repudiated by the latter firm as invalid. The complainant's firm pressed their claim under the contract and instructed a

pleader named Srish Babu to write to Messrs. Birkmyre Brothers and demand fulfilment. Then the accused finding that his fraud in connection with the contract was likely to be discovered went to the pleader Srish Babu, represented himself to be a member of the complainant's firm, which he was not, and instructed him to write a letter in the name of the complainant's firm to Messrs. Birkmyre Brothers stating that the contract which the complainant's firm had entered into had been cancelled. The pleader wrote the letter but before despatching it referred to the complainant's firm, and the accused's fraud was discovered. On these facts accused was convicted by the Chief Presidency Magistrate under sec. $\frac{417}{511}$, I. P. C., and sentenced to one month's rigorous imprisonment and a fine of Rs. 50.

This rule was issued for setting aside the conviction and sentence.

Their Lordships observed :—

"The grounds on which we have been asked to set aside the conviction are (1) that the accused have been convicted of attempting to cheat not the complainants' firm but the pleader Srish Babu (2) that the act of the accused did not amount to an attempt at cheating, as it was not likely to harm the pleader in any way.

The first of these grounds cannot prevail, because the prosecutor in all criminal cases is the Crown. . . . Then it would seem to us that his act does amount to an attempt to cheat the pleader. He made a very false representation to him. He caused him to write a letter to Messrs. Birkmyre Brothers which the pleader would not have written if it had not been for the false representation made to him by the accused. If this fraud had been successful it must necessarily have caused injury to the pleader in mind and reputation. The pleader would certainly have been likely to lose reputation, and perhaps business, if it appeared that he had been negligent and had been readily deceived by the accused. He might also have found himself involved in litigation."

The sentence was commuted to one of fine of Rs. 500 in all.

Mr. Garth, Mr. Pugh and *Babu Monmotha Nath Muckherji*, for the Petitioners.

Mr. Sinha and *Babu Chandra Sekhar Banerjee*, for the Opposite Party not allowed to oppose.

B. C.

CIVIL APPELLATE JURISDICTION. Before GEIDT and CHITTY, JJ. APPEAL FROM APPELLATE ORDER No. 431 OF 1906. DUKHARAN SING AND OTHERS, Defendants, Appellants v. MUSSAMAT BIBI SOGHRA, Plaintiff, Respondent. 10th February 1908.

Partition decree—Landlord and Tenant—Division of Tenancy—Sec. 88 Bengal Tenancy Act.

Plaintiff is zamindar of mouza Balour. Within his mouza there are 100 bighas of English lands held by the Plaintiff and the Defendants jointly as tenants at a uniform rate of annas three per bigha, the Plaintiff's share therein being 1 an. 15 dam. The Plaintiff brought a suit for partition of those lands and the different sets of Defendants also applied for partition of the lands according to their respective shares. The partition decree was made on the 20th August 1900 in which different plots of lands were allotted to the plaintiff and several sets of Defendants and the parties took delivery of possession according to their respective share of the lands alloted in the partition decree. The Plaintiff thereafter brought the present suit against the Defendants jointly for recovery of the arrears of rent in respect of the 14 an. 5 dam. share (*i.e.* excluding only his own share). The defence was that by the partition decree separate tenancies were created under the Plaintiff and they are bound only to pay rent for the lands held by them separately at the uniform rate of two annas per bigha and that the suit against them was not maintainable. The Munsiff upheld this contention and dismissed the suit In his judgment he said. "The entire tenure was put under partition at the instance of the Plaintiff and it was split up into several *taktas* in her own presence * *. It was perfectly known to the Plaintiff that division of land meant distribution of rent as well. It appears to me that allotment of the land was made according to the share of each party or sets of parties without any regard to the assets for the obvious reason that the rate of rent was uniform. If the Plaintiff consented to a division of the land it was quite easy affair for her to have known the *jama* payable for the land alloted to each Defendant or sets of Defendants. Then again it is not consistent with the principles of equity to make a Defendant or set of Defendants answerable for the whole *jama* when the Plaintiff is fully aware that under the partition he is in possession of only a portion of the land."

On appeal the learned District Judge set aside the decision of the Munsif and remanded the case for trial on the merits. The learned District Judge in his judgment observed. "The suit for partition was brought by the Plaintiff not as a proprietor but as a co-sharer in the English land and by the Plaintiff's action in bringing the suit, she has not consented to a division of the tenancy which the Defendant held under her as proprietor. It is true that the suit gave the Defendants an opportunity to get the remaining English lands which fell within their tenancy partitioned but that cannot amount to the Plaintiff acquiescing in or consenting to the division of their tenancy under her and serve the purpose of her consent in writing as required by sec. 88 Bengal Tenancy Act. The joint liability of the Defendants to pay rent to her continues in spite of the partition. The lower Court speaks of equity but as there is in sec. 88,

B. T. Act an express provision law on the subject equitable considerations cannot arise."

Against this order the Defendants preferred the above appeal to the High Court and it was contended on their behalf that sec. 88, Bengal Tenancy Act is not conclusive on the point. Bengal Tenancy Act is not exhaustive but only embodies certain law on the subject, see preamble to the Act. There are other means except consent in writing as laid down in sec. 88, by which a tenure can be subdivided so as to bind the landlord. In Act X of 1859, sec. 27 and Act VIII of 1868 sec. 26, there were similar provisions but inspite of the strict wordings of those sections it was held that subdivision of tenancies was effected by act of landlord other than his consent in writing. See 15 W. R. p 225, 25 W. R. 19 In this case the effect of the partition decree was to create separate tenures.

Held—The partition decree did not effect a subdivision of the tenancy within the meaning of sec. 88, B. T. Act and cannot affect Plaintiff's right as landlord to sue for the entire rent.

Babu Khetra Mohun Sen for the Appellants.

Mr A. Chowdhry and *Moulvi M. Isfaq* for the Respondent.

A. T. M. *Appeal dismissed.*

Civil Appellate Jurisdiction. Before Maclean, C.J. and Dass, J. Appeal from Original Decree No. 366 of 1906. MATI LAL PAL, Appellant *v.* MATI LAL NEOGI and others, Respondents. 21st February 1908.

Mortgagee purchasing share of equity of redemption —Splitting of security—Contribution.

This was a suit to enforce a mortgage. The original mortgagor died leaving three sons who became equally entitled to the equity of redemption. One of the sons sold his one-third share in the equity of redemption to the Plaintiff, the mortgagee. The Plaintiff after instituting his suit offered to allow one-third of the mortgage debt, as being the share of that debt which he was liable to pay as the purchaser of one-third share of the equity of redemption. The mortgagors, the owners of the other two-thirds of the equity of redemption, claimed to deduct from the mortgage debt the full value of the share purchased by the mortgagee. The lower Court accepted that view and dismissed the suit.

Held—That the mortgagee standing in the shoes of the mortgagor to the extent of the one-third share purchased by him, was only bound to give credit for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt.

Mati Lal Singh v. *Misree Lall* (2 N. W. P H C. R. 88) followed *Bisheshur Doyal* v. *Ram Sarup*, (I. L. R. 22 All. 284 F. B.), *Lkhmi Das Ram Das* v. *Jamna Das Sanker Lal*, (I. L. R. 22 Bom. 304 F. B.) and *Fakirya* v. *Gadiya*, (I. L. R. 26 Bom. 88) referred to.

Dr. Rash Behary Ghose and *Babus Norendra Chunder Bose and Surendra Chunder Bosu* for the Appellant.

Babu Bepin Chunder Mullick for the Respondents.

A. T. M. *Appeal decreed.*

Civil Appellate Jurisdiction. Before Brett and Coxe, JJ. Appeal from Appellate Decree No. 977 of 1906. GANGA PORSAD SHA Plaintiff, Appellant *v.* RAMKHELWAN PASSI Defendant, Respondent. 27th February 1908.

Forfeiture of tenancy—Landlord and Tenant—Notice to quit not necessary.

Plaintiff sued to eject the Defendant from a piece of land and house standing thereon on the allegation that he let out the house to Defendant at a monthly rent of annas eight; that during his absence Defendant commenced erecting a new building and though Plaintiff remonstrated the Defendant did not listen to him and have stopped payment of rent and by dispossessing the Plaintiff by his unlawful act the Defendant was in the position of a trespasser. The Plaintiff wanted *khas* possession of the land with mesne profits. The defence was that the land belonged to the Defendant and not to the Plaintiff and the suit was barred by limitation. Both the lower Courts found Plaintiff's title to the land was proved and the first Court gave the Plaintiff a decree directing the Defendant to vacate the land within one month but the lower Appellate Court dismissed the Plaintiff's suit on the ground, that as no notice to quit was given the suit was premature. The Plaintiff appealed and it was contended on his behalf (1) that no notice to quit was necessary as the Defendant repudiated the tenancy and never pleaded that he was Plaintiff's tenant. Notice to quit was necessary only when tenancy was admitted on both sides Woodfall on Landlord and Tenant 17th edition p 410. I. L R. 9 Bom. 517. The tenancy was determined under sec. 111 cl. (*g*) T. P. Act (2) question of notice was not raised in the written statement nor any issue raised on the point and the lower Appellate Court was wrong in making a new case for the Defendant. 9 C. W. N. 460 cited. The Respondent argued that the Plaintiff ought to have served notice to quit and based his cause of action on that, and that the tenancy has not been determined as the title of Plaintiff was denied in the written statement. I. L. R. 28 Cal. 125 cited,

Held—No notice to quit was necessary, the tenancy of Defendant was determined by his action, and his subsequent possession was that of trespasser. The Sub Judge was wrong in going into question of notice when it was not raised in the pleadings.

Babu Khetra Mohon Sen for the Appellant.

Babu Sashi Sekhar Bose for the Respondent.

A. T. M. *Appeal decreed.*

KABIRUDDIN *v.* THE KING-EMPEROR.

They have been referred to by my learned brother in his judgment and I need not discuss them.

For the above reasons I concur with my learned brother and dismiss this appeal.

B. C. *Appeal dismissed.*

PRIVY COUNCIL.

[CONSOLIDATED APPEALS FROM BENGAL.]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1908.
24, January.

RAJA RAI BHAGWAT DAYAL SINGH and ors., Appellants,
v.
DEBI DAYAL SAHU and others, Respondents.
and
RAJA RAI BHAGWAT DAYAL SINGH and ors, Appellants,
v.
DEBI DAYAL SAHU, Respondent.

Champerty—Assignment—Validity, if may be questioned by third parties—Consideration made payable upon success of suit—Gambling in litigation—Public policy—Purchase from limited owner—Hindu woman's estate—Onus on purchaser, extent of—Ratification—Contract Act (IX of 1872), sec. 196—Sale without legal necessity—Recovery by reversioner—Mesne profits, claim for.

In India an agreement cannot be avoided on the ground of champerty.

RAM COOMAR COONDOO *v.* CHUNDER CANTO MOOKERJEE (1), KUNWAR RAM LAL *v.* NIL KANTH (2) and LAL ACHAL RAM *v.* RAJA KAZIM HUSAIN KHAN (3) *followed.*

(1) L. R. 4 I. A. 23: s. c. I. L. R. 2 Cal. 233 (1876).
(2) L R. 20 I. A. 112 (1893).
(3) 9 C. W. N. 477: s. c. L. R. 32 I. A. 113; I. L. R. 27 All. 271 (1905).

The agreement in this case provided that out of the purchase money which was fixed at Rs. 52,600, Rs. 600 only was to be paid down and the balance when the property should be recovered,

Held—*That the agreement was generally of a champertous character but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration.*

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment.

One who claims title under a conveyance from a Hindu woman with the usual limited interest which a Hindu woman takes, and who seeks to enforce that title against reversioners is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier; and this rule is recognised in sec. 196 of the Indian Contract Act.

Where the Defendant held possession of properties under deeds of sale from a limited owner, which were found to have been executed without legal necessity, the

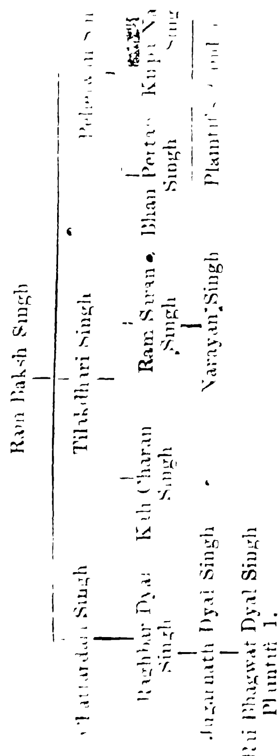
RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

Plaintiff's claim for mesne profits was allowed.

Two consolidated appeals from two decrees of the High Court of Judicature, at Fort William in Bengal dated 20th July 1903, modifying two decrees of the Court of the Subordinate Judge of Zillah Ranchi dated 20th December 1899, and dismissing the Appellants' suits with costs.

The main questions raised in the appeal were whether the suits were maintainable on the ground of champerty and maintenance, and whether two deeds of sale executed by certain Hindu ladies were valid and binding on the male reversioners to the estate of the last male owner in possession.

The following pedigree will help to explain the facts of the case:—



Of the persons named in the above pedigree, Tilakdhari Singh was the owner of the villages Lalgara, Chiyanki and Ganka—the subject matter of the suits, and others. He died in 1868, and was succeeded by his son, Ram Saran Singh, his other son, Kali Charan Singh, having predeceased him. Ram Saran Singh died on 7th February 1879, and was succeeded by his infant son, Narayan Singh, who died while still an infant and unmarried, on 7th August 1879, leaving him surviving his step-mother, Mussammat Etraj Koer, the widow of Ram Saran Singh, as also his grandmother, Mussammat Jileb Koer, the widow of Tilakdhari Singh, and Mussammat Aprup Koer, the widow of Kali Charan Singh. The male members of the family then alive were Rai Bhagwat Dyal Singh, Bhan Pertab Singh, Kirpa Narayan Singh.

On 10th February 1877, Ram Saran Singh had granted to the Respondent Debi Dayal Sahu a *zurpeshgi* lease of certain lands in the village Lalgara for a term of five years at an annual rental of Company's Rs. 2, "in lieu of a loan of money under a bond and expenses amounting to Company's Rs. 600, which is fixed as *zurpeshgi* money."

On 9th March 1180, Mussammat Etraj Koer having borrowed Rs. 600 "for paying off the debts due to creditors" of her husbad, from Debi Dayal Sahu, fixed that sum as *zurpeshgi* money and granted to him a *zurpeshgi* lease of certain lands in the village of Lalgara for a term of 9 years, at an annual rent of Rs. 2 "in lieu of the aforesaid *zurpeshgi* money of Rs. 600."

On the same date Mussammat Etraj Koer granted to Debi Dayal Sahu a *zur-*

peshgi ticca pattah in the entire 16 annas of Mouzahs Chiyanki and Ganka for a term of 9 years at an annual rental of Rs. 20. The deed recited that "Rs. 6,400 has justly been found due, according to account up to this day under 3 registered instalment bonds and simple bonds to Debi Dayal Sahu—by the late Thakurai Ram Saran Singh,—and . . . the said amount is daily increasing by interest, and it is impossible for me (Etraj Koer) to pay it off in one lump, for this reason, I (Etraj Koer) have executed a separate bond to the said Sahu for Rs. 200 out of that amount and there remained a balance of Rs. 6,200, and I (Etraj Koer) have fixed the said amount as *zurpeshgi* money" The whole of the sum of Rs. 6,200, the *zurpeshgi* money was set off in payment of the money formerly due to the Respondent, Debi Dayal Sahu.

On the same date Mussammat Etraj Koer gave the Respondent Debi Dayal Sahu a bond for the repayment of the balance of Rs. 200 referred to in the recital of the last mentioned deed and undertook to "repay the said amount principal with interest at the rate of 8 annas per cent per mensem in one lump sum on 30th Magh 1288 F." If the principal and interest remained unpaid on the promised date, the interest after that date was to run at the rate of Rs. 2 per cent. per mensem up to the date of payment of the principal and interest.

On 24th July 1880, Mussammat Etraj Koer executed a simple bond in favour of Debi Dayal Sahu for Rs. 1,000. The rate of interest was Rs. 2 per cent. per mensem and the amount was made up as follows:—

1. Due under bond dated 9th March 1880	...	Rs. 200
2. Paid in Cash	...	„ 800
		Rs. 1,000

On 26th August 1880, the Court of the Deputy Commissioner, and the Subordinate Judge, Lohardaga, granted a certificate under Act XXVII of 1860, to Mussammat Etraj Koer, whose application was opposed by Bhan Pertab Singh.

On 16th May 1881, Raja Rai Bhagwat Dayal Singh instituted a suit against Mussammats Etraj Koer, Jileb Koer and Aprup Koer to recover possession from them of all the villages which had been in the possession of Narayan Singh, basing his title on an alleged family custom by which maintenance grants reverted to the Raj on the death of the maintenance holder without direct male descendants. The suit was finally determined by a judgment of the High Court of Judicature at Fort William in Bengal, on 11th July 1883, which decided that the village of Nawa reverted to the Raj under the alleged custom, but that the remaining villages in suit were the self-acquired property of Tilakdhari Singh, and, as to those, the suit was dismissed. Bhan Pertab Singh and Kirpa Narayan Singh intervened in that suit.

On 12th July 1882, Mussammat Etraj Koer "borrowed Rs. 2,000 in cash for necessary expenses in the High Court" from Nandram Dubey at Rs. 2 per cent. per mensem and gave him as security for the loan a mortgage on the village Sonehera.

On 19th October 1882, Mussammat Etraj Koer executed a bond for Rs. 600 in favour of Debi Dayal Sahu, of which

RAJA RAI BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.

"Rs. 300 is due to him, on account of expenses, taken in cash" and Rs. 210 borrowed in cash "for purpose of meeting expenses." The rate of interest was 2 per cent. per mensem.

On 30th August 1883, Mussammat Etraj Koer gave Debi Dayal Sahu a mortgage bond of Rs. 3,500 on Chiyanki and Ganka at Rs. 1-12 per cent. interest per mensem. It recited that "according to account Rs. 2,613-14 has now been found due to Debi Dayal Sahu . . . under two former bonds (dated 24th July 1880, and 19th October 1882) and petty amounts borrowed at different times, and now I (Etraj Koer) have borrowed Rs. 886-2 for the purpose of making payment to Muktar Maksud Ali and meeting necessary expenses"

On 4th March 1884, Mussammats Etraj Koer, Jileb Koer, and Aprup Koer executed in favour of Debi Dayal Sahu a mortgage bond on Chiyanki and Ganka for Rs. 5,387 at Rs. 1-12 per cent. interest per mensem It recited that "money is due to Debi Dayal Sahu . . . under a registered *zurpeshgi* pattah, dated 9th March 1880, for Rs. 6,200 . . . another registered *zurpeshgi* pattah, dated 9th March 1880, for Rs. 600 . . . and a *zurpeshgi* pattah, dated 10th February 1877, . . . for Rs. 600. . . . And besides this, according to account, Rs. 3,887, principal and interest, has been found due by us (the three Mussammats) under a registered mortgage bond, dated 30th August 1883 . . . and we (Mussammats) now borrow Rs. 1,500 from the said Sahu in cash for the purpose of meeting the expenses of the marriage of the daughters of Thakurai Ram Saran Singh deceased."

On 2nd May 1884, Mussammats Jileb Koer, Aprup Koer and Etraj Koer, gave William Arthur Redford two mortgage bonds for Rs. 4,000 on the villages Lalgara and Hurilong. They were identically in the same terms and each contained the following recital:—"The marriages of the daughters of the late Thakurai Ram Saran Singh . . . are about to take place, and the bridegroom's party is expected to come here to-morrow from districts Balia and Ghazipur; therefore to meet the expenses of the marriages and to keep up the dignity and prestige of us, the declarants, and that of our family, we are in need of Rs. 4,000. For this reason, we, the declarants, out of our respective free will and accord, have borrowed Rs. 2,000— on interest at the rate of Rs. 2-8 per cent. per mensem."

On 26th May 1884, the three Mussammats borrowed Rs. 4,000 from N. A. Hodges at the same rate of interest and for the same object as stated in the mortgage bonds given to Redford.

On 22nd December 1884, the three Mussammats borrowed Rs. 600 from Akhouri Gokhulnand, who subsequently obtained a decree against them for Rs. 785-15-6.

On 20th August 1885, the three Mussammats executed a mortgage deed on Lalgara in favour of Debi Dayal Sahu for a consideration of Rs. 10,000 made up as follows:—

		Rs.	A.	P.
1. Due under deed, dated 4th March 1884	...	7,083	12	0
2. Paid in cash	...	2,916	4	0
	Rs.	10,000	0	0

The deed recited that the cash was

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

borrowed "for the purpose of paying off the debts due to the other creditors and to meet necessary expenses." The interest was at the rate of Rs. 1-12 per cent. per mensem.

On 24th September 1885, the three Mussammats borrowed from Debi Dayal Sahu Rs. 300 at Rs. 2 per cent. per mensem "for the purpose of paying interest to Hodges Sahib" and executed a simple bond in his favour.

On 27th January 1886, Mussammat Etraj Koer executed a mortgage deed in favour of Nandram Dubey for Rs. 4,000, made up as follows :—

	Rs.	A.	P.
1. Principal and interest due under bond, dated 12th July 1882 ...	3,754	11	0
2. Principal and interest due under bond, dated 18th January 1885	125	8	0
3. Paid in cash ...	119	13	0
Rs.	4,000	0	0

The interest was at the rate of Rs. 2 per cent. per mensem, and the cash was borrowed "on account of necessary business."

On 19th January 1887, the three Mussammats sold the villages of Chiyanki and Ganka to Debi Dayal Sahu and executed a deed in his favour. The consideration was Rs. 20,916-5 made up as follows :—

	Rs.	A.	P.
1. Principal and interest due under deed, dated 9th March 1880 ...	6,200	0	0
2. Principal and interest due under deed, dated 20th August 1885 ...	13,068	5	0
3. On account of expenses ...	50	0	0
4. Principal and interest due under bond, dated 24th September 1885	398	0	0
5. Paid in cash ...	1,200	0	0
Rs.	20,916	5	0

It recited that "these debts were incurred for the purpose of meeting legal and *shastri* expenses and it is proper and necessary under every circumstance for us (the three ladies), the declarants, to pay it off; and the interest of the said money is daily increasing whereby it is apprehended that the properties held by us, the declarants, shall be ruined and destroyed. And besides this, money is also due to several other creditors. For this reason there is no other means whereby this heavy debt and debts due to the other creditors can be paid off by us, the declarants. Therefore, under these circumstances, except by transferring a portion of the properties held by us, it is impossible to pay off the aforesaid debts in any other way."

On 2nd August 1887, Redford obtained on his two registered mortgage bonds, dated 2nd May 1881, a decree for Rs. 5,977-5-11. And on same date Hodges obtained on his registered bond dated 26th May 1884, a decree for Rs. 5,098-13-6. In execution of these decrees Lalgara was put up for sale.

On 11th September 1888, the three Mussammats borrowed Rs. 8,000 at Rs. 2 per cent. per mensem from Hanuman Singh to pay off the decretal amounts due to Redford and Hodges and executed a deed of mortgage on Lalgara in his favour.

On 13th October 1890, the three Mussammats borrowed Rs. 500 "for the pur-

pose of giving portion presents (*rukhsut*) to sons-in-law," from Ganput Sahu and Ram Ratan Sahu, sons of Debi Dayal Sahu, and gave them a simple bond.

On 16th October 1890, the three Mussammats executed a deed of mortgage on Lalgara in favour of Ganput Sahu and Ram Ratan Sahu for a consideration of Rs. 1,000 made up as follows :—

	Rs.	A.	P.
1. Due bond, dated 13th October 1890 ...	500	0	0
2. On account of petty expenses ...	156	0	0
3. Cash payment ...	344	0	0
Rs	1,000	0	0

Rs. 344 was borrowed "for the purpose of paying off the debts due to creditors." Rs. 2 per cent. per mensem was the rate of interest.

On 15th May 1891 the three Mussammats executed in favour of N. A. Hodges a deed whereby they sold the village of Lalgara to him for a consideration of Rs. 34,000 made up as follows :—

1. Paid to Hanuman Sing on account of principal and interest due to him under the mortgage deed, dated 11th September 1888	13,136	10	0
2. Paid to the Sahus on account of principal and interest due under three mortgage deeds, dated 10th February 1887; 9th March 1880; and 16th October 1890 ...	2,340	0	0
3. Paid to Akhouri Gokhulnand ...	801	4	6
4. Paid to Nandram Dubey on account of principal and interest due under the mortgage deed, dated 27th January 1886 ...	6,800	0	0
5. Paid in cash ...	10,922	1	6
Rs.	34,000	0	0

The deed recited *inter alia* that "Rs. 40,000 or 42,000 is due to the creditors by us, the declarants; but, we, the declarants, could not pay it off up to this moment; and if this debt be not paid off for a short time more, then all the properties held and possessed by us, the declarants, will be sold at auction sale and will be ruined, and it is impossible to pay off such a large debt by any means except by means of transfer of property." Of the consideration it set out that "Rs. 23,077-14-6 has been set off and deposited with the said Sahib and we have received now the balance Rs. 10,922-1-6 from the said vendee."

On 1st December 1893, N. A. Hodges executed a deed of sale and conveyed his interest in the village Lalgara to Debi Dayal Sahu, Ganpat Sahu, Ram Ratan Sahu and Ram Bilas Sahu for a consideration of Rs. 40,000.

Mussammat Jileb Koer died on 22nd November 1894. Mussammat Aprup Koer died on 7th February 1895. On 29th November 1895 Bhan Pertab Singh and Kirpa Narayan Singh sold the whole of their right, title and interest in the estate of Narayan Singh to Raja Rai Bhagwat Dayal Singh for a consideration of Rs. 52,600, of which the sum of Rs. 600 was paid in cash to the vendors and the balance was only payable to them in the event of the

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

vendee's success in obtaining the property in suit "and in the event of recovery of a portion of the property sold a proportionate amount only was payable." Mussammat Etraj Koer died on 25th August 1897.

On 29th August 1898, Raja Rai Bhagwat Dayal Singh, Bhan Pertab Singh, and Kirpa Narayan Singh instituted two suits in the Court of Subordinate Judge of Ranchi. One of the suits (No. 8 of 1899) related to the village of Lalgara and the Defendants to that suit were Debi Dayal Sahu, Gunpat Sahu, Ram Ratan Sahu, Ram Bilas Sahu, and the executors of N. A. Hodges now represented by J. W. Sowton. The other suit (No. 9 of 1899) related to the villages Chiyanki and Ganka, and Debi Dayal Sahu was the sole Defendant thereto. The pleadings and issues in both suits were similar. The plaint alleged *inter alia* that large property consisting of land and moveables, which passed on the death of the last male owner to his heiress, produced an income of Rs. 10,000 a year. If the deeds of sale of the villages in suit were in fact executed, they were valid only for the life of the executant. The Defendants knew, or, on inquiry, might have known that the income revived by Mussammat Jileb Koer from the estate of the last male-holder, was more than amply sufficient to meet all her legitimate wants, and all legitimate charges thereon, and that there was no necessity, either in fact or law, for the alienation of the property in suit. The title of Bhan Pertab Singh and Kirpa Narayan Singh to succeed on the death of Mussammat Jileb Koer was acquired by Bhagwat Dayal Singh under the sale deed of 29th Novembe 1895. The prayers of the plaint were possession to be given to the first Appellant, and for mesne profits, a declaration and further and other reliefs.

The defence was *inter alia* that Etraj Koer was in adverse possession of the estate for 12 years and had thereby obtained on absolute title, and, ultimately, that if Jileb Koer took the estate by inheritance, she took an absolute estate as paternal grandmother under the Mitakshara law. That the Mussammats joined in the deeds fully understading the value and consequence of the transaction and for proper value. "The consideration money obtained by the purchase of the property in suit has been applied to the payment of lawful and necessary debts, and for lawful and necessary purpose." The conveyance to Bhagwat Dayal Singh was without consideration; collusive and fraudulent, immoral and opposed to public policy, being made for the purpose of gambling in litigation.

Of the issues fixed in suit No. 8 of 1899 it is necessary to mention here only the following:—

"5. Is the *kobala* executed by Plaintiffs Nos. 2 and 3 in favour of Plaintiff No. 1, in November 1895, a *bonâ fide* and valid deed? Did any consideration pass thereunder?

"6. Were Mussammats Jileb Koer, Aprup Koer, and Etraj Koer, the absolute owners of property in dispute, or was their interest a qualified one?

"7. Is the *kobala*, dated the 19th January 1887, executed by the Mussammats in favour of the Defendants, a legal and valid document? Was it executed fo legal necessities. Did any

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

consideration pass, and did such go to satisfy debts, which costitute legal necessities? Is it binding on the reversioners?"

On 20th December 1899, the Subordinate Judge delivered one judgment in both suits. He decided the fifth issue in favour of the Respondents, holding that the conveyance under which the first Appellant claimed was gambling in litigation, immoral, and not enforceable on grounds of public policy. He, however, added, the conveyance failing, the title of the vendors, the 2nd and 3rd Plaintiffs, remained, and that they were entitled to a decree, if the alienations made by the ladies be invalid in law. On the sixth issue he decided that Jileb Koer was solely entitled to the succession to the last full owner and that she took a qualified estate. On the seventh issue he was of opinion that the estate of the ladies had been mismanaged, and that advantage had been taken of their position. He found that legal necessity was proved in regard to the payment of ancestral debts, and for the expenses attendant on the marriage of Ram Saran Singh's daughters. In the result he passed decrees for possession in favour of the 2nd and 3rd Appellants conditional on the payment to the Respondents of the sum of Rs. 11,198-13 6, and Rs. 6,400 in suits Nos. 8 and 9, respectively, made up as under:

Suit No. 8.

	Rs. A. P.
Amount covered by the *zurpeshgi* pattah, dated 10th February 1877	600 0 0
Part of the amount of the mortgage bond, dated 4th March 1884	1,500 0 0
Amount of Redford's bond, dated 2nd May 1884	2,000 0 0
Amount of Redford's bond, dated 2nd May 1884	2,000 0 0
Amount of Mr. Hodge's decree	5,098 0 0
Total Rs. ...	11,198 13 6

Suit No. 9.

Amount of the *zurpeshgi* pattah, dated 8th March 1888 ...	6,200 0 0
Amount of simple bond, dated 9th March 1880	200 0 0
Total Rs. ...	6,400 0 0

Both the Appellants and the Respondents appealed to the High Court of judicature at Fort William in Bengal. On 20th July 1903 that Court delivered its judgment dismissing the suits with costs. The finding of the Subordinate Judge that the suits were not maintainable by Bhagwat Dayal Singh was affirmed, and on that finding the High Court was of opinion that the suits ought to have been dismissed. It also held that there was legal necessity for the execution of each deed of sale and that they were made for adequate consideration. The material portion of the judgment of the High Court is as follows:—

"We agree with the Subordinate Judge that this deed is void for the reasons assigned by him. In the first place, the property conveyed is worth three lakhs. The consideration of the conveyance was Rs. 52,000, of which the sum of Rs. 600 only was said to have been paid. The balance was to be paid

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

in proportion to the Plaintiff's success in recovering the property. Although the English rule against champerty and maintenance does not prevail in this country in its entirety, yet this would seem clearly an unconscionable and speculative agreement, and one opposed to public policy as fostering and promoting gambling in litigation, and hence void as found by the Subordinate Judge. *See Ram Coomar* v. *Chunder Canto* (1) and *Fischer* v. *Kamala Naicker* (4).

"The next question which arises is, whether the Plaintiff's suit should not have in these circumstances been entirely dismissed. It seems to us that they should. The Plaintiff No. 1 has been found by the Subordinate Judge to have no title to the property. He is the only person who claimed possession of it. When his suits are dismissed, it seems to us, the Subordinate Judge was not justified in giving the Plaintiffs Nos. 2 and 3 a decree for relief, which they did not ask for and in respect of which in their plaints they made no claim. In the plaints they alleged that they had entirely transferred their interests to the Plaintiff No. 1. They asked for nothing for themselves. In paragraph 20, it is alleged that the Plaintiffs 2nd party are made parties to the suits merely in order that the suits may be decided in their presence,—so that they may be bound by the decisions. They might, therefore, have equally well been Defendants —if indeed they should not more properly have occupied that position.

"We, therefore, feel no doubt that the sales disputed in these suits were good sales, made for legal necessity, and after due enquiries had been made by the purchasers, which in the circumstances they were not required to make. The suits seems to belong to a class very common in the country, in which reversioners endeavour to recover property alienated by Hindu widows for legal and pressing necessities, and in which purchasers of property from such widows too often lose both their property and the money they have paid for it. It is unnecessary, we think, to discuss the last plea raised by the Defendant, *viz.*, whether the Subordinate Judge was justified in giving the Plaintiffs decrees for the recovery of the property conditional on their payment to the Defendant of the sums of Rs. 11,198 and Rs. 6,409. We would only say that we do not think he was. The Plaintiffs made no offer to pay off any sums which might be found to have been borrowed for legal necessities The Plaintiffs deliberately chose to rest their cases upon allegations of wasteful, extravagant, and unnecessary borrowing, and they have failed to substantiate their allegations. They have never offered to repay any portion of the purchase money and we do not consider that the alienations were in excess of the legal requirements of the case, and that the purchasers in any way failed to make proper enquiries."

. For the full text of the judgment, see 8 C. W. N. 408.

The Appellants, thereupon, preferred the present appeals to His Majesty in Council.

Mr. Cohen, K. C., and *Mr. Brown* for the Appellants.—The lower Courts were wrong in holding that the deed of con-

(1) L. R. 4 I. A. 23 : s. c. I. L. R. 2 Cal. 283 (1876).
(4) 8 M. I. A. 171 at p. 187 (1860).

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

veyance executed by the 2nd and 3rd Appellants in favour of the 1st Appellant was void. Reference was made to *Bradlaugh* v. *Newdegate* (5) and *Alabaster* v. *Harness* (6) for the English law of maintenance and champerty But the English law does not go so far as to upset an agreement of this kind. There is not a single English case to support the view taken by the Courts in India. But in India the English law of maintenance and champerty has never been introduced, and, therefore, the agreement in question is valid: *Ram Coomar Coondoo* v. *Chunder Canto Mukerjee* (1). Again in the case of *Kunwar Ram Lal* v *Nil Kanth* (2) it is laid down that the English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy. The lower Courts were wrong in holding that this agreement was against public policy as it was a gamble in litigation. The question of the validity of the agreement could arise only between the parties to it. The Respondents are not parties to it and they cannot question its validity on the ground of its being champertous: *Lal Achal Ram* v. *Raja Kazim Husain Khan* (3).

The Subordinate Judge was right in setting aside the alienations to the Respondents. There is a general prayer of relief in the plaint and that would cover the decree made by the Subordinate Judge.

A Hindu widow cannot of her own will alienate property except for special purposes, if there be collateral heirs of her deceased husband. To support an alienation for worldly purposes she must show necessity: *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (7). In order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shown, in a case like this, that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was. The obligation on the grantee is to inquire and satisfy himself that the widow from whom he is taking a charge upon her husband's inheritance had a proper justification for so charging. This onus is not discharged, if the grantee or mortgagee rests content as the Respondents here do, with the vague and misleading statements in the deed. Nor would it be discharged by thinking that he, the mortgagee, is taking title under an absolute owner: *Lala Amarnath Sah* v. *Rani Achan Kuar* (8). It is for the mortgagee or alienee to allege and prove the circumstances which alone will give validity to the mortgage: *Sham Sunder Lal* v. *Achhan Kunwar* (9). Reference was also made to *Tacoordeen Tewary* v. *Nawab Syed Ali Hossein Khan* (10),

(1) L R. 4 I. A. 23: S. C. I. L. R. 2 Cal. 233 1876)
(2) L. R 20 I. A. 112, 115 (1893).
(3) 9 C W N. 477: S. C. L. R. 32 I. A. 113; I. L. R. 27 All. 271 (1905).
(5) 11 Q B D. 1 (1886).
(6) (1895) 1 Q. B. 339 (1894).

(7) 8 M. I A. 500 at pp. 549-551 (1860).
(8) L. R. 19 I A 196 at p. 202 (1892).
(9) 2 C. W N. 729: S. C. L. R. 25 I. A. 183 at p. 191 (1898).
(10) L. R. 1 I. A. 192 (1874).

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

Baboo Kameshwar Pershad v. *Run Bahadoor Singh* (11), *Tika Ram* v. *Deputy Commissioner of Bara Banki* (12) and *Deputy Commissioner of Kheri* v. *Khanjan Singh* (13). The Subordinate Judge was right in holding that the Respondents have not discharged the burden of proof that is incumbent upon them to validate the deeds of 19th January 1887, and 15th May 1891. Debi Dayal Sahu himself says "I cannot say how much did the Mussammats borrow for the suit. I did not inquire how much had the Mussammats borrowed for the suit before borrowing from Nand Ram, Rs. 10,900; Rs. 1,000 and Rs. 4,200 were given to the Mussammats to pay off their creditors. I heard of this. I made no inquiries about this. I do not know whether Mr. Hodges did not himself keep back the amounts to pay off such creditors. I do not know whether such creditors had bonds. I made no inquiry when I purchased whether such men had bonds." The High Court is wrong on this point. The deeds in question are not valid and binding against the Appellants and the Subordinate Judge has adopted the right mode of dealing with them.

Earlier bonds and mortgages were given by Etraj Koer, who had no interest in the property during the lifetime of Jileb Koer. They were not binding on the Appellants. The consideration stated in each of the sale deeds mainly went towards the discharge of debts incurred by Etraj Koer and interest on those debts. They were not, under the circumstances, binding on the Appellants.

Sir Robert Finlay, K. C, and *Mr. De Gruyther* for the Respondents.—The other side submitted that whether the agreement was void on the ground of its being champertous was a matter between the parties to it. But that is not so. This is not a deed got out of a party in necessity; nor is it extortionate. If the validity of the deed were questioned on those grounds, it would be a matter between the parties. But in this case the payment of the bulk of the consideration money depends upon the success of the then contemplated suit. That is merely a gamble in litigation, and contrary to public policy, and the Courts were right in holding the agreement void on those grounds. The question of its validity need not be raised only by a party to it. The Respondents, who are not a party to it, could question its validity: *Tara Soondree Chowdhrani* v. *The Court of Wards on behalf of Shama Soonduree* (14), (N. B., *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1) was a sequel to this case).

Though the English Statute law and Common law are not introduced into India, there is something very similar to that in India, which will upset an agreement of this kind on the ground of public policy, and also on the ground of its being a gamble in litigation: *Lal Achal Ram* v. *Raja Kazim Hussain Khan* (3).

(11) L. R. 8 I. A. 9, 11 (1880).
(12) L. R. 26 I. A. 97 (1899).
(13) 11 C. W. N. 474: s. c. L. R. 34 I. A. 72; I. L. R. 29 All. 331 (1906).

(1) L. R. 4 I. A. 23: s. c. I. L. R. 2 Cal. 233 (1876).
(3) 9 C. W. N. 477: s. c. L. R. 32 I. A. 113 at p. 121; I. L. R. 27 All. 271 (1905).
(14) 20 W. R. 446 (1871).

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

[LORD ROBERTSON.—Can you show me any form of an agreement of this class, which would not be a gamble in litigation?]

Sir Robert Finlay.—The agreement is against public policy and is legally immoral; and though the law of maintenance and champerty is not binding in India, it should be set aside on the ground of public policy.

[LORD ROBERTSON.—Society in India makes it inexpedient to apply the law of champerty there.]

Reference was also made to Stephen's Commentaries (5th Ed.), Vol. 4, Bk. VI Ch. 9 XIII, pp. 316, 317; Corpus Juris Civilis, Bk 48, title 10, para 20 (1865) 5th Ed., Lipsial; Le Droit Civil Explique, (15th Ed. 1856) by M. Troplong, p. 482; Corpus Juris Civilis, (1865) edited by D. Albertus Et. D. Mauritius Fratres Krisgelu, Vol. I, Bk. 44, title 6, and Vol. II, Bk. 4, title 35, and Bk. 8, titles 36 and 37; Dictionaire Usuel De Droit by Max Legrand—Retraint Litigieux; and French Code, Vol. 2, Arts. 1699 and 1700.

The 1st Appellant (Plaintiff) claims possession and mesne profits on the ground of the alleged custom and assignment. The Subordinate Judge was wrong in giving the 2nd and 3rd Appellants the relief, which he did. Neither of them has claimed any relief in the plaint, which is not amended. No amendment, which is inconsistent with the original character of the suit, could now be made: Civil Procedure Code (Act XIV of 1882), sec. 53. Relief given by the Subordinate Judge could not come under a prayer of general relief in the plaint. Such a prayer must always be limited by two things:—The facts which are alleged and the relief which is expressly asked: *Cargill* v. *Bower* (15). Any relief which might have negatived another suit under sec. 13 of the Civil Procedure Code ought to be included in the general prayer, but not a relief of this kind.

[LORD ROBERTSON—It breaks up the alliance, which is the theory of the plaint.]

Sir Robert Finlay.—Yes, my Lord. One claim is absolutely repugnant to the other. No amendment of the plaint was in fact made.

The evidence shows that debts were incurred for necessaries. Money was borrowed over and over again to pay previous debts. Money borrowed to pay the costs of litigation was reasonable. Again, money borrowed to meet the marriage expenses, which were not extravagant, was a necessity. It is not incumbent upon the persons advancing money, as mortgagees or otherwise, to tax the bill and tell the borrowers, the ladies in this case, that a certain less amount of money would be sufficient instead of the sum contemplated to be spent. A Hindu widow is under an obligation to discharge her husband's debts and she could either mortgage or alienate property for that purpose. A female heir is bound to maintain, and perform the marriages, and other ceremonies of those who are a burden on the estate, and she may mortgage or sell the property to procure the necessary funds: See Mayne on Hindu Law and Usage, 7th Ed., secs. 633, 634, 635 and 346. Etraj Koer was the manager, and as such

(15) L. R. 10 Ch. D. 502 at p. 508 (1878).

she gave the bonds, which were ratified by Jileb Koer and Aprup Koer by their joining Etraj Koer in the later documents, which recite the earlier bonds. Looking at the evidence there is no case whatever of misconduct with the management of the three ladies or on the part of the Respondents. The High Court was right in holding that the alienations here were for necessaries, and, therefore, binding on the Appellants, the next heirs.

If the agreements of sale are set aside, the Respondents are entitled to be put in their original position. The figure decreed by the Subordinate Judge is quite out of the question. He allows no interest, which should be allowed.

Mr. Cohen, K. C., in reply, contended that neither the French nor the Roman Law of champerty would apply to India. Even the English Law on the subject was not in force in India. Reference was made to *Hutley* v. *Hutley* (16); *Tarachand* v. *Suklal* (17), and The Laws of England, Vol. I, p. 52, and the cases there cited. There was not a single case either English or Indian, where the Defendant was a third party and a stranger to the champertous agreement, and such agreement was set aside. Only one case of *Tara Soondaree Chowdhrani* v. *The Court of Wards on behalf of Shama Soonduree* (14) was cited, but in that case the Defendant derived her title through a party to the champertous agreement. Reference was also made to the Indian Contract Act (IX of 1872), sec. 30; Civil Procedure Code (Act XIV of 1882), sec. 18; and Principles of German Civil Law, by E. J. Schuster (Ed. 1907), Headings, Effects of Absence of Authority, Ratification, and Ratification of Agreements, pp. 119 and 120; and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhury* (18). Etraj Koer had no authority to act for and she was not acting as the Agent of Jileb Koer, who could not, therefore, ratify Etraj Koer's act. If the Appellants get a decree for mesne profits as well as for possession, the Respondents may have interest at the usual rate, *i.e.*, 6 per cent. per annum.

Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—These consolidated appeals relate to three villages, Chiyanki, Ganka, and Lalgara, and the substantial conflict is between the first Appellant and the first Respondent.

The villages with others were formerly the property of Ram Saran Singh, who on his death was succeeded by his infant son Narayan. Narayan died, while still an infant and unmarried, on the 7th August 1879, and left surviving him his grandmother Jileb Koer, an aunt Aprup Koer, widow of Ram Saran's brother, and a stepmother Etraj Koer, widow of Ram Saran Of these, the grandmother was heir to the boy's property, with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grandmother, which took place on the 22nd November 1894.

On the death of the grandmother, the inheritance again opened, and the second

(14) 20 W. R. 446 (1871).
(16) L. R. 8 Q. B. Cases 112 at p. 115 (1873).
(17) I. L. R. 12 Bom. 559 (1888).
(18) 13 M. I. A. 209 at p. 224 (1869).

RAJA RAI BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.

and third Appellants, Bhan Pertap Singh and Kirpa Narayan Singh, were then the nearest male heirs of the deceased boy. Those two persons, on the 29th November 1895, purported to sell the three villages in question to Rajah Bhagwat Dayal Singh, the first Appellant, and that is the title under which he claims.

The first Respondent, on the other hand, as the case is now put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grandmother, Jileb Koer, the sales being, it is contended, justified by necessity so as to pass the whole inheritance. The first of these deeds bore date the 19th January 1887. It purported to be a conveyance by way of sale, by the three ladies who have been mentioned, of the two villages Chiyanki and Ganka to the first Respondent. The second deed was dated the 15th May 1891. It purported to be executed by the same three ladies in favour of one Hodges, and to convey to him by way of sale the village Lalgara. Hodges afterwards conveyed to the first Respondent.

The present suits were brought on the 29th August 1898, in the Court of the Subordinate Judge at Ranchi. The Plaintiffs were the first Appellant and the two persons from whom he purchased. The sole Defendant in one suit and the substantial Defendant in the other was the first Respondent. The first suit related to village Lalgara, the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits.

The first question raised in the case and argued on the appeals was whether or not the sale by the second and third Appellants to the first Appellant was void in law, so as to pass no title on the ground that it was champertous, or contrary to public policy.

For the Respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases, *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1), *Kunwar Ram Lal* v. *Nil Kanth* (2), *Lal Achal Ram* v. *Raja Kasim Husain Khan* (3), before this Board, a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase money by the first Appellant to the second and third. The purchase money was fixed at Rs. 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

(1) L. R. 4 I. A. 23 : s. c. I. L. R. 2 Cal. 233 (1876).
(2) L. R. 20 I. A. 112 (1893).
(3) 9 C. W. N. 477 : s. c. L. R. 32 I. A. 113 ; I. L. R. 27 All. 271 (1900).

RAJA RAI BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as Plaintiffs in the present actions. Their Lordships are therefore of opinion that the attack upon the title of the first Appellant upon any such grounds as those indicated must fail.

The second question that has to be considered is whether the Respondent has shown a good title in himself by purchase from Jileb Koer, the grandmother, under the two sale deeds mentioned, and under such circumstances as to make that title effectual against the reversionary heirs.

The Subordinate Judge, who tried the cases held that the conveyances were not good but he allowed, in favour of the first Respondent, certain sums which he considered to have been advanced for purposes of legal necessity; and whilst giving a decree to the Appellants and Plaintiffs for possession of the property, he made that decree conditional upon the payment to that Respondent of the sums held to have been advanced for legitimate necessities. On the argument of these appeals, Mr. Cohen, for the Appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that the necessity for the sales in question was established.

Before dealing further with this question, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The Respondent in his written statement alleged a title derived, not from Jileb Koer, but from Etraj Koer. He said, in paragraph 21, that "Etraj Koer was no heir to Narayan Saran Singh, and that she acquired an absolute right by adverse possession;" in paragraph 23 "that it is not true, as the Plaintiffs allege, . . . that on the death of Narayan Saran Singh, Jileb Koer succeeded as heir and was in possession up to her death; the fact is . . . . . that Etraj Koer alone was in such possession until her death," and in paragraph 25 that "Jileb Koer and Aprup Koer never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deeds was a matter of form of evidence of members dependent for maintenance on Etraj Koer, and was merely a surplusage;" and it was added in paragraph 26 that "even if Jileb Koer were to have taken the estate . . . by inheritance, she would take it in absolute state . . . under the provisions of Mitakshara law, and so also if she was made a co-sharer by Etraj Koer in Etraj Koer's right." In his evidence given at the trial the Respondent endeavoured to maintain the case

RAJA RAI BHAGWAT DAYAL SINGH *v.* DEBI DAYAL SAHU.

that his title was derived from Etraj Koer and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the first Respondent were with Etraj Koer, and there is no satisfactory evidence to show that Jileb Koer, the real owner, took part in them, or authorised them in any way.

It was argued however that, if Jileb Koer was not shown to have authorised the earlier transactions, she had ratified them by being a party to the later documents and particularly the two sale deeds. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in sec. 196 of the Indian Contract Act. Looking to the substance of the matter, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could, by act *ex post facto*, charge upon the estate which she represents obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include one sum of Rs. 1,500 which the Subordinate Judge credited to the first Respondent in the manner already explained. Apart from this sum the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Koer with accretions interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale deed is not quite so simple. With regard to it the Subordinate Judge gave credit to the first Respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that deed he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first Respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration; and they see no sufficient ground for rejecting his conclusions.

There remains one other point for con-

RAJA RAI BHAGWAT DAYAL SINGH v. DEBI DAYAL SAHU.

sideration. The Plaintiffs claimed not only possession but mesne profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that, as the deeds of sale are not good as such, the claim for mesne profits is well founded. In argument it was conceded that on the other side of the account interest at 6 per cent. should be allowed on the sums credited to the first Respondent. The amounts thus to be allowed on the one side and on the other can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, that the decrees of the High Court should be discharged with costs to be paid as regards the first decree by the present Respondents other than Sowton and as regards the second decree by the first Respondent, that the decrees of the Court of the Subordinate Judge should be discharged, and that instead thereof it should be ordered that upon the first Appellant paying to the first Respondent the sums found in favour of the latter by the Subordinate Judge with interest at 6 per cent. per annum the first Appellant do recover possession of the property in suit together with mesne profits to be ascertained in execution proceedings and costs to be paid by the first party Defendants in the first suit and by the sole Defendant in the second suit.

The Respondents other than Sowton will pay the costs of these appeals.

Solicitors: *Messrs. Withal and Withal* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co*, for the Respondents other than Sowton.

Appeals allowed.

CIVIL APPELLATE JURISDICTION.

APPEAL FROM APPELLATE DECREE No. 611 OF 1906.

MITRA, J. CASPERSZ, J. 1908. Heard, 3 and 4, February. Judgment, 4, February.	MUNSHI BASIRUDDIN AHMED and anr., Plaintiffs, Appellants, v. MAHOMED JALISH PATWARI and ors., Defendants, Respondents.

Benamdar, *right of suit by—Mortgage—Conveyance without consideration.*

A benamdar *cannot bring a suit for recovery of a mortgage debt.*

A mortgagee assigned over his interest under the mortgage to the Plaintiffs who instituted the present suit against the mortgagors for recovery of the mortgage-debt. It was found that the assignment was a benami *transaction and was intended to put the mortgagors into difficulty,*

Held—*That the Plaintiffs' suit was rightly dismissed.*

LAL ACHAL RAM v. RAJA KAZIM HUSAIN (1) *distinguished.*

The mere non-passing of consideration is not sufficient to show that a transaction is benami.

This was an appeal preferred on the 25th of April 1906, against the decree of M. Yusuf Esq, District Judge of Zillah Noakhali, dated the 8th of March 1906, reversing that of Babu P. C. Ghose, Subordinate Judge of that district, dated the 29th of April 1905.

The facts found by the lower Appellate Court are as follows:—

Defendants Nos. 1 and 2 executed a mortgage in favour of Defendant No. 3.

(1) 9 C. W. N. 477: s. c. L. R. 32 I. A. 113; I. L. R. 27 All. 271 (1905)

MUNSHI BASIRUDDIN AHMED v. MAHOMED JALISH PATWARI.

In Aghran 1310, the Defendant No. 3 executed a *kobala* in favour of Plaintiffs Nos. 1 and 2 by which he purported to convey his interest under the mortgage to the Plaintiffs for a certain consideration. The lower Appellate Court found that "only 11 days previous to the execution of the *kobala* one Durlav, the maternal uncle of Defendant No. 1 had obtained sanction for the prosecution of Plaintiff No. 1 on charges of forgery and suppressing documents," and that "Defendant No. 1 had actively prosecuted on behalf of Durlav in the proceedings preliminary to the grant of sanction." There were besides various other causes of ill-feeling between the Plaintiffs Nos. 1 and 2 and Defendants Nos. 1 and 2. And the lower Appellate Court was of opinion that "the *kobala* was obtained by the Plaintiffs from Defendant No. 3 fraudulently and collusively without any consideration money having passed, with a view to harass the Defendants Nos. 1 and 2 with whom they were on bad terms, the immediate cause of enmity being the sanction granted to Durlav to prosecute the Plaintiff No. 1 for forgery, &c."

As the *kobala* was not a *bonâ fide* one and was without consideration, the lower Appellate Court was of opinion that the Plaintiffs were not entitled to maintain the suit, although Defendant No. 3 appears to have admitted the execution of the *kobala* and the receipt of the consideration money, Rs. 600 in cash and the rest in the shape of a note of hand executed by the Plaintiffs in his favour. Against this decision the Plaintiffs appealed to the High Court.

Moulvi Syed Shamsul Huda for the Appellants.

Moulvi Mahomed Yusuf and *Dr. Preo Nath Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

Defendants Nos. 1 and 2 executed a mortgage in favour of the Defendant No. 3. Years after the execution of the instrument, the Defendant No. 3 purported to assign over the interest created by the deed to the Plaintiffs Nos. 1 and 2. The Plaintiffs have instituted the present suit for recovery of the money covered by the mortgage and for sale of the immoveable property covered by it.

The defence was that the transaction between the Defendant No. 3 and the Plaintiffs was colourable and intended to cause unnecessary harm to the Defendants Nos. 1 and 2.

The lower Appellate Court has found that no consideration passed on the alleged transfer by the Defendant No. 3 to the Plaintiffs, that there was really no intention to transfer and that the Plaintiffs Nos. 1 and 2 got a colourable document in order to do unnecessary harm to the Defendants Nos. 1 and 2.

There were various issues raised in the case all of which were not touched by the lower Appellate Court.

The Plaintiffs have appealed from the decree of the lower Appellate Court and it has been contended before us on their behalf that, on the findings of fact arrived at by that Court, the suit should not have been dismissed and reliance has been placed on the decision of the Judicial Committee of the Privy Council in

MUNSHI BASIRUDDIN AHMED v. MAHOMED JALISH PATWARI.

the case of *Lal Achal Ram* v. *Raja Kazim Husain* (1).

That the finding of fact arrived at by the lower Appellate Court amounts to a finding that the Plaintiffs were *benamdars* of the Defendant No. 3 cannot be denied. One of the principal elements for determination of the question whether a conveyance is *benami* or not is 'did consideration pass'? The finding is that no consideration passed. But mere non-passing of consideration is not sufficient to show that a transaction is *benami*. There might be a promise to pay not disclosed in the instrument itself. Sec. 54 of the Transfer of Property Act would lead us to conclude that there may be a transfer without present consideration passing. The present case is, therefore, distinguishable from a case in which there was an intention to transfer, though no consideration passed. Here the deed expressly stated that consideration did pass and that was a false allegation, as found by the lower Appellate Court. It was also been found that the intention of the vendees, the Plaintiffs, was not that they should recover any money but that they should put the Defendants Nos. 1 and 2 to difficulty. It is not in so many words found that the transaction was *benami*; but the whole tenor of the judgment would lead to the conclusion that the Court intended to find that there was no *bonâ fide* transfer to the Plaintiffs. That being so, the question really is whether a *benamdar* can sue for recovery of a mortgage debt.

The decisions of this Court are practically uniform, though some of the other High Courts in India have differed from this Court. That a *benamdar* cannot sue for recovery of immoveable property is, so far as Bengal is concerned, laid down by the Judicial Committee in the case of *Gopee Krista Gosain* v. *Ganga Persad Gosain* (2), (the remarks of the Judicial Committee will be found at p. 73 of the report). This decision has been followed consistently in this Court and we may refer to the cases of *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (3), and *Mohendra Nath* v. *Kali Proshad* (4).

In *Hari Gobind* v. *Akhoy Kumar* (3), reliance was placed on the statement made by the vendor in the course of the suit admitting the execution of the document and receipt of consideration; but the learned Judge declined to place any reliance on such statement as the admission was made subsequent to the institution of the suit and reliance was properly placed on the decision of the Judicial Committee in the case of *Amrita Lal* v. *Rajani Kant* (5).

In *Mohendra Nath* v. *Kali Proshad* (4), the Court observed that a suit by a *benamdar* is liable to dismissal on the ground that no specific performance of the contract could be enforced against the vendor and reliance was placed on sec. 20 cl. (b) of the Specific Relief Act. All the earlier decisions were collected in those two reports and it is not necessary for us to refer to any other case. In *Lal Achal Ram* v. *Kazim Husain* (1),

(1) 9 C. W. N. 477 : s. c. L. R. 32 I. A. 113 ; I. L. R. 27 All. 271 (1905).

(1) 9 C. W. N. 477 : s. c. L. R. 32 I. A. 113 ; I. L. R. 27 All. 271 (1905).
(2) 6 M. I. A. 53 (1859).
(3) I. L. R. 16 Cal. 364 (1889).
(4) I. L. R. 30 Cal. 265 (1902).
(5) 15 B. L. R. 10 ; 2 I. A. 113 (1875).

MUNSHI BASIRUDDIN AHMED v. MAHOMED JALISH PATWARI.

the transaction was allowed to stand as between the Plaintiff and the Defendant inasmuch as, though no consideration passed, the terms were reasonable in themselves and the transaction was neither champertous nor contrary to public policy. That was the distinguishing element in the conveyance in favour of the Plaintiff in the case before the Judicial Committee In the present case, the contrary facts have been found and we do not see how it can be held that a transaction admittedly without consideration was valid, notwithstanding the facts found as to the intention of the vendor and the effect which it would have as regards the rights of the parties. We, therefore, see no reason to differ from the judgment of the lower Appellate Court and we dismiss this appeal with costs.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 33 OF 1906.

MACLEAN, C. J. COXE, J. 1908. 29, January.

S. M. HARA KUMARI DASI, Defendant, Appellant, *v.* MOHIM CHANDRA SARKAR, Plaintiff, Respondent.

Hindu Will—Construction—Bequest to widow—Power of appointment—Bequest for life with power of alienation—Gift over.

A Will, addressed by the testator to his wife, was to this effect: "You are my legally married wife and entitled to the property to be left by me. Should I on a sudden die . . . you shall under this Will become possessor of my properties, &c, and perform my sradh *at a suitable cost; and for the benefit of my soul you shall purchase a house . . . and establish a* Mohadev *in it and perform its* sheba *and services, &c., and you shall fix a suitable allowance as* pronami *for my spiritual guide. You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties. My daughter Sreemutty Hara Kumari shall become entitled to and possessor of whatever properties will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid* shebas, *&c. . . . The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away those properties shall possess the same and enjoy them keeping up and maintaining the* sheba, *&c.,"*

Held—*That giving effect to all the words of the Will, the widow took an estate for life with a power of alienation, and to the extent to which such power was not exercised, the daughter similarly took the property.*

This was an appeal preferred on the 7th of February 1906, against the decree of Babu Jogendra Nath Deb, Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 25th of September 1905.

The appeal arose out of a suit for the construction of a Will and for a declaration of the respective rights of the parties under the Will.

The Will purported to be that of one Anando Lal Sarkar, who died at Benares in Falgoon 1272 B. S., leaving him surviving his widow Ichhamoyi, and a daughter Hara Kumari, his brother

Mohan Lal Sarkar, the father of the Plaintiff, and his step-brother Benodi Lal Sarkar now deceased.

The widow Ichhamoyi applied for and obtained probate of a certified copy of the Will (which was stated to have been ost), on 24th September 1885 from the Court of the District Judge of Pabna. The Plaintiff applied for revocation of the Will in July 1898 alleging that the Will was a forgery, but his application was dismissed on the 24th June 1904 by the Subordinate Judge of Pabna who held that the Will was a genuine document duly executed by the testator before his death. The Plaintiff preferred an appeal from that decision to the High Court. The present suit was at the same time instituted on the 19th July 1901 in the Court of the Subordinate Judge at Alipur for the construction of the Will. The case was heard by the Additional Subordinate Judge on the 25th September 1905. He held *inter alia* that the Will did not cover all the properties left by the testator and there was an intestacy with regard to the properties not mentioned therein; that it conferred an absolute interest to the widow Ichhamoyi in the properties mentioned in the Will subject to a trust for an idol with a power of appointment for the trust; that the trust and power of appointment failed not having been carried out by Ichhamoyi; that the daughter Hara Kumari took nothing under the Will and the gift over to her absolutely of "whatever may remain" was invalid for uncertainty.

Hara Kumari preferred this appeal. By the time this appeal came on for hearing, the Plaintiff appears to have withdrawn his appeal in the matter arising out of his application for revocation of probate.

The material portion of the Will i as follows:--

"We, seven brothers, ... were jointly in possession and enjoyment of whatever ancestral zemindaries we had in the district of Pabna. On the 11th assar of the present year, we executed a document determining our equal shares, and we are in possession of the same. And of Taraf Nischindipur, which I purchased from my own earnings from service, I have given a 2 annas share to my brother Mohan Lal Sircar, and a 6 annas share to the late Abhoy Churan Sircar's widow Drabamoyi Dasia, mother and guardian of Annada Churn Sircar, and I have kept the remaining 8 annas share for myself, and am in enjoyment and possession of the same. Secondly, from my own earnings from service, I have purchased two brick-built houses at Calcutta, Bhowanipur, and some property in the town of Murshidabad and some Government securities. My brother or brother's sons or brother's widows have no connection with these properties, and I am in possession thereof. Owing to ill health, I have given up service and am living with my family at Benares. My illness now, instead of being cured, is gradually increasing, and so I despair of life. I have no son, and I have only one daughter Sreemati Hara Kumari Dasi. Although I have given her in marriage, still it is my duty to maintain her. I therefore, of my own free will, and in sound health and in possession of my senses, execute this will in your

S. M. HARA KUMARI DASI v. MOHIM CHANDRA SARKAR.

favour. You are my legally married wife, and entitled to the property to be left by me, Should I, on a sudden, die at Benares, you shall, under this Will, become possessor of my properties &c., and perform my *sradh*, &c, at a suitable cost; and for the benefit of my soul, you shall purchase a house at this Benares, and establish a Mohadev in it, and perform its *seba* and service, &c., and you shall fix a suitable allowance as *pronami* for my spiritual guide. You will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties. My daughter Sreemati Hara Kumari Dasi shall become entitled to and possessor of whatever properties will remain after your death and she shall enjoy the same, keeping up and maintaining the aforesaid *sebas* &c. Should you happen to die before establishing the *seba*, &c., in that case, the said Sreemati shall establish the Mohadev and do all other things. The said daughter shall have the same rights in the aforesaid properties as you have and he, to whom my said daughter may willingly give away those properties, shall possess the same, and enjoy them, keeping up and maintaining the *seba*, &c. But no one shall ever be able to alienate any property, without keeping in hand property sufficient for the maintenance of the *seva* &c, of the Siva in the way you may fix for it. To the above effect I execute the Will. The 28th Falgun (year given above)."

Babus Golap Chandra Sarkar and *Shama Churn Roy* for the Appellant.

Dr. Rash Behari Ghose and *Babu Debendra Nath Baychi* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a very curious suit. It is a suit asking to have the Will of one Ananda Lal Sarkar construed. But in his plaint the Plaintiff sets up very prominently that the Will is a forgery and an appeal was until recently pending in this Court to have the probate revoked. If the suit had come before me, I should have dismissed it summarily. But we are told that the appeal to this Court which was existing when the decision now appealed against was given, has since been withdrawn. So we will deal with the question of the construction upon the merits.

The question turns upon the construction of a very short Will dated the 10th of March 1866: and, we are told the testator died two or three day afterwards. After certain recitals as to his property, the material portion of the Will runs as follows: "I have no son, and I have only one daughter Sreemutty Hara Kumari Dassi," (who is the present Appellant). "Although I have given her in marriage, still it is my duty to maintain her." Pausing there for a moment, these words would appear to indicate that the testator proposed to make some provision by his Will for his daughter. Then he goes on, "I, therefore, of my own free will, and in sound health and in possession of my senses, execute this Will in your favour." The Will purports to be addressed to his wife. "You are my legally married wife, and entitled to the property to be left by me." Up to this point the contents of the Will are in the nature of recitals. I now come to that which may be regarded as the

operative part of the Will. "Should I, on a sudden die at Benares, you shall under this Will, become possessor of my properties, &c., and perform my *shradh* &c., at a suitable cost, and for the benefit of my soul you shall purchase a house at this Benares, and establish a Mohadev in it, and perform its *seba* and service &c., and you shall fix a suitable allowance as *pronami* for my spiritual guide." Pausing there the expression "possessor of my properties" is not inconsistent with the view that the widow was only to have a life interest in the property. There is, so far as I have read, no clear and absolute gift to the widow. Then come the words upon which reliance has been placed by the Respondent, "you will have the right and power to alienate by gift or sale all the aforesaid moveable and immoveable properties." If the will had stopped there it might have been difficult to say that the widow did not take the property absolutely. But very important words follow, and we must give effect to all the words of the Will, so far as we can. "My daughter Sreemutty Hara Kumari Dassi shall become entitled to and possessor of whatever properties will remain after your death, and she shall enjoy the same, keeping up and maintaining the aforesaid *sebas* &c." Later on he says, "The said daughter shall have the same rights in the aforesaid properties as you have and he to whom my said daughter may willingly give away those properties, shall possess the same, and enjoy them, keeping up and maintaining the *seba* &c."

The question is what interest did the widow take. For the Appellant, it is contended that she only took a life interest with a power—one which in England would be regarded as a power of appointment to alienate by gift or sale the property passing by the Will. This is the view pleaded by the Plaintiff in paragraph 5 of the plaint. "According to the directions" he says "contained in the alleged Will, the widow Ichhamoyi had only a life estate in the properties mentioned in the Will." If the Will had stopped at the words "moveable and immoveable properties" as I have already pointed out, it might have been difficult to say that the widow did not take absolutely, but we cannot eliminate from the Will all the words which follow in favour of the daughter. It is clear the daughter was to be "entitled to and possessor of what properties will remain after your death" and she was to "enjoy" the same. Are these words to go for nothing? There is not, in so many words, any clear and absolute gift to the widow, and we can give effect to all the words in the Will by holding that the widow took for life, with a power of alienation, but to the extent to which such power was not exercised, the daughter similarly took the property. She was to have the "same rights in the properties" as the widow. If the Respondents' argument prevail she takes nothing. We think this is the true construction of the Will. It is only in this way that we can give proper effect to the words that the daughter "shall become entitled to and possessor of whatever properties will remain after her death and she shall enjoy the same." We cannot strike these words out of the Will. In my opinion the view of the lower Court that the widow took an absolute interest and the

S. M. HARA KUMARI DASI v. MOHIM CHANDRA SARKAR.

daughter took nothing is mistaken. The decree of the Court below must be discharged and in the circumstances the suit must be dismissed with costs including costs of the appeal.

COXE, J.—I agree.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO 27 OF 1908.

RAMPINI, J. SHARFUDDIN, J. 1908 Heard, 30, January. Judgment, 4, February.	MOHESH CHANDRA SAHA and anr., Petitioners, v. THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 350—De novo trial—Change of trying Magistrate.

The provisions of sec. 350, Cr. P. C. apply to all cases in which cases are transferred for whatever reasons from the file of one Magistrate to that of another.

When a case is transferred under sec. 528, Cr. P. C. from the file of one Magistrate to that of another, the former ceases to exercise jurisdiction in the case and is succeeded by the latter in the exercise of the jurisdiction within the meaning of sec. 350, Cr. P. C.

DEPUTY LEGAL REMEMBRANCER v. UPENDRA KUMAR GHOSH (1) *disapproved.*

This was a rule granted on the 9th of January 1908, against an order of Babu Jogobundhu Ghosh, Sub-Deputy Magistrate of Dacca, dated the 25th of November 1907, which order was on appeal affirmed by A. Bentinck, Esq., Joint Magistrate of Dacca, on the 23rd of December 1907.

(1) 12 C. W. N. 140 (1906).

The facts of the case will appear from the judgment.

Mr. Norton, Babus Dassarathi Sanyal and *Sarat Chandra Basak* for the Petitioners.

The Advocate-General for the Crown.

THE JUDGMENT OF THE COURT was as follows:—

This is a rule to show cause why the conviction and sentences in this case should not be set aside on the ground that after the case was transferred to the file of Babu Jogobundhu Ghosh, that officer did not hold a *de novo* trial.

The Petitioners have been convicted under sec. 147, Cr. P.C. Kechu Pramanik has been sentenced to one month's rigorous imprisonment, and Mohesh Chandra Saha to pay a fine of Rs. 100.

The case was originally on the file of Mr. G. E. Oddie who recorded the evidence of the witnesses for the prosecution. They were cross-examined before him and a charge was drawn up by him. He was then transferred. The District Magistrate took the case on his own file, under sec. 528, Cr. P. C., and transferred it to the file of Babu Jogobundhu Ghosh, Deputy Magistrate. The accused did not claim a new trial: so Babu Jogobundhu Ghosh completed the trial and convicted the accused. They appealed to the Joint Magistrate, who on the 7th December ordered the Deputy Magistrate to examine two more witnesses. On the case coming before the Joint Magistrate for the second time, the appeal of the accused was dismissed. The day after the arguments in the case had been heard, the Appellants pleader cited the case of *Deputy Legal Remembrancer* v. *Upendra*

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MARCH 16, 1908. [No. 18

Contents.

NOTES

THE CIVIL PROCEDURE CODE BILL WAS PASSED INTO law, at the last sitting of the Legislative Council for India. The Hon'ble Mr. Earle Richards stated his belief that the Bill was generally accepted by the public and the legal profession. The paucity of criticism which the bill has met in its later stages is no doubt due largely to the confidence reposed in the Special Committee who recast the Code in its present form. It must also be admitted that the length of time that the Bill had been lying before the public necessarily weakened the interest taken in it even by professional lawyers.

THERE IS STILL ANOTHER REASON AND THAT IS THAT the principal innovation made in the Bill, *viz.*, the conferring of power to the Rules Committees attached to the various High Courts to settle details of procedure, is experimental in character and has still to justify itself by actual working. As regards the work of amendment proper, the Simla Committee as well as the later Select Committee are to be congratulated for having proceeded in an eminently cautious manner. No part of the work of these Committees was characterised by the hustling with which we have learned to associate the ordinary working of the Supreme and the Local Legislatures.

THE SUGGESTION OF DR. RASH BEHARY GHOSE, THAT power should be given to persons interested in charities to apply summarily for an account of the receipts and expenditures of the funds of the charity has not for the present been adopted in view of the fact that in the opinion of Government the matter has not been fully discussed by the leaders of the communities concerned. The Government is however willing to have the matter considered as a separate bill to be introduced by Dr. Rash Behari Ghose.

A BILL TO AMEND THE WHIPPING ACT WAS INTRODUCED by Sir Harvey Adamson at a meeting of the Legislative Council of the Governor-General on Friday last. The Hon'ble member mentioned that an amendment in the Whipping Act (VI of 1864) had become necessary in view of the changes in public opinion regarding whipping as a form of punishment within recent years. We have noticed in these columns the progress of humane principles in criminal law in recent times and we are glad that they are finding recognition by the Indian Legislature. We cordially welcome Sir Harvey's enunciation of the principle that "whipping should be restricted to offences of a degrading nature and that it should never be administered when it is likely to outrage self-respect." A large number of offences for which the Whipping Act provided either an alternative penalty (sec. 2) or an additional punishment (secs. 3 and 4) have been excluded by this Bill. The object of the Bill evidently is to amend the provisions of the Indian law in conformity with the English law.

IN ENGLISH LAW ADULTS WHO MAY BE CONVICTED of robbery with violence may be punished with whipping. But ordinary theft is not so punishable. Sir Harvey however says that having regard to the different conditions of prison life here, it has been considered desirable to include casual theft amongst offences punishable with whipping. But we would have thought that cases of casual theft, for which a sentence of imprisonment may not be considered desirable, may very well be dealt with under the provisions of the law for first offenders. We all know how the magistrates in this country, whether they be of first class or of lower grade, are reluctant to give effect to the humane provisions of the law. Also having regard to the fact that the Bill leaves a large discretion in the hands of magistrates, who have already expressed their alarm at the proposed abolition of whipping as an additional punishment, it does not seem either wise or desirable to retain theft amongst offences punishable with whipping.

WHILE WE HAVE NOTHING TO SAY AGAINST THE retention of whipping as an alternative or additional punishment for dacoity and robbery with violence and rape, we must say it passes our comprehension why assaulting or using criminal force to women with intent to outrage their modesty or unnatural offences, especially in cases of second convictions, should be put outside the pale of such punishment. It seems exceedingly anomalous that while even technical theft should be retained amongst offences punishable with whipping, repetition of offences of such loathsome character should be excluded. Property is surely not more sacred than honour of women.

THE BILL WHILE RESTRICTING THE PUNISHMENT OF whipping to only a limited class of offences so far as adults are concerned, makes no alteration in this direction with regard to juvenile offenders. The only change in the law in respect of juveniles is that punishment in the case of persons below the age of sixteen is not to exceed fifteen stripes. This is no doubt a change for the better. But it may be questioned why every offence not punishable with death should in the case of a juvenile offender be punishable with whipping. Sir Harvey Adamson advances the analogy of English law under which offences other than homicide are in the case of juveniles so punishable. But the law and practice differ widely in this respect in England. Since the practical discontinuance of flogging in the army, navy and public schools there has been a considerable revulsion of feeling in England regarding flogging as a form of punishment under criminal law. Magistrates in England do not resort to this brutal form of punishment lightly. They treat juvenile offenders with almost parental consideration. They are always anxious to make over such offenders to parents, guardians, teachers or clergymen for correction.

BUT THE MAGISTRATES IN INDIA ARE FAR FROM considerate to juveniles. Cases of flogging are much more common here than in England. It is therefore very desirable that the Legislature should limit the class of offences for which a juvenile may be flogged and not leave it to the unlimited and undefined discretion of first class magistrates who are in this country not necessarily men of mature judgment or experience. It is no doubt contemplated in the Bill that the Government of India will have power to exempt by notification juveniles from flogging in respect of such offences as they please. But we do not believe in such legislation by notification. When the Government of India intend imposing such restrictions, it would be more [illegible] to embody them in the body of the

IT IS, HOWEVER, GRATIFYING, TO NOTE THAT SIR Harvey recognises the fact that the educated and respectable classes in India consider flogging as a most degrading form of punishment, and we need only add, that the sentiment is not confined to adults but also extends to juveniles. Magistrates in India have been known to subject boys of respectable parentage to public flogging in cases where a mere reprimand or warning or making over to parents or guardians for correction would have sufficed. Such punishment is not only resented by the boy and his family but in fact by the whole of the Indian community. Being conscious of this Sir Harvey repeats in concluding that "it should never be inflicted when it is likely to outrage self-respect." We do not share his confidence in the good sense of the magistracy in this country but we expect the High Court will issue well-considered instructions to the Magistrates, as suggested by Sir Harvey, as soon as the Bill is passed into law.

IN THE CASE OF *Kishan Lal* v. *Umras Singh* DECIDED by the Allahabad High Court a report of which appears at page 121 of 5 *Allahabad Law Journal* it has been held that a property subject to a mortgage, cannot be sold in execution of a simple money decree held by the mortgagee, even where he disclaims all his interests under the mortgage and obtains a simple money decree. In this case the mortgagee during the pendency of the mortgage suit abandoned his rights under the mortgage and obtained a simple money decree, and in execution of that decree attached and sold the mortgaged property. It was held that the sale was in contravention of sec. 99 of the Transfer of Property Act and therefore bad. But that after the confirmation of the sale, the mortgagor lost his right to set aside the sale as "after the sale is confirmed as between the auction purchasers and the judgment-debtors (*i.e.*, the mortgagors) the title of the former becomes complete."

A SIMILAR QUESTION AROSE IN THE CALCUTTA FULL Bench case of *Ashu Tosh Sikdar* v. *Behari Lal Kirtunia* (11 C. W. N. 1011) in which it was held by the Full Bench that if an application is made after the confirmation of sale for setting aside the sale on the ground that it was held in contravention of sec 99 of the Transfer of Property Act, the applicant can set aside the sale only on his proving that owing to fraud or other reasons he had no notice of the sale or its confirmation. The decision of the Allahabad High Court does not say what would be the result if after the confirmation of sale an application is made for setting aside the sale and it is proved that the applicant was kept in ignorance of the sale proceedings by reason of fraud or otherwise. This question did not arise at all as in the case the mortgagors did know of the confirmation of sale.

AS REGARDS THE APPLICABILITY OF SEC. 99 OF THE Transfer of Property Act to the facts of this case, there may arise some questions. Here the mortgage claim was given up by the mortgagee and a simple money decree was obtained by him presumably in the presence of the judgment-debtors, the mortgagors. If the mortgagors at that time did not object to this course adopted by the mortgagee and expressly or impliedly consented to the mortgagee's obtaining a simple money-decree against them after having given up his rights as a mortgagee, could they afterwards turn round and say when the property had been sold in execution of the money-decree that the sale was bad because it contravened the provisions of sec. 99.

THE LANGUAGE OF SEC. 99 MAY LEAD TO THE CONclusion that that section does not apply to a case like this. In the first place when the property was attached and sold the property was not subject to the mortgage, for the mortgage claim had been given up long before the attachment, was neither the decree-holder (who was no doubt a mortgagee before he obtained his money-decree) a mortgagee when he attached and brought to sale the property in execution of the money-decree. Suppose A mortgages his property to B and is also indebted to B in other ways. B gives up his mortgage rights altogether, so that the mortgage is extinguished to all intents and purposes. He then gets money-decrees against A in respect of other debts. Would not B be allowed to attach and sell the properties of A including the property which was formerly mortgaged, without instituting a suit under sec. 67 of the Transfer of Property Act? As the mortgage was not subsisting at all, it would be impossible for B to bring a suit under sec. 67. The very fact that a suit is directed to be instituted under sec. 67 shows that the mortgage must be subsisting at the time the attachment is made or the sale is held in execution of the money-decree.

THE OBSERVATION OF HIS LORDSHIP MOOKHERJEE J, in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtunia* lends support to this view. His lordship observes, "The substance of the sec. (*i e.* sec. 99) therefore is that when the mortgagee has, in execution of money decree against the mortgagor, effected an attachment of the mortgaged property, he cannot proceed to sell it, he must bring a suit upon the mortgage against all the parties interested in the equity of redemption, and the decree in such suit should be, not for the sale of the equity of redemption but for the sale of the property, free from the mortgage claim of the Plaintiff &c." This shows that the provisions of sec. 99 are only applicable when the mortgage is subsisting. The object of sec. 99 is to protect the right of redemption possessed by the mortgagor against any attempt on the part of the mortgagee to take away the right by the sale of the mortgaged property in execution of any decree for money. But when the mortgage has ceased to subsist and the property is free of the mortgage claim, the necessity for the protection does not exist.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before GEIDT and WOODROFFE, JJ. CRIMINAL REVISION NO. 88 OF 1907. POSHI MAHOMED AND OTHERS *v.* THE KING-EMPEROR. 26th February 1908.

Bad livelihood—Criminal Procedure Code, sec. 110—Sureties for good behaviour—Refusal to accept, grounds for.

On a police report the Sub-divisional Magistrate of Kurigram instituted proceedings under sec. 110, Cr. P. C, against the Petitioners with the result that each of the Petitioners was ordered by the said Magistrate to execute a bond for Rs. 100 with two sureties of the same amount to be of good behaviour for one year or in default to suffer rigorous imprisonment for the same period. An appeal was preferred to the District Magistrate Rungpur which was dismissed with regard to these Petitioners. Within a fortnight of the order passed by the Sub-divisional Magistrate under sec. 118, Cr. P. C, the Petitioners presented their bail bonds duly executed by sureties to the Sub-divisional Magistrate who asked the Police to enquire into the fitness of the sureties. The Police reported that the sureties were fit and proper persons, but notwithstanding this the Sub-divisional Magistrate delayed in accepting the bail bonds and releasing the Petitioner. Several applications were made to the Magistrate for the release of the Petitioners who were in jail on accepting the bonds executed by the Petitioners and the sureties, but the Magistrate did not pass any order. The Petitioners then came up to the High Court and obtained the present rule. In his explanation to the High Court the Sub divisional Magistrate said "I have certainly no objection to let out the accused on good sureties. The delay is due to my desire to look into the sureties personally and as those people who filed petitions went to attend *melas* the matter could not be disposed of so long." The District Magistrate in forwarding the explanation of the Sub-divisional Magistrate added "In my opinion it is not possible to be too careful in the matter of accepting sureties for persons of the predatory classes for whom sec. 110 is mainly intended. The surety must be not only one who is in a position to pay the amount of

the bond but also one who can exercise some effective control on the mode of the life of the person bound down. The desire of the Sub-divisional Magistrate to satisfy himself on this point is a very audable one and he has, I think, sufficiently explained the delay in carrying out his intentions."

Their Lordships observed :—" The Magistrate virtually admits that the sureties are in a position to pay the amount of the bond. It is, therefore, ordered that the rule be made absolute and the Magistrate directed to accept the sureties offered, to allow the Petitioners to execute recognizances required of them and on their doing so to release them from jail. The Magistrate's explanation of the delay is not satisfactory."

Mr. Khundkar, with *Mr. Sowgat Ali* for the Petitioners.

Rule absolute.

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM ORIGINAL DECREE No. 340 OF 1906. MUSSAMMAT SRIBATI KUMRI, Defendant, Appellant *v.* RAJA SHIB CHUNDER BANERJI, Plaintiff, Respondent. 6th March 1908.

*Alienation by husband—Maintenance, claim by widow for—Charge—*Bonâ fide *purchaser.*

The suit out of which the appeal arose was brought for recovery of a sum of money due on a bond executed by two persons, now deceased, in favour of the Plaintiff. The Defendant No. 1 was the widow of one of the executants of the bond. The Court below passed a decree in favour of the Plaintiff.

Defendant No. 1 contended that she was entitled to a charge upon the estate of her husband for her maintenance. In support of this objection the cases of *Jamna* v. *Mocha* (I. L. R. 2 All. 315), *Becha* v. *Mothina and others* (I. L. R. 23 All 86), *Sarola Dassee* v. *Bhoobun Mohun Neoghy* (I. L. R. 15 Cal. 292) and *Narbada Bai* v. *Mahadeo* (I. L. R. 5 Bom. 99) were cited.

Held—The widow has no right to a charge upon her husband's property in case of alienation during the life-time of her husband for consideration, nor has she a right to follow the property in the hands of a *bonâ fide* purchaser for value.

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bonâ fide* purchaser for value, even with knowledge of the widow's claim for maintenance unless the transfer has been made with the intention of defeating the widow's claim.

Ram Kunwar v. *Ram Dai* (I. L. R. 22 All. 326), *The Bharatpur State* v. *Gopal Dei* (I. L. R. 24 All. 160), *Jayanti Subbiat* v. *Alamelu Mangamma* (I. L. R. 27 Mad. 45) and *Digambari Debi* v. *Dhankumari Bibi* (10 C. W. N. 1074) referred to.

Babus Golap Chunder Sarker and *Kulwant Sahay* for the Appellant.

Babus Jogendra Chunder Ghose and *Ashutosh Mukerjee* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J., and DASS, J. APPEAL FROM ORIGINAL ORDER No. 83 OF 1907. KRISHNA PADA DUTT AND ANOTHER, Petitioners, Appellants *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER, Objectors, Respondents. Heard, 17th February 1908. Judgment, 28th February 1908.

Hindu Law—Dayabhaga—Sister's daughter's son, if heir—Succession certificate.

The appeal arose out of an application under the Succession Certificate Act (VII of 1889) for a certificate to collect the debts due to the estate of one Ishan Chandra Mitter. The Petitioners were (1) the daughter of the sister of the deceased and (2) the son of that daughter. The Secretary of State opposed the Petition on the ground that under the Dayabhaga School of Hindu Law, by which the deceased Ishan Chandra Mitter was governed the Petitioners were not heirs at all. The brother of the wife of the deceased raised a similar objection.

The District Judge rejected the application on the ground that under the Dayabhaga law, the Petitioners were not heirs, as they offer no funeral oblations to the ancestors of the deceased. The Petititioners appealed to the High Court.

Held (without expressing any final opinion on the question), that *primâ facie* the claims of the daughter of the sister who offers no oblations cannot be placed upon a higher footing than that of the sister herself; and that a sister's daughter's son has been held to be an heir under the Mitakshara law on the ground of community of corporal particles between him and the propositus, but he is not an heir under the Dayabhaga law.

Babu Dwarka Nath Mitter for the Appellant.

Babus Ram Churn Mitra and *Brojo Lal Chuckerbutty* for the Respondents.

A. T. M. *Appeal dismissed.*

MOHESH CHANDRA SAHA *v.* THE EMPEROR.

Kumar Ghosh (1), to the Joint Magistrate, and contended that the proceedings of Babu Jogobundhu Ghosh in not holding a *de novo* trial were illegal. Before us Mr. Norton has supported the rule. The Advocate-General for the Crown has shown cause against it.

The contention of the Advocate-General is that the provisions of sec. 350, Cr. P. C. apply both to cases of transfer of a case under sec. 528 Cr. P. C. and to cases which after being begun by one Magistrate have to be completed by another, owing to the former Magistrate having left the district, when only, it is argued by Mr. Norton, he can be said to be succeeded by another Magistrate. The Advocate-General, however, replies that when a case is transferred under sec. 528 from the file of a Magistrate to that of another, the former ceases to have jurisdiction in the case, and is succeeded in the exercise of jurisdiction in the case by the other, just as if the former had been removed from the district and been succeeded in his office by the other.

In this case, Mr. Oddie was transferred from the district. The District Magistrate however passed an order under sec. 528, Cr. P. C. transferring the case, no doubt because Mr. Oddie was an Assistant Magistrate, and Babu Jogobundhu Ghosh, Deputy Magistrate, could not be said, strictly speaking, to succeed him in the office of Assistant Magistrate.

We consider the contention of the Advocate-General must prevail. We do not think that the provisions of sec. 350, Cr. P. C. apply only to cases in which Magistrates succeeded each other in their office. Magistrates subordinate to the District Magistrate rarely do so. Deputy Magistrates never succeed each other in their offices. But the terms of the section appear to us to apply to all cases in which cases are transferred for whatever reason from the file of one Magistrate to that of another. This is admitted in the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghosh* (1), in which Mitra and Holmwood, JJ., say: "The section, it seems to us, is capable of the interpretation that it covers all cases of change of trying Magistrates, whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chap. XLIV of the Code."

Further on, they observe: "The words of sec. 350 of the present Code are slightly different from the words of similar sections of the Codes of 1872 and 1882. The alteration might have been made with a view to include cases of transfer." They then conclude with this order:—"Having regard to the general principle of interpretation that provisos and sub-clauses should be governed by the operative portion of the section and to the fact that the general rule laid down in the earlier rulings have been recognised and approved of on more than one occasion since the amendment was made, we hold that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Adie."

But the reasons for this order appear to us to be inconsistent, for the operative portion of sec. 350 expressly permits the conviction of an accused on evidence recorded, or partly recorded, by one Magistrate, who is succeeded by another;

(1) 12 C. W. N. 140 (1906).

(1) 12 C. W. N. 140 (1906).

MOHESH CHANDRA SAHA *v.* THE EMPEROR.

while the earlier rulings referred to are no doubt in favour of the opposite view.

We observe further that the conclusion of the learned Judges who decided the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghosh* (1), is only that Moulvi Abdus Samad acted irregularly, and for this reason they set aside the conviction. We presume they were of opinion that the irregularity was one that had prejudiced the accused.

The earlier rulings referred to by Mitra and Holmwood, JJ., have been laid before us. They are *Purmessur Singh* v. *Soroop Adhikaree* (2), *Kopil Nath Sahi* v. *Koneeram* (3), *Raghoo Parirah* (4) and *Queen* v. *Harnath Guho* (5). But the first two of these rulings appear to us to be in favour of the view advocated by the learned Advocate-General. The case of *Raghu Parirah* (4) is not in point. The only case in favour of the view contended for by Mr. Norton is that reported in *Queen* v. *Harnath Guho* (5), alluded to in the judgment in the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghosh* (1).

Then, as for the rulings in which the general rule laid down in this case has been recognised and approved of, since the alteration in the wording of the corresponding section of the Code of 1872, the only case exactly in point which Mr. Norton cites is that of *Queen-Empress* v. *Angnu* (6), which is the decision of a single Judge of the Allahabad High Court, and accordingly is not binding on us.

He also calls attention to *Queen-Empress* v. *Bashir Khan* (7) and *Damri Thakur* v. *Bhowani Sahoo* (8). In the former of these the accused expressly prayed for a *de novo* trial, and as the Magistrate did not accede to their request, the conviction of the accused was rightly set aside. The latter case is not in point and need not be considered.

We are therefore of opinion that we are free to follow the interpretation which in our opinion should be put on the terms of sec. 350, Cr. P. C. and which Mitra and Holmwood, JJ., admit, the section is capable of having put on it, *viz.*, that it applies to all instances of transfer of a case, for whatever reason the transfer may be made.

We have been pressed, if we take this view, to refer the question for the decision of a Full Bench. But looking at the terms of the order in the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghosh* (1), *viz.*, that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Adie, which lays down no general rule, and which must have proceeded on the principle that the irregularity had prejudiced the accused, which is not shown to have been the case in the present instance, we do not think we need or could do so.

We accordingly discharge the rule. The Petitioner who has been sentenced to imprisonment must be relegated to jail to undergo the remainder of his term.

B. C. *Rule discharged.*

(1) 12 C. W. N. 140 (1906).
(2) 13 W. R. 40 (1870).
(3) 14 W. R. 3 (1870).
(4) 19 W. R. 28 (1873).
(5) 24 W. R. 52 (1875).
(6) All. W. N., 1889, p. 130 (1889).
(7) I. L. R. 14 All. 346 (1892).
(8) I. L. R. 23 Cal. 194 (1895).

PRIVY COUNCIL.

[CONSOLIDATED APPEALS FROM BENGAL.]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1908.
24, January.

BAIJNATH GAENKA, Appellant,
v.
RAMDHARI CHOWDHRY and others, Respondents.
and
DEO NANDAN PERSHAD, Appellant,
RAMDHARI CHOWDHRY and others, Respondents.

*Mahommedan Law—Pre-emption—*Talab-i-mowashibat *and* talab-i-istishad*—Unreasonable delay, a question of fact—Action for pre-emption—Claimants, co-sharers as well as mortgagees—Deposit of mortgage money in Court by purchaser—Withdrawal by claimants—Waiver of claim.*

The right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. Whether there has been such delay is a question to be determined upon the facts of each particular case.

The Plaintiffs, in this case, claimed the right to pre-empt by reason of their having previously acquired a share in the property. They had also obtained the transfer of a zurpeshgi ***mortgage binding the share the sale of which was the occasion of the present suit. In the course of the suit the purchaser, Defendant, deposited the mortgage amount in Court and the same was withdrawn by the Plaintiff.***

Held, ***that until a decree for pre-emption was made the purchaser owned the land, and had a right to redeem; and that the taking out of the money by the Plaintiffs, as mortgagees, was no recognition of anything more than that, and was quite consistent with their claim to pre-empt.***

Two consolidated appeals from two decrees of the above-mentioned High Court, both dated 20th January 1904 reversing two decrees of the Court of the Subordinate Judge of Monghyr both dated 31st, March 1900 and dismissing the Appellants' suits.

The main question raised on the appeals was whether the Appellants were entitled to pre-empt a 4 anna share in certain properties sold on 17th December 1907, by Anupbati Koeri (Respondent No. 2) to Nirbhoy Chowdhry, (original Defendant No. 1), who died *pendente lite* and was represented by Respondent No. 1 and others.

The two suits were analogous and had been tried together at the instance of the parties. It was admitted that both suits would be governed by one judgment.

One Maharaj Singh was the original owner of Taluka Rasulpur Bhatowni consisting of two separate puttis. On 3rd March 1873 he divided that Taluka equally between his two sons, Jugal Pershad Singh and Kamla Pershad Singh, who became the owners in possession each of an 8 anna share.

In or about the year 1884 Jugal Pershad mortgaged his 8 anna share to Jowhuri Lal and Mangni Ram (original Plaintiffs and Appellants deceased). On his death his widow Rajbati acquired his estate by right of inheritance. Suits for sale of the mortgaged property were brought against her. On 2nd April 1889,

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY.

decrees were made in favour of the mortgagees. In execution of those decrees the 8 anna share was on 18th January 1891 purchased by the Appellants who thus became owners each of a 4 anna share and obtained possession thereof.

Kamla Pershad died leaving him surviving two widows, Sundarbati and Anupbati (Respondent No. 2), who acquired their husband's 8 anna share in the Taluka. In order to pay their husband's debts they borrowed Rs. 63,000 from the Ulas Babus, and executed a Sudbharna pottah in their favour on 10th January 1883, mortgaging their 8 anna share. The usufructuary mortgagees remained in possession of that share. Sundarbati in order to liquidate the mortgage debt, sold her 4 anna share in the taluka to the Appellants, a 2 anna share to each, under two separate *kobalas* dated 9th July 1897, receiving for the two sales an aggregate consideration of Rs. 40,000. The Appellants deposited in Court the entire Sudbharna debt, Rs. 63,000, and redeemed the mortgage and obtained possession of the entire 8 anna share which belonged to the two widows with the exeeption of certain small share in a certain mouzah.

On 17th December 1897 Anupbati sold her 4 anna share (subject to certain minor reservations) to Nirbhoy Chowdhry.

On 30th June 1898 the Appellants instituted the present suits in the Court of the Subordinate Judge of Monghyr. The plaints alleged that the Appellants, who were share-holders in the taluk, were willing to purchase Anupbati's share. But she sold the same as already stated without their knowledge and consent. The Appellant Jowhuri Lal, in the first suit came to know of the sale for the first time on 20th December 1897, and he at once performed the ceremony of *talab i-mowashibat* (immediate demand) on that day. The Appellant Mangni Ram in the second suit returned to Monghyr from Benares on 5th January 1898 and learnt for the first time about the sale in question on that day, and at once performed the ceremony ot *talab-i-mowashibat* on the same date. Both Appellants then caused the ceremony of *talab-i-istishad* to be performed by their respective agents at the residence of the purchaser, Defendant Nirbhoy Chowdhry, at Mahishpur, on 7th January 1898, and on the property sold, and at the residence of the vendor Anupbati at Bhat Khund on the 11th and 12th of that month The Appellants pleaded that Rs. 44,850, the amount entered in the sale deed as the consideration, was not actually paid. The relief sought was a decree for preemption on payment of the true consideration as determined by the Court.

The Defendant Nirbhoy Chowdhry in his written statement filed on 1st September 1898 denied that 20th December 1897 and 5th January 1898 were respectively the earliest dates on which the Appellants had obtained information of the sale. He pleaded *inter alia* that the Appellants had previously known and acquiesced in the negotiations and agreement and execution of the sale deed, that the formalities required by the Mahomedan Law were not carried out at the proper time and place; that the Appellants induced Anupbati's co-

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY

widow to sell to them her 4 anna share by promising to pay to her any excess price which Anupbati might obtain; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000 and that they were never ready and desirous to purchase the same at a proper price. He also denied that the consideration set out in the deed of sale was not paid in fact.

The Respondent Anupbati also filed her written statement in both suits to a similar effect. She further alleged that the Appellants while refusing to raise their price said "that if any other person was willing to pay a higher price this Defendant should sell to him" and that on account of this refusal she sold to Nirbhoy Chowdhry for Rs. 11,850 the proper price, the Appellants all along declining to buy and endeavouring to prevent a purchase by Nirbhoy Chowdhry or any other person. The Defendant third party Mangni Ram in the first suit was the Plaintiff in the second suit and the Plaintiff in the last suit was the Defendant third party in the second suit.

After the institutions of the suits the Appellants on 13th September 1898 withdrew from Court the amount of the Sudbharna debt deposited by Nirbhoy Chowdhry, on 2nd July 1898, on account of the share of his vendor Anupbati, and gave up possession over the property in suit. The plaints were accordingly amended at the instance of the Appellants. Of the nine issues fixed by the Subordinate Judge it is necessary to mention here only the following :—

3. When was the Plaintiff aware of the purchase by Defendant first party?

4. Whether the ceremonies *talab-i-mowashibat* or *talab-i-istishad* were duly and legally performed and were *bonâ fide*?

5. Whether Plaintiff had notice of and gave consent to the Defendant second party's selling the property in suit, if she got a higher price than Rs. 36,000?

6. Whether Plaintiff's right of pre-emption has been lost by reason of his gross negligence and is he estopped from claiming the same?

7. For what price was the disputed property sold to the Defendant first party, and what consideration did he actually pay for the property?

On 31st March 1900, the Subordinate Judge delivered his judgment. He found that the Appellant Jowhuri Lal was first informed of the sale in dispute on 20th December 1897 and that the Appellant Mangni Ram on 5th January 1898 and that both the Appellants immediately on receipt of the information declared their intention to claim pre-emption and thus duly carried out the formality of the *talab-i-mowashibat.* He also decided that the other formality of the *talab-i-istishad* had also been duly performed and without unreasonable delay. He also held that the actual consideration for the sale was Rs. 37,000 and that the Appellants were not estopped by their conduct from asserting their right to pre-emption. In the result he made a decree in favour of each of the Appellants for pre-emption of one-half of the property sold on payment of one-half of the sum of Rs. 37,000. The following passages from his judgment are material:—

"In both suits, I therefore find that *mowashibat* was duly performed by the Plaintiffs and that there is no legal defect in such performance.

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY.

"I now come to the evidence bearing upon the performance of the next ceremony, *talab-i-istishad* by the Plaintiffs. There is no difference in dates regarding the performance of this ceremony between the two Plaintiffs. The main objection urged by the learned pleader for the Defendants on this subject is, that there was unreasonable delay in the performance of this ceremony by the Plaintiffs. He contends that the Plaintiffs became aware of the sale on the 19th December 1897, when the mortgage debt due to them by Anupbati was tendered to the Plaintiffs and they refused to accept the amount tendered. Now, I have already stated that the assertion of the tender of the debt to the Plaintiffs on the 19th December 1897 is not correct. That being so it remains to be seen whether there was any unreasonable delay and gross negligence on the part of the Plaintiffs in performing the *talab-i-istishad.* It appears from the evidence of the Plaintiff's side that the disputed *kobala* was executed on 17th December 1897 at Gogri, and registered there on the following day that on the 20th of that month, Plaintiff Jowhuri Lal received news of the sale, and immediately performed the ceremony *Mowashibat*; that on the 21st of that month, Jowhuri Lal sent a man to his tashildar Rambaran Lal, who resided at some place near Gogri, to take a copy of the *kobala*, but as the Sub-registry office at Gogri, was closed from 21st to 26th of that month, on account of the Christmas holidays an application for copy was made on 27th December and the copy was ready on the 29th and actually delivered on the 30th of the month. It further appears that Rambaran Lal sent the copy to Jowhuri Lal by post in a registered cover on the 31st, and the cover reached the Monghyr Post Office on 2nd January 1898. The post peon, to whom the cover was made over for delivery to the addressee, Jowhuri Lal, has been examined as a witness by the Defendants. He states that he went to deliver the cover to Jowhuri Lal on the 2nd January and could not find him at his house. But this statement seems to be incorrect, for the 2nd was Sunday and therefore under the postal rules, no registered cover could have been delivered to the addressee on that day. The peon must have therefore gone to Jowhuri Lal's house for delivering the cover on 3rd January, but he was not at home on that day and so it was delivered to him on the 4th. On the 5th January Plaintiff Mangni Ram returned to Monghyr from Benares, and on receipt of the news of the sale in question, at once performed the ceremony of *talab-i-mowashibat.* On the 5th Mangni Ram went to Mr. Scott a Barrister-at law practising in the local Courts, to take his advice for getting police escort for sending the purchase money, Rs. 44,850, to the residence of the Defendant Nirbhoy Chowdry at Mahishpur. He thought that the money was required to be tendered to Nirbhoy Chowdhry under the Mahomedan law, but although his impression was erroneous, yet the tender of the money was, as explained by the Plaintiff's pleader, necessary before the Defendant No. 1 could be called upon to execute a *kobala* of the property sold. Be that as it may, the conduct of the Plaintiffs in seeking legal advice for securing Police help in sending the purchase money on behalf of

BAIJ NATH GAENKA v. RAMDHARI CHOWDHRY.

each of them to Mahishpur which is about 7 miles off from Monghyr is perfectly *bonâ fide*, and it cannot be construed to be an act of wilful negligence on their part. On 5th January Mr. Scott was said to be very busy when Mangni Ram called on him. On the night of that day, Mr. Scott advised Mangni Ram's servant Megh Raj to apply for police guard to escort the money to Mahishpur. On 6th January the application was made on behalf of both of the Plaintiffs to the District Superintendent of police at Monghyr and an order for police guard was made. On 7th January the agents of both Plaintiffs accompanied by other persons on their behalf and police guard, started for Mahishpur and performed the ceremony of *istishad* at the residence of Defendant Nirbhoy Chowdhry who, as appears from the evidence, fled inside his house on seeing the party coming there. On 10th January the agents of the Plaintiffs and other men on their behalf started from Monghyr for going to the villages of which the share had been sold, and to Bhat Khund where Anupbati used to reside. On 12th January the ceremony was performed by them at the residence and in the presence of Anupbati; on the 11th and 12th the same ceremony was performed by the party in question in the villages. Here I should add, that on the 8th January, the party had to arrange for conveyance and as the 9th was a Sunday there was no steamer service from Monghyr to Gogri on that day. This explains the delay for those two days On the whole, I am perfectly satisfied with the evidence adduced by the Plaintiffs that the ceremony of *istishad* was duly and properly performed by proxy Ganesh Lal, who performed the ceremony on behalf of Jowhuri Lal, being his Am-Mukhtar and agent, and Latafat Hassim, who performed the ceremony on behalf of Plaintiff, Mangni Ram, being his agent. There were also some certified mukhtars and pleaders amongst the party deputed by the Plaintiffs for performing the ceremony. I further find that there was no unreasonable delay, or any act of gross negligence on the part of the Plaintiffs in the performance of this ceremony. The evidence adduced by the Defendants on this point, is to my mind, not at all worthy of credit. This issue is therefore also decided in favour of the Plaintiffs.

"I now propose to deal with the 5th and 6th issues together. It is quite clear from the evidence on both sides that both Sundarbati and Anupbati first negotiated with the Plaintiffs for the sale of their shares, and that the Plaintiffs offered Rs. 36,000 for each of these shares. But I think there is no satisfactory evidence to show that they positively declined to make the purchase, or that they told Anupbati to sell her share to anyone she liked, for a higher price. Of course, the Plaintiffs were perfectly free to make the best bargain they could, and their attempt to reduce the price cannot amount to fraud. It appears that the negotiations with the Plaintiff fell through on account of there being a difference in the price claimed, and the price offered. The Mussammats then opened negotiations for sale with Rai Suraj Narayan Singh Bahadur, but during the period that was going on Sundarbati sold her share to the Plaintiffs, and thereupon

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY

Rai Suraj Narayan who is a well-known pleader of the Bhagalpur District Court, and knew the Mahomedan law of pre-emption thoroughly declined to purchase Anupbati's share. After that, it is alleged by the Defendants, Anupbati again opened negotiations for sale with Plaintiffs. The Plaintiffs deny this allegation and I think the allegation is not satisfactorily proved. There is some difference between the allegation in the written statement of the Defendants and the evidence adduced by them on this point. In the written statement, it is alleged that Anupbati herself came to Monghyr to re-open the negotiation with the Plaintiffs, but the evidence adduced is to the effect that she did not do it herself, but sent her relation Jadubir to do it. It also looks somewhat inconsistent why Anupbati should re-open the negotiation with the Plaintiffs when she had previously refused to sell her share to them for Rs. 36,000 which they offered. On the whole I think this allegation of the Defendants is not true, and that the evidence adduced in support of it is not reliable. There is also no satisfactory evidence of the assertion that the sale by Anupbati was effected with the knowledge and the consent of the Plaintiffs, tacit or express.

"Then as to the plea of estoppel by conduct, I find in the first place, that there is no reliable evidence to shew that the Defendant first party was induced by the Plaintiffs to buy the property in dispute, and that they waived their right of pre-emption by any act on their part.

"The Mahomedan law is that the waiver and relinquishment on the part of a pre-emptor must take place, after, and not before the sale. In these cases, no such thing is alleged or proved. The equitable doctrine of estoppel, embodied in sec. 115 of the Indian Evidence Act is not applicable here, because there is no proof of the facts that the Defendant first party was induced by the Plaintiffs to make the purchase, or that the Defendant second party was influenced by them to sell to Defendant No. 1. Both these issues are therefore found against the Defendant.

"7th issue.—The *kobala* of the 17th December 1897 purports to have been executed for a consideration of Rs 44,850. The Plaintiffs allege that Rs. 5,330, which is said to have been paid to Ganpat, Rs. 2,520 which is said to have been paid to Karman Mahton out of the consideration money, on account of debts due to them by Anupbati, were not actually paid. It is further asserted on the part of the Plaintiffs that the sum of Rs 1,000 out of Rs. 1,466-4-6, which is said to have been paid in cash to Anupbati out of the purchase money, was not actually paid. With the exception of these 3 items the rest of the consideration money was admittedly paid. I shall therefore examine the evidence bearing upon the 3 items in dispute. Now Ganpat and Karman appear to be relatives of Defendant first party. They have given their evidence in these cases and have produced their account books. Some of these books look very suspicious, specially those produced by Ganpat. They have evidently been made to look old, the paper being clearly soaked in water to give them an old appearance. The debts due to Ganpat and Karman are not secured by any

BAIJNATH GAENKA v. RAMDHARI CHOWDHRY.

registered deeds. The debts are no doubt heavy. Anupbati's share was mortgaged along with Sundarbati's share in the taluka to the Babus under a Sudbharna pottah (Ex. 4), the amount advanced was Rs 63,000. In that state of things no money lender would advance money to Anupbati upon mere Khata Bahis and Chittis, as is alleged to have been done by Ganpat and Karman. I also fail to understand why Ganpat kept with him the old Chittis, when they were renewed by new ones. I further find that at the time of the execution of the *kobala* in question, no account was made of the debts due to Ganpat and Karman. Considering therefore all these circumstances, and the unsatisfactory nature of the evidence adduced to prove these debts, I find that the debts were not actually due by Anupbati and are merely illusory, and that the payment of such debts is altogether false. These debts amount to Rs. 7,850. The payment of this amount out of the consideration is therefore not established. Then as to the remaining payment of Rs. 1,000, out of Rs. 1,466-4-6 paid in cash to Anupbati, I find that this was an actual payment. Anupbati admits the receipt of this amount in her evidence taken by commission. The other evidence bearing upon this point is unreliable, and I am not prepared to reject it altogether. There has been a good deal of discussion on both sides regarding the market value of the property sold, but I don't think it necessary to enter minutely into the evidence bearing upon it. All that I have to observe on the point is, that the price actually paid was Rs. 37,000 only and this amount represents also the market value of the property sold. So there is no improbability regarding the actual payment of this amount as price of the property sold."

Against the decrees of the Subordinate Judge Nubhoy Chowdhry appealed to the High Court of Judicature at Fort William in Bengal. The High Court delivered its judgment on 20th January 1904. It decided that the *talab i-mowashibat* and the *talab-i-istishad* were performed as alleged but was of opinion that the Appellants were precluded from claiming pre emption, because they had not made *talab-i-istishad* with the least practicable delay. The High Court was also of opinion that the full amount of consideration as stated in the deed of sale had been paid by the vendee to the vendor, and that the Appellants had waived their rights of pre-emption. In accordance with the above findings the High Court made decrees reversing the decrees of the Subordinate Judge and dismissing the suits with costs In so doing the High Court observed as follows.

"Subordinate Judge in his judgment has shown that there is ample evidence with regard to the performance of the *talab-i-mowashibat* by both Plaintiffs as soon as they heard of the actual sale to the Defendant No. 1 and we do not think we need say more on this point than that we agree with him as to the performance of all the necessary formalities, and that the *talab-i-mowashibat* is not vitiated by the Plaintiffs not having specified the names of all the villages they claimed the right to pre-empt. The Subordinate Judge has given in his judgment sufficient reasons for coming to

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY.

the conclusion he has arrived at in respect of this part of the case. The formalities required for the *talab-i istishad* were also, we think, duly performed. But we are unable to agree with the Subordinate Judge in his view that it was performed with the necessary promptitude It is clear that it is absolutely essential that this formal demand of the right of pre-emption should be made "with the least practicable delay." *Mussammat Jumeelun* v. *Luteef Hassim* (1): Wilson's Digest, Art. 375 (2) page 412 and in our opinion it was not so performed The Plaintiff Jowhuri Lal heard of the sale to the Defendant No. 1 on 20th December 1897 and the Plaintiff Mangni Ram heard of it on the 5th January 1898, but neither of them went to Defendant's house and performed the *talab-i istishad* until 7th January 1898. Now, the Plaintiff Jowhuri Lal explains that he was engaged during the time in getting a copy of the deed of sale and in making arragements for a police guard for the conveyance of the money which he tendered to the Defendant when he performed the *talab-i istishad*. The Plaintiff Mangni Ram excuses his delay by saying he was absent in Benares up to 5th January and that he could not go to Defendant No. 1's house on 6th January as he was afraid to go without the protection of the police and so his agent proceeded there, as soon as he got a police guard, which was when the agent of the Plaintiff Jowhuri went to the Defendant's house. But we do not consider these excuses satisfactory. The evidence discloses the fact that there was considerable and certainly sufficient delay to invalidate the *talab-i istishad* on the part of both Plaintiffs The Plaintiff Jowhuri Lal instructed his agent Ram Baran Lal to procure a copy of the deed of sale. Ram Baran Lal went to the Registry Office at Gogri, where the deed was registered, on 21st December at 4 P. M. The office was then closed, as it would naturally be, for 4 o'clock P. M. is after office hours. The witness states he went again on 27th December. The Subordidate Judge observes that this delay was due to the fact that the office at Gogri was closed from 21st to 26th December. But this was not so. There is no evidence to this effect. We have been referred to a list of the executive Christmas holidays published by this Court for the year 1897. From this list it appears that there were executive holidays on the 24th, 25th, 26th December only. There was therefore an unnecessary delay of at least 3 days in making the *talab-i istishad*, which is fatal. But that is not all. The postal peon Har Lal Mandar deposes that he took the envelope containing the copy of the deed of sale to the Plaintiff Jowhuri Lal on the 2nd January. The Subordinate Judge remarks that this cannot be correct, for 2nd January 1898 was a Sunday, when registered letters are not delivered. But this does not seem to be a sufficient reason for considering that the peon did not take the letter to the Plaintiff Jowhuri on the 2nd January. But, even if this conclusion be correct and that the postal peon did not go on the 2nd January but on the 3rd there was still delay on the part of the Plaintiff, for the peon says he went twice and tendered the letter to the Plaintiff and twice the

(1) 16 W. R. F. B. 13 (1871)

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY.

Plaintiff refused to take it and told him to take it away and bring it back and he would take it "after thinking over for some time." The Plaintiff according to the peon only received the letter the third time it was tendered to him, that is at 4 o'clock P. M. on 4th January, so that there was clearly at least two days delay in the receipt by the Plaintiff Jowhuri of the registered copy of the deed of sale. The Plaintiff was evidently during these two days trying to gain time for reflection. Then the Plaintiff Jowhuri Lal was, according to his own showing, in possession of all the information he required for the *talab-i-ishhad* on 4th January by 4 o'clock P. M. But the *talab-i-ishhad* was not made on his behalf till the 7th January, though the purchaser's house was at a distance of only 7 miles. He explains that he was engaged during this time in consulting a Barrister named Mr. Scott as to how he should procure a police guard and in procuring a police guard and this is also the excuse given by the Plaintiff Mangni Ram for his delay from the 5th to 7th January. But it is unquestionable that this was an unnecessary delay. It is not necessary according to the Mahomedan Law to tender the money at the time of making *talab-i-ishhad* so there was no necessity for any police to guard the money. Besides, the agent of the Plaintiff Mangni Ram took his money in notes which he could carry on his person, so in this case the police guard was doubly unnecessary. The cases of both Plaintiffs must therefore fall to the ground. This being so, it is, strictly speaking, unnecessary for us to consider the other grounds for appeal.

"But we would wish to record that we are further unable to agree with the findings of the Subordinate Judge that there was no waiver on the Plaintiff's part of the right of pre-emption and that the price paid for the property was not Rs. 44,850 but only Rs. 37,000.

"In the first place the evidence adduced by the Defendant convinces us that the Plaintiffs were throughout endeavouring to purchase the property at as low a price as possible, that they offered Rs. 36,000 and would give no more, and that their agents told the Defendant Anupbati and her nephew Jadubir that they would give no more and that if Anupbati would not accept Rs. 36,000 she was at liberty to sell the property to whom she pleased, Anupbati failed in her negotiations with the pleader Surja Narayan and again tried to induce the Plaintiff to give more. She then sold to the Defendant Nirbhoy The Plaintiff Jowhuri Lal was well aware of these negotiations. It is in evidence that he was informed of Anupbati's overtures to Nirbhoy Chowdhry and that he engaged a pleader, also named Jowhuri Lal, to go to Ramdhari, the son of Nirbhoy Chowdhry, to pursuade him not to buy the property so as to force Anupbati to sell to the Plaintiffs at their own price. This leads us to believe the witnesses who depose that the Plaintiff's agents told Anupbati that she was at liberty to sell to another at a higher price, if she could get it. The Plaintiff Jowhuri Lal did not expect she would be able to do so. He endeavoured to frustrate her attempts to sell for a better price and certainly never after becoming aware of her negotiations

BAIJNATH GAENKA v. RAMDHARI CHOWDHRY.

to sell to Nirbhoy, came forward and offered to buy at the price that Nirbhoy was willing to give or warned her that he intended to exercise his rights of pre-emption, if she did succeed in selling to another (see *Brojo Kishore Sarma* v. *Kirtee Chandra Sarma* (2), *Torul Komhar* v. *Achhee* (3), *Kooldeep Singh* v. *Ramdeen Singh* (4), *Bhairon Singh* v. *Lalman* (5).

"Then we see no reason for supposing that the price paid was not Rs. 44,850 but only Rs. 37,000. The Subordinate Judge finds that 2 debts of Rs. 5,330 and Rs. 2,520 alleged to be due to persons named Ganpat and Karman were illusory and not real debts. We are not of this opinion. The debts have been proved to our satisfaction: Ganpat, Karman and other witnesses have deposed to them. They produce their books, both recent and of earlier date, in which these debts are entered. Some of these books have gone through several rainy seasons. One witness explains that the roof of the house in which they were kept fell in and so they got damp. We see no reason to disbelieve this story. At any rate they do not appear to have been soaked in water, as the Subordinate Judge is of opinion they have been, to give them an old appearance. On the contrary they appear to be genuine old books and we believe in the existence of the debts in proof of which they have been produced. But whether these debts were real or illusory we are convinced that the Defendant No. 1 paid Rs. 44,850, to Anupbati and that she received this sum from him. If she only received Rs. 37,000 which exceeds by but a trifling amount what the Plaintiffs had offered to her, it seems most probable that the Plaintiffs would have bought the property and that there would have been no occasion for these suits. It was because Anupbati would not sell for Rs. 36,000 or any sum approaching that amount, but wanted much more, so as to clear her of her liabilities that the negotiations with the Plaintiffs were broken off and that she sold to Defendant No. 1 for Rs. 44,850. Even this sum appears an inadequate price for the properties sold, as Ramdhari, the son of Nirbhoy, deposes that they are worth not less than Rs. 50,000.

"In these circumstances we do not think we need discuss any other of the grounds of appeal raised by the Appellants. We would only remark in conclusion there is in our opinion no force in the plea that the Plaintiffs ratified the sale to the Defendant. They may have accepted small sums out of the purchase money in payment of debts due to them but they never intended, we consider, to ratify the sale, nor can their act be regarded as amounting to ratification. Moreover this plea was not expressly taken in the written statement of the Defendants or pressed in the lower Court"

The Appellants thereupon preferred the present appeals, which were consolidated, to His Majesty in Council.

Mr. DeGruyther and *Mr. G. A. H. Branson* for the Appellants.—The question for decision relates to Mahomedan usage or institution and the law applicable to the case is the Mahomedan law on grounds of justice, equity, and good

(2) 15 W. R. 247 (1871).
(3) 18 W. R. 401 (1872).
(4) 24 W. R. 198 (1875).
(5) I. L. R. 7 All. 23 (1884).

BAIJNATH GAENKA *v.* RAMDHARI CHOWDHRY.

conscience: The Bengal, United Provinces and Assam Civil Courts Act (XII of 1887, B. C.), sec. 37. To assert a valid claim to pre-emption two formalities are requisite known as the *talab-i-mowashibat* and the *talab-i-istishad*. The former consists in declaring an intention to pre-empt immediately on hearing of the sale, the latter consists in a formal declaration made with the least practicable delay to the same effect, before witnesses, in the presence of either the vendor or vendee, or on the premises sold: For the explanations and definitions of these two terms reference was made to Baillie's Digest of Mahomedan law, Vol. I (2nd Ed. 1875), pp. 487 and 489; Hamilton's Hedaya (2nd Ed. 1870), pp. 550 and 551; *Jarfan Khan* v. *Jabbar Meah* (6); Ameer Ali's Mahomedan Law, Vol. I. (3rd Ed. 1904), Ch. 25, sec. 3 and *Ram Mohan Das* v. *Lakhi Narayan Roy* (7). The law seems to rest upon the Koran and then upon tradition and lastly upon the judicial decision and interpretation of the Koran and tradition. Both Courts in India have concurred in holding that *talab-i-mowashibat* was duly and properly performed by the Appellants immediately on hearing of the sale, they have also concurrently found that the *talab-i-istishad* was duly performed. But the Subordinate Judge held that there was no unnecessary delay in its performance, while the High Court held that there was delay. It is submitted that the Subordinate Judge was right and that the High Court erred. *Talab-i istishad* must be performed after the first demand without any unnecessary delay, which

(6) I. L. R. 10 Cal. 383 at p. 387 (1884).
(7) 4 B. L. R. 208 (1870).

means that it must be performed in a reasonable time. The pre-emptor is entitled to be satisfied as to the truth of the sale. There was no delay after the facts were obtained. The official calender shows that the delay was due to holidays the Appellants are not responsible for that.

The High Court was wrong in holding that the Appellants waived their right to pre-empt, because when they could not come to terms, they said "you may sell to any one you like." The true consideration for the sale was Rs. 37,000 as found by the Subordinate Judge.

Mr. Jardine, K. C. and *Mr. Cowell* for the Respondents.—The right of pre-emption owes its origin to motives of expediency and a desire to prevent the introduction of stranger among co-sharers and neighbours likely to cause inconvenience or vexation. It is a personal right and not a right incidental to ownership of property: Ameer Ali's Mahomedan Law, Vol. I, (3rd Ed. 1904), p, 596. Reference was also made to Sir R. K. Wilson's Digest of Anglo-Mahommedan Law (2nd Ed. 1903), Ch. 12, Arts. 375 and 379; and Baillie's Digest of Mahommedan Law, Bk. 7, Chs. 1 and 3. It is not necessary that the pre-emptor should tender the price at the time of making his formal claim. Here the delay is partly put down to getting escort of police for safety of the tender money. *Talab-i-istishad* should be made with the least practicable delay. *Mussammat Jumeelun* v. *Luteef Hossein* (1). The High Court is right in coming to the conclusion that there was unnecessary delay. There is ample evidence to show

(1) 16 W. R. F. B. 13 at p. 14 (1871).

BAIJNATH GAENKA v. RAMDHARI CHOWDHRY,

that the Appellants were perfectly aware of the negotiations, which brought about the sale in question. The ceremony of *talab i stish-ad* must be done "instantly," and it is not enough, as the Subordinate Judge says, that there should be no gross negligence in doing it.

If the pre emptor takes any benefit from the purchaser or recognises his right under the purchase in any way, he (the pre emptor) waives his right of pre-emption. The purchaser paid money into Court on 2nd July 1898 to pay off the mortgage on the property. The Appellant-pre emptors, who were the mortgagees, took that money out of Court on 13th September 1898, and gave possession to the purchaser. The Appellants thus recognised the purchase and waived their right to pre-empt. The High Court says the point was not raised in the written statement, which was filed on 1st September. The money was taken out on 13th September. It was, therefore, not possible to raise this plea in the written statement. But it was raised at the earliest opportunity in the memorandum of appeal. The Appellants having once taken the money out of Court, could not question the purchase: Reference was made to the Transfer of Property Act (IV of 1882), secs. 83 and 84; and *Habib-un-nissa* v. *Barkat Ali* (8).

Mr. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—These two consolidated appeals arise out of two suits, one brought by Mangni Ram, the other by Jowhuri Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in taluka Rasulpur Bhatowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Mangni and Jowhuri had become the owners in equal shares of 12 annas of the property. The remaining four annas belonged to the Respondent, Anupbati Koeri, who on the 17th December 1897 sold those four annas to Nirbhoy Chowdhry; and that is the sale against which the right of pre emption is claimed. It has been found that Jowhuri first heard of the sale on the 20th December 1897, and that thereupon he at once made the immediate claim to pre-empt which the law requires. Mangni first heard of the sale on the 5th of January 1898, and at once made his immediate claim. No question therefore arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhuri, on hearing of the sale, which he did at Monghyr, at once sent to his agent at or near Gogri to procure from the Registry Office a copy of the sale deed. The agent obtained that copy and sent it to Jowhuri, who actually received it on the 4th January. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, first, that the copy from the Registry was not obtained and sent off as soon as it might have been. But an examination of the Official Calendar shows clearly that the learned Judges

(8) I. L. R. 8 All. 275 (1886).

were led to this conclusion by a misapprehension as to the time during which the Registry Office was closed for the Christmas Vacation. The High Court held, secondly, that Jowhuri was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office peon. This conclusion is based upon the evidence of the peon himself, which the learned Judges believed. But the Judge who had this witness before him disbelieved his story. That story is admittedly inconsistent with the rules of the Post Office; and it finds no support from the witness's own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Mangni and Jowhuri is identical. On the 5th January they knew everything which it was essential to know. On that day they took the advice of local barrister, and in accordance with his advice they on the next day, the 6th January, applied to the proper officer for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on 7th, and the messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is whether the interva that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the Respondents arises in this way:—The two Plaintiffs Mangni and Jowhuri had obtained a transfer of a *zurpeshgi* mortgage binding the four annas share sold by Anupbati to Nirbhoy After that sale Nirbhoy paid the mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage: and after some hesitation the two Plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention Until a decree for pre-emption was made Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the Plaintiffs, as mortgagees, was no recognition of anything more than this, and

was quite consistent with the claim to pre-empt.

There remains only one other point for consideration, as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850 As to this point their Lordships do not find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advice His Majesty that these appeals should be allowed; that the decrees of the High Court should be discharged with costs; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of the pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine; that subject to these variations and the payment to the Appellants of additional costs (if any) the decrees of the Subordinate Judge should be restored; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The Respondents who have resisted the appeals will pay the costs thereof

Solicitors: *Messrs. Watkins and Lempriere* for the Appellants.

Solicitors: *Messrs. A. H. Arnould and Son* for the Respondents.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 201 OF 1906.

MACLEAN, C. J.
COXE, J.
1908.
Heard, 28 and 29, January.
Judgment, 29, January.

NUNDA LAL GOSSAMI and others, Appellants,
v.
ATARMONI DASSI and others, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 50—Land Acquisition proceeding—Apportionment of compensation between landlord and tenant—Presumption of permanency of holding.

Although sec. 50 of the Bengal Tenancy Act does not apply when the question of the permanency or otherwise of a tenure arises in a proceeding for the apportionment between landlord and tenant of money awarded for compulsory purchase of land, the principle involved in that section is a useful guide to the Courts in deciding it.

This was an appeal preferred on the 11th of June 1906, against the decree of Moulvi Abdul Barry, Subordinate Judge, Zillah Hooghly, dated the 27th April 1906.

The facts are as follows:—

A plot of 25 bighas of land belonging to the Gossain family of Serampore was formerly held by one Bissumbar Sen as a tenant at a *jama* of Rs. 54 6 8. After his death his son Sreenath held the land. On 10th November 1873, Sreenath gave a *mourasi mokurari pattah* of the plot to the Champdani Jute Mills under a registered sub-lease at a rent of Rs. 102 per year. Sreenath was succeeded by his widow Atarmoni, one of the Respondents in this appeal.

NUNDA LAL GOSSAMI v. ATARMONI DASSI.

Out of this 25 bighas, the Government acquired 2 bighas, 5 cottahs at Rs. 4,246-3-6 p. and the Deputy Collector apportioned the compensation money awarding a sum to the zemindars and *putnidars*, equal to the capitalized value of 20 years rent and also at the same rate to Atarmoni, and giving the rest to the Champdani Jute Mills. The zemindars being dissatisfied with this caused a reference to be made to the Civil Court. The Judge found on the evidence that the rent was paid at a uniform rate for more than 20 years and therefore the presumption of law arose that the tenure was permanent. He held that under the circumstances the zemindars could not get more than what had been awarded by the Deputy Collector and dismissed the zemindar's claim with costs

Against this judgment the zemindars appealed.

Babus Dwarka Nath Chuckerbutty and *Sib Chandra Palit* for the Appellants.

Dr. Rash Behari Ghose and *Babu Upendra Lal Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The question in this case arises as to the apportionment of certain money awarded for compulsory purchase of land under the provisions of the Land Acquisition Act. It is the old struggle between the zemindar on the one hand, and the tenant on the other. The real question is this, whether the Court below was right in presuming, in the circumstances I am about to state, that the tenure of one Bissumbar Sen, who is long since dead, was of a permanent nature. The origin of the tenure is lost in obscurity, and we do not know what it was. But it appears that one Bissumbar Sen had been holding the land as a tenant at a rent of Rs. 54 odd. It appears from the evidence in the case that ever since the death of Bissumbar which apparently occurred some 55 years ago, his son Sreenath Sen, who then by inheritance held the property, had been paying the same rent, and after his death, his widow, a party to the present proceedings, Sreemati Atarmoni Dassi, has been paying the same rent. The result, therefore, is that for a period of some 55 years, the evidence shows, the same rent has been paid. It appears that on the 10th of November 1873, Sreenath Sen gave a *mourasi mokurari pattah* of the land to the Champdani Jute Mills Co., who are the Respondents on the present appeal, at an enhanced rent of Rs. 102 per annum It also appears that the value of the land has gone up very much and, upon the evidence of the Appellants' own witnesses, the value of the whole land included in the tenure is now seven-thousand rupees, instead of Rs 54, a year. It is equally clear that no steps have been taken by the landlord either to evict Bissumbar Sen or those holding under him, or to enhance the rent of the tenure. In these circumstances was not the Court right in holding that a presumption arose that the tenure was of a permanat nature? It is not disputed that sec. 50 of the Bengal Tenancy Act does not apply to qestions which arise in proceedings of this nature: but it is said, and I think properly said, that the principle involved in that section is a useful

NUNDA LAL GOSSAMI v. ATARMONI DASSI.

guide to the Courts in matters of this nature. I do not put it higher than that. But this is clear that if the zemindar had brought an action, either to evict or to enhance, on the ground that the tenure was not a permanent one, the Defendants, the tenure-holders could then have claimed, and successfully, the benefit of sec. 50 of the Bengal Tenancy Act, and it is probable that for that reason, notwithstanding the great rise in the value of the land, the zemindar has not brought any suit of that nature. In these circumstances, is not the Court justified in presuming that the tenure was permanent? There is nothing on the part of the landlord to show what was the nature of the tenure in its inception: and, I have stated all the facts which we have before us On these facts, I think the view taken by the Court below is right, and the presumption has not been rebutted that the tenure is permanent.

The result is that the appeal fails and must be dismissed with costs, two sets of hearing fee, for Respondents Finlay Muir & Co., four gold mohurs, and for Respondent Atarmoni two gold mohurs.

COXE, J.—I agree.

N. G. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE NO. 2795 OF 1907.

MACLEAN, C. J.
COXE, J.
1908.
7, January.

ASIRUDDI MONDOL, Petitioner,

MUKHODAMOYEE DASSI, and ors, Opposite Party.

Civil Procedure Code (Act XIV of 1882), sec. 310A—Application to set aside rent sale—Bengal Tenancy (Amendment) Act (I B. C. of 1907), sec. 54—Bengal General Clauses Act (I B. C. of 1899), sec. 8, cl. (c)—Right accrued previous to, but application after, repeal.

A raiyati holding having been sold on the 7th May 1907 in execution of a rent-decree, an under-raiyat applied to have the sale set aside under sec. 310A, C. P. C., on the 23rd May following,

Held—*That the application could not be entertained, the Bengal Tenancy (Amendment) Act I of 1907 having come into operation on the 22nd May 1907.*

Sec. 54 of the amending Act by enacting that sec. 310A, C. P. C., shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of sub-sec. (c) of sec. 8 of the Bengal General Clauses Act.

This was a rule granted on the 26th of August 1907, against the order of Babu Basanta Kumar Pal, Munsif, 1st Court at Basirhat, dated the 16th of July 1907, passed in execution case No. 556 of 1907, rejecting the objections of the Petitioner taken to the application of the opposite party Mukhoda Dassi made under sec. 310A, C. P. C., and holding that the opposite party had a *locus standi* to apply under the said sec. 310A, C. P. C.

The facts of the case are as follows.

One Nabin Chandra Ghose obtained a decree for rent against his tenant Ahed Mollah.

In execution of that decree the decree-holder caused the tenancy held by the tenant to be sold on 7th May 1907 in execution case No. 556 of 1907 in the 1st Court of the Munsif of Basirhat.

ASIRUDDI MONDOL *v.* MUKHODAMOYEE DASSI.

The Petitioner purchased the same at the auction sale.

The opposite party Mukhodamoyee Dassi alleging herself to be an under-raiyat under Ahed Mollah, the judgment-debtor, applied under sec. 310A of the Civil Procedure Code to have the sale set aside after depositing the decretal amount, on the 23rd May 1907.

The Petitioner opposed the said application, but the learned Munsif by his judgment dated the 16th July 1907 held that the opposite party had a *locus standi* to apply under sec. 310A and disallowed the Petitioner's objection.

The Petitioner then moved the High Court and obtained this rule.

Babu Atul Krishna Roy for the Petitioner.

Babu Baikuntha Nath Das for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is an application under sec. 622 of the Code of Civil Procedure, to discharge an order of the Munsif of Basirhat, dated the 16th of July 1907, by which he gave an under-raiyat liberty to pay in the purchase money under see. 310A, of the Code of Civil Procedure. the auction purchaser applied for a rule to discharge that order on the ground that the Judge had no jurisdiction to make it, and, a rule was granted.

It appears that the application upon which the order of the Judge was passed was made on the 23rd of May 1907. But on the previous day, the 22nd of May 1907, the amending Bengal Tenancy Act (Act I of 1907) came into operation, and by sec. 54, amending sec. 170 of the existing Bengal Tenancy Act, it was enacted that the words "310A" should be inserted in sec. 170. The effect of that amendment was to prevent any order being passed under sec. 310A of the Code: and, if the matter had rested there, the rule must have been made absolute. Whilst the opposite party concedes that, it is urged that he is protected under sec. 8, sub-section (*c*) of the Bengal General Clauses Act (Act I of 1899). That section runs as follows:—

"Where this Act or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not affect any right privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed." It appears that the execution proceeding and the sale in this particular case had taken place before the amended Bengal Tenancy Act came into operation on the 22nd of May 1907 and the argument is that sec. 54 of the amending Act repealed some portion of the Bengal Tenancy Act and that the opposite party had acquired a right, under sec. 310A, to come in and make the deposit, and that the repeal could not affect that right. That is in substance the argument submitted to us.

We must first consider whether there has been any repeal of the Bengal Tenancy Act upon this point. In no part of the Bengal Tenancy Act (Act VIII of 1885) is sec. 310A of the Code of Civil Procedure referred to, and for the best of all reasons that it was not then in existence, in as much as sec. 310A

ASIRUDDI MONDOL *v.* MUKHODAMOYEE DASSI.

was not added to the Code of Civil Procedure until the 2nd of May 1894, that is nearly nine years after the Bengal Tenancy Act had been in operation. The argument of the opposite party is that sec. 170 does by implication, coupled with sec. 143 of the Bengal Tenancy Act, incorporate, if I may use the expression, all the sections of the Code of Civil Procedure relating to suits, except those which are expressly excepted. Sec. 170 runs thus: "sec. 278 to 283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon." And, sec. 143, sub-sec. (2) runs as follows "subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure shall apply to all such suits." But those provisions can only apply to the Code of Civil Procedure as it then stood, and it could never have been intended that all the provisions of any subsequent amendment of the Code were to apply. In this view, there was no repeal of any portion of the Bengal Tenancy Act; and consequently sec. 8 of the Bengal General Clauses Act has no application. No doubt, this Court has held, although there is some difference of opinion upon the point, that applications under sec. 310A may properly be made when a tenure or holding has been attached in execution of a decree for arrears due thereon under the Bengal Tenancy Act. But for the reasons I have pointed out, there was no enactment to that effect under the Bengal Tenancy Act of 1885, nor could there have been any such, because, as I have said, the section was not then in existence.

For these reasons I think the point taken by the opposite party cannot prevail: and as it had been expressly enacted that sec. 310A was not to apply to a tenure or holding attached in execution of a decree for arrears due thereon before the application to deposit the purchase money was made, the rule must be made absolute with costs, hearing fee two gold mohurs.

COX, J.—I agree.

N. G. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 118 OF 1906.

STEPHEN, J. DASS, J. 1908 Heard, 28 and 29, January. Judgment, 29, January.	SYED KHALILUR RAHMAN and others, Plaintiffs, Appellants, *v.* RUPAN MAHTON and others, Defendants, Respondents.

*Landlord and Tenant Act (VIII B. C. of 1869), sec. 6—Bengal Tenancy Act (VIII of 1885), sec. 116—*Kamat *land—Right of occupancy—Tenant, holding over.*

Where the rights of the parties were governed by Act VIII, B. C. of 1869, lands which were kamat *did not cease to be so by virtue of a* mokurari *settlement of the same.*

A tenant of kamat *land does not acquire a right of occupancy by holding it over after the expiry of the lease.*

This was an appeal preferred on the 1st of February 1906, against the decree of Babu Aswini Kumar Guha, Subordinate Judge of Zillah Bhagulpur, dated the 20th of November 1905, reversing that of Babu Surendra Nath Ghose

SYED KHALILUR RAHMAN *v.* RUPAN MAHTON.

Munsif of Monghyr, dated the 21st of February 1905.

The facts of the case appear from the judgment.

Moulvis Syed Shamsul Huda and *Syed Mahomed Tahir* for the Appellants.

Babus Sarat Chandra Roy Chowdhury and *Harendra Krishna Mukerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is a suit for recovery of lands which the Plaintiffs claim as their *kamat* lands. This claim is resisted by the Defendants on the ground that they have acquired an occupancy-right in the lands, and that if they have not acquired the occupancy right they are at all events entitled to a notice with which they have not been served.

In considering the rights of the parties we have to consider the matter from a chronological point of view. In the first place we will assume that before 1869 these lands were *kamat* lands of the predecessor in title of the Plaintiffs. Before 1869 at a time which is not found the present Plaintiffs became *mokuraridars* of the lands in question and as such they granted a lease to the Defendants' predecessor in title.

Now the first question which we have to decide is whether on the Plaintiffs becoming *mokuraridars* the lands ceased to be *kamat* and we hold that they did not, because whatever may be the effect of sec. 116 of the Bengal Tenancy Act, the rights of the parties at that time were governed by Act VIII (B. C.) of 1869, sec. 6, which excepts from the acquisition of occupancy-rights *kamat* lands belonging to the proprietors of the state or tenure and let by him on a lease for a term or year by year. Looking at the meaning of the words estate and tenure as shown by the contents of the Act of 1869 compared with the definition in the Bengal Tenancy Act, which, of course, did not then exist, we are of opinion that the lands did not cease to be *kamat* merely because the *mokurari* was created, and therefore we hold on the supposition we have mentioned that the lands were *kamat* lands as far as that lease is concerned.

The next matter we have to consider is the termination of that lease by efflux of time in 1876. According to the finding of the lower Appellate Court what happened then was that the tenant, the predecessor in title of the Defendants, remained in possession of those lands, and he and the Defendants remained in possession of those lands holding them on the terms provided in the lease for the space of 21 years. Now, if those lands were to be taken as *kamat* lands during all that time the tenants failed to acquire any occupancy by reason of sec. 6 of 1869 and sec. 116 of the Bengal Tenancy Act.

It has been argued before us that the Defendant became a trespasser on the termination of the lease in 1876, and that he accordingly acquired the right of occupancy without any reference to sec. 116. We cannot consider that this is so, for as he is found to have paid rent we must take it that at the end of the first year of his tenancy any trespass which he committed by holding over after his tenancy was completed was condoned and was in fact no trespass at all.

SYED KHALILUR RAHMAN *v.* RUPAN MAHTON.

Thus then we find that the Defendant had acquired no right of occupancy when the lease was granted to him by the Plaintiff in 1896. That lease was in terms granted by the Plaintiff as *mokuraridar* and there is a finding to the effect that he was a *mokuraridar*. This however does not affect the question of whether the lands remained *kamat* lands, as if they were *kamat* lands when the *mokurari* was instituted they would remain so. We must take it therefore that the land was *kamat* land during the currency of the second lease of 1896. Now that the lease terminated in 1903, and there is no finding that after its termination the Defendant held over or consequently acquired any right of occupancy, he is therefore since the termination of the lease of 1896 a trespasser, and on the supposition we have mentioned, namely, that the lands were *kamat* before 1869, he has no defence to the present action.

As regards the question as to whether the lands were *kamat* before 1869, there is a definite finding by the lower Appellate Court. But that is based on the contents of the second lease of 1896, and it has been held in the case of *Masudan Singh* v. *Gooder Nath* (1), that the contents of the lease cannot change a non-occupancy holding into *kamat* land. In this case it has not been suggested that the contents of the lease have any evidentiary value. We are accordingly left without any finding by the Appellate Court on which we can act as to whether these lands ever were *kamat* or not. If they were not *kamat*, the basis of the Plaintiffs' case fails because obviously the Defendants will have acquired occupancy title between the termination of the first lease and the commencement of the second.

The lower Court having come to no finding on this question, the case must be remanded to that Court for such finding to be arrived at. The Subordinate Judge will therefore come to a finding whether the lands in question were *kamat* lands before the *mokurari* was created. If they were, he will give judgment for the Plaintiffs, otherwise for the Defendants.

The costs of this appeal will abide the result in the discretion of the Court below.

S. C. S *Case remanded.*

(1) 1. C. L. J. 456 (1905).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1445 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
21, January.
Judgment,
24, January.

BANSI LAL, Petitioner,
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act IV of 1898), secs. 190 (1) (c) and 191—Applicability to the Appellate Court—Appeal, part of a trial.

A Magistrate, passing orders for the issue of summons against the accused in a case placed before him by an order of the Collector to the effect that the case should be put up before the Magistrate for the issue of necessary orders, takes cognizance of the case under sec. 190 (1) (c).

A Subordinate Magistrate who took cognizance of a case under sec. 190 (1) (c),

BANSI LAL *v.* THE EMPEROR.

Cr. P. C., could not after becoming District Magistrate hear an appeal from a conviction in the case which was tried by another Subordinate Magistrate, without following the procedure laid down by sec. 191, Cr. P. C., an appeal being part of the trial for an offence.

This was a rule granted on the 12th of December 1907, against an order of Babu Dhirakshan Singh, Deputy Magistrate of Gya, dated the 14th of September 1907, which order was, on appeal, modified by Mr. M. K. Deb, District Magistrate of Gya, on the 21st of September 1907.

The facts of the case briefly stated are as follows :—Under Collector's order dated the 6th May last, one Abdus Samad Amin—the complainant in the present case—was deputed to relay the boundaries of village Chandra belonging to one M. Abdullah. On the 17th the said Amin reported to the Collector, Mr. Foley, that he had erected eight boundary pillars on the western side of the village and when he had gone to take his dinner, the accused with 20 or 25 men went to the spot, destroyed the pillar and took away the materials with them. On this Mr. Foley passed the following order.

"See under what sections Bansi Lal, Dasrathi Lal and their servants can be prosecuted and prosecute them accordingly. Put up before Mr. Deb for the issue of necessary orders."

The case coming up before Mr. Deb, he made the following order. "Summon Bansi Lal under sec. 434 for 28-5."

The accused was then put on trial before a Deputy Magistrate and convicted under secs. 379 and 434, I. P. C. On appeal Mr. Deb as District Magistrate set aside the conviction and sentence under sec. 379 but upheld the conviction and sentence under sec. 434, I. P. C.

The rule was issued to set aside the conviction and sentence under sec. 434, I. P. C.

Babu Dasarathi Sanyal for the Petitioner.

No one appeared to show cause against the Rule.

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why the conviction of the Petitioner under sec. 434, I. P. C., should not be set aside. He was charged with having destroyed and carried off the materials of certain boundary pillars erected by a survey Amin under the authority of the Collector. He was then convicted by the Deputy Magistrate under secs. 379 and 434, I. P. C., and sentenced to undergo 1 month's rigorous imprisonment under the former, and to pay a fine of Rs. 50 under the latter section.

On appeal the conviction and sentence under sec. 379, I. P. C., were set aside by Mr. Deb, District Magistrate and the conviction and sentence under sec. 434 were affirmed.

In support of this rule it has been argued (1) that the acts of the accused did not amount to mischief (2) that Mr. Deb as District Magistrate was incompetent to hear the appeal.

We do not think the first of the pleas can prevail. The Petitioner seems to have had good reason to know and to have known very well that the boundary pillars had been put up by a public servant under the authority of the Col-

BANSI LAL v. THE EMPEROR.

lector. His act in destroying the pillars and scattering and removing the materials in our opinion does amount to mischief.

We consider, however, that the second plea is a good one. Mr. Deb as Joint Magistrate appears to have taken cognizance of the case under sec. 190 (1) (c), for the Deputy Magistrate says that the report made by the Amin to the then Collector, Mr. Foley, "was not the complaint made to the District Magistrate in the sense in which it is defined in the Criminal Procedure Code, but it was simply an information regarding the occurrence of an offence, which had taken place." Mr Foley's order on this report was "see under what sections Bansi Lal, Dasrathi Lal and their servants can be prosecuted and prosecute them accordingly. Put up before Mr. Deb for the issue of necessary orders" This is not the order which would be passed on a written complaint under sec. 202 made to a Magistrate. Mr. Deb's order was "summon Bansi Lal under sec. 434 for 28 5." Hence, it would seem to us that he took cognizance of the case under sec. 190 (*1*) (*c*). It is now argued by the District Magistrate, Mr. Foley in his letter showing cause that the Amin filed a written complaint to him. This is contrary to the view taken by the Deputy Magistrate in his judgment and it would not seem to us that the written report of the Amin was a complaint, nor was it treated by Mr. Foley as a complaint but rather dealt by him as Collector as the Deputy Magistrate says it was, and hence Mr. Deb must be regarded as taking cognizance of the case under sec. 190 (*1*) (*c*). So before hearing the appeal when he became District Magistrate he should have followed the procedure laid down by sec. 191, because an appeal is part of the trial of an offence. Mr. Deb should have accordingly given the accused his choice of having the appeal heard by another Magistrate but did not do so We therefore set aside the Appellate Court's order dated the 21st September 1907, and direct that the accused's appeal be heard and disposed of by any Magistrate other than Mr. Deb competent to hear it, whom the District Magistrate may select for the purpose, or by the District Magistrate himself Mr. Foley, if there is no other Magistrate at the station of Gya competent to hear the appeal

B. C. *Rule made absolute.*



THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MARCH 23, 1908. [No. 19

Contents.

NOTES

In our last issue we had occasion to remark in connection with the Whipping Bill, that juvenile offenders are treated in England with parental care. We have noticed in these columns before, the movement in England for the establishment of separate courts for juveniles. There is already such a court in Birmingham. Although such courts have not come into existence all over the country, yet the principle and practice of keeping juvenile offenders separate from ordinary criminals and treating them as they would be treated at home or at school have found almost universal recognition in all the important magisterial courts in England. Remand homes have been established to prevent juveniles from being taken to the Police lock-up before or pending trial. Boys in India are ordinarily confined in Police cells with other criminals and brought up along with them to take their trial in open Court even for trivial offences.

In England juvenile or youthful offenders are not allowed to be mixed up with criminals. They are brought up before the magistrate in a separate room or in the Court room from which the public and adult offenders are excluded. They are not made to stand in the dock. The Magistrate gives them advice or administers reproof or warning, makes them over to parents or guardians or remands them to voluntary or public institutions or homes for reformation. In fact every effort is made and care taken to guard against the juveniles leaving the Magistrate's Courts with the impression that he is a criminal. If it is too much for us to expect at present that the same humane principles should be adopted in India in the treatment of juvenile offenders, it is certainly not too much to ask that strict limitations should be put on the powers of magistrates in the Whipping Bill to flog them publicly. It will be seen from an article we reproduce from the English Law Journal what special considerations are shown to youthful offenders in England and what special arrangements are in contemplation. A Bill recently introduced in the House of Commons by Mr. Herbert Samuel, the Parliamentary Secretary to the Home Office, some provisions of which we reproduce below, is also worthy of attention. Youthful offenders are not so very common in this country and that makes the duties of the Government in regard to them easier of performance.

The question how far a Presidency Magistrate is bound to take down evidence came up for decision before Chandavarkar and Knight, JJ. of the Bombay High Court in the case of *Emperor* v. *Haris Chandra Talcherkar*, a report of which appears at p. 20 of vol. X of the Bombay Law Reporter. One H a respectable person was placed on his trial before the Presidency Magistrate on a charge of insult and assault, convicted, and sentenced to pay a fine of Rs. 15. The Magistrate did not record any evidence and in his explanation submitted to the High Court he observed, "The case referred to was tried by me as a warrant case subject however to the special provisions of sec. 362 of the Code Criminal Procedure." The High Court while pronouncing judgment in the case observed. "The learned Magistrate observes in his report that he tried the case subject to the provision of sec. 362 of the Code of Criminal Procedure Code. No doubt the section lays down that except in certain cases the Magistrate shall take down evidence in the manner prescribed thereby, but that does not mean that in the cases excepted he can act arbitrarily

and record nothing by way of evidence. The exception gives merely a discretion to take down the evidence or not. In other cases to which the exception does not apply he is bound to record the evidence. But the discretion, like all discretionary powers, should be exercised judicially in a reasonable spirit and not arbitrarily. For instance in petty offences such as "nuisances" or what are called in police parlance "morning cases" there may be no necessity to record any evidence. But in cases of this kind, where an educated man holding a comparatively respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong."

SOME OF THE PRESIDENCY MAGISTRATES IN CALCUTTA seem to be under the impression that they are not bound to record any evidence in any case unless it falls within the description of the cases mentioned in sec. 362 Criminal Procedure Code, that is to say, cases in which a Presidency Magistrate imposes a fine exceeding Rs. 200 or imprisonment for a term exceeding six months. But it should be remembered that the decisions of the Presidency Magistrates in cases not falling within the description are not declared by law to be final; their decision is subject to revision by the High Court But how is the High Court to judge of the correctness or otherwise of the decision unless some notes of the evidence in the case are on the record? No doubt the law gives a certain amount of discretion to the Presidency Magistrate in the matter of recording of evidence. But that discretion must be held to have been given in the interest of the administration of justice. Otherwise there could be no justification for allowing such a discretion. It may be, the Legislature thought that in many petty cases the decision of the Presidency Magistrate will be virtually final, as the persons convicted would not move the High Court against those convictions. In cases which are likely to come up to the High Court, the Calcutta High Court have made it a rule that the record of the Presidency Magistrate must be such as to enable the Court of revision to judge of the propriety of the order.

AN IMPORTANT QUESTION AS TO THE LEGALITY OR otherwise of a condition subsequent in a Will was decided by the Chancery Division, on the 21st December 1907 a report of which appears at page 225 of the Times Law Reports vol. XXIV. The facts were briefly these:—A testator bequeathed certain properties to his nephew Herbert Beard and his assigns for his life without impeachment of waste "provided that he does not enter into the naval or military services of the country" with remainder to the use of his children in fee simple as tenants in common. The Will then continued: "But if my said nephew Herbert Beard shall enter into the naval or military services of the country . . . . then I give and devise my said freehold hereditaments . . . to my nephew Francis Beard another son of my said brother John Beard in fee simple." The assigns of Herbert Beard brought an action for a declaration that the estate bequeathed to Herbert Beard was absolute and the proviso in the Will relating to the divesting of the estate on Herbert Beard's entering into naval or military services of the country is void and inoperative being contrary to the public good and welfare of the community.

MR. JUSTICE SWINFEN EADY HELD THAT THE PROVISO was void being against the public good or public policy. But the learned Judge observed that great caution is necessary in considering whether a certain contract or stipulation is void on account of being contrary to public policy or public good. "At different times very different views have been entertained as to what is injurious to the public." Thus in the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy. "But since that time the rule has been relaxed so far as the exigencies of the trade for the time being required." If however it be clearly established that the condition is against public policy, it is certainly void. But if the question were a doubtful matter of policy, an agreement or condition should not be held to be void on the ground of public policy. As regards the provision in the Will in question the learned Judge held: "In my opinion, however, there can be few, if any, provision more against the public good and the welfare of the State than one tending to deter persons from entering the naval or military service of the country. Such a provision strikes at the very security of the State, which must depend for its protection against external enemies on the armed forces of the Crown, both naval and military; and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition." Following this line of reasoning we expect, that the law Courts in India might declare that in a bequest made by a testator to a person coupled with a condition that on the persons entering into Government service the property will pass from his hands to another person, the condition divesting the estate is void and inoperative as being opposed to public policy.

JUVENILE COURTS AND REMAND HOMES.

The history of the movement in favour of the separation of the young offender from the old or adult offender before and during trial, so far as England itself is concerned, extends

over a recent period of little more than two years, whereas in some of the States of America and some of the English Colonies the matter has been under legislative consideration for a considerable number of years.

The first legislative attempt in the United States was in the city of Boston, Massachusetts, as far back as 1863. A long legislative gap then takes place until South Australia considered the question in 1890, when Children's Courts were established under a ministerial order, and subsequently legalised by enactment in 1895. Ontario passed in Act in 1893 preventing trials of children's cases in Police Court rooms ordinarily used as such. In 1894 the Dominion Parliament passed a Youthful Offenders Act for the whole of Canada, providing that the trials of young persons apparently under sixteen years of age should take place without publicity, apart from the trials of other accused persons, and special provision was made for the detention of youthful offenders awaiting trial. Twenty-two of the United States then framed Children's Court Laws, and six have done so more lately. South Africa, in 1904, passed an Act preventing women and young persons awaiting trial being subject to the contamination of gaols

The whole subject had for some time in England been under discussion in the many societies considering the welfare of children—the Children's Aid Society, the State Children's Association, and the Committee on Wage-earning Children. In 1893 the Inter-departmental Committee upon Physical Deterioration in issuing their report had recomended as follows: 'In all cases touching the young where the assistance of a Magistrate is invoked, he should, where possible, be a specially selected person sitting for the purpose.' This important recomendation was not the outcome of the evidence of any particular witness, but emanated as the opinion of the Departmental Committee itself. In 1903 the Employment of Children Act was passed, which gave local authorities considerable permissive powers to make by-laws relating to the employment of children, and if this Act had been made obligatory on the local authorities a larger number of children would be charged before the Courts for offences under the Act.

In January, 1905, a circular was recived by the Lord Mayor of Birmingham, signed by the Earl of Crewe, on behalf of the State Children's Association, recomending special Courts for cases against juvenile offenders This was referred to the Prison Visiting Committee, of which Mr. J. Courtenay Lord, J. P., was chairman. At the request of that Committee he made all possible enquiries as to procedure elsewhere, and specially in Canada and the United States of America, and he then drew up a series of recomendations which were approved by the Prison Committee with one exception—namely, the necessity for the appointment of probation officers in connection with Children's Courts. This recommendation, now considered to be the keynote of this system was left out; but the remaining recommendations were approved and submitted to the Magistrates in session assembled on April 6, 1905, in the form of a report, which was unanimously adopted and ordered to be carried out. By the co-operation of the Chief Constable, the clerk to the justices, etc., the Court was opened on April 13 For the first few months this probation work was left to the police and volunteer ladies and gentlemen; but it was soon found that the police had not time to properly follow up the cases, and by an arrangement with the Watch Committee and the Chief Constable three paid officers were appointed.

Within twelve months after the establishment of this special Court in Birmingham the visiting Magistrates of the prison there reported a remarkable decrease in the number of juvenile offenders, a reduction from eighty-four of the previous year to twenty-one, and this was entirely due, in the opinion of the governor of the prison in his report to the Prison Commissioners, to the opening of this Children's Court.

Instructions were issued to the stipendiary Magistrates of London from the Home Office in June 1905, which were, shortly, as follows: (1) Charges against children in custody to be taken first each morning, and against children brought afterwards during the day to be given precedence over other cases; (2) summonses against children as far as practicable to be taken apart from other business; (3) children awaiting trial or removal to Remand Homes, industrial or reformatory schools to be kept apart from other prisoners; (4) no child to be in Court until its case comes on; (5) during hearing of a child's case no adult prisoner to be in Court; (6) when tried, no child to be placed in the dock.

In Scotland in Glasgow and Greenock, in Ireland in Dublin separate Courts for juvenile delinquents have also been established.

The history of the establishment of the Remand Homes is interesting to refer to at this point Three Remand Homes are provided by the Metropolitan Asylums Board in London (1901) arising out of the provisions of the Youthful Offenders Act of that year, and under an order of the Local Government Board of 1897, for children who up till then had been remanded to the workhouses. These Homes have met a great want and are in every way desirable. All children now remanded by the Magistrates for London go at once to one of these three homes, two north of the Thames and one south, fed by the Metropolitan and City Police Courts, and they either appear again before the Magistrates or are sent to industrial schools or reformatories. There is, however, this difference, which will no doubt soon be changed—the Metropolitan Police Magistrates appear to have no power to order children previous to appearing before their Courts to be taken by the police over-night to the Remand Homes, whereas in the case of children arrested in the city, the city police take them direct to the Remand Homes before bringing them before the City Police Courts, and so in these cases the children never come to the police stations within the city area.

In 1901 the Youthful Offenders Act was passed, which enacted that 'a Court of summary jurisdiction, on remanding or committing for trial any child or young person, instead of committing him to prison, may remand or commit him into the custody of any fit person named in the commitment who is willing to receive him This act, therefore, is only optional, and not obligatory, as to sending juvenile offenders to Remand Homes, and another defect in the Act is, as has been stated, that the homes are only available after their first appearance before the Magistrates of the Metropolitan Police Courts thus during 1905 thirty-seven children under ten years of age, eighty-six between ten and thirteen years, and 293 between thirteen and sixteen years slept in police stations.

The following return made to an address of the House of Commons at the instigation of Mr. J. C. Wedgwood, M. P., for Newcastle-under-Tyne, shows, however, a remarkable record of the probable number of cases of juvenile-offenders before the Magistrates throughout England and Wales. During the last three months of 1906 (October, November, December), out of a population of some 32½ millions, 8,491 children and young persons were during those three months charged with offences, of these, 2,694 charges were dismissed and 551 were bound over. If these figures were the same for the remaining nine months of the year, we should have the startling total of nearly 34,000 charged annually before the criminal summary tribunals of the country These figures do not include the educational cases which come before the Magistrates; in London, only some 11,000 of these cases come before the Courts

The Juvenile Court has hitherto dealt with young persons under sixteen; the age has been raised in some of the American Court to eighteen and even twenty-one; in Detroit it is seventeen, in Portland it is eighteen, and it is said in an able pamphlet upon the whole of this important subject about to be issued by Miss N. Adler, of the Educational Committee of the London County Council, that in the celebrated Court at Denver, presided over by Judge Lindsey, the age is twenty-one. More recently (she says) Court clinics for the observation and treatment of children's ailments have been attached to the juvenile Court; and at Marion County Court, Indianapolis, there is a staff of three doctors, one a lady. The whole question of the relationship of juvenile delinquency

to mental disease is receiving increased attention in America, and observations on cases are being constantly made.

Judge Julian Mack, of Chicago, recently delivered an address to the Bar Association of the State of Minnesota, dealing at much length on the change in the administration of the old common law, which knew no distinction between the child and the adult who had committed an offence against the state:—

"The purpose in bringing juvenile delinquents before some special Court is to lead them away from and to destroy their propensities to vice; to elevate, not to degrade; to reform, not necessarily to punish Their parents, likewise, must be met and dealt with in the same spirit. These are some positive needs that mean so much in the development of the child; through them may come the prevention of that delinquency for which the Juvenile Court offers merely a cure. No man could sit in a Juvenile Court week after week unless he were an optimist. More children come before the Courts than formerly; more agencies are at work to bring them, studying child life and attempting to help and better it The future demands the united and devoted efforts of the whole community, bent on keeping children at least from becoming criminals.

SOME PROVISIONS OF MR. HERBERT SAMUEL'S BILL.

"If any person sells or gives to a person apparently under the age of 16 years any cigarettes or cigarette papers, whether for his own use or not, or sells or gives to such a person any other tobacco which he knows or has reason to believe is for the use of that person, he shall be liable on summary conviction in the case of a first offence, to a fine not exceeding £2, and in the case of second offence to a fine not exceeding £5 and in the case of a third or consequent offence to a fine not exceeding £20.

"Exemption from the operation of this clause is, however, given to young people employed by a dealer in tobacco for the purpose of his business."

"A distinction is drawn between cigarettes and tobacco. No one under 16 may have cigarettes at all, but he may carry tobacco, if it is not for his own use."

. . . .

"A child shall not be sentenced to imprisonment or penal servitude for any offence."

"A young person shall not be sentenced to penal servitude for any offence."

The term "a child" embraces all young people up to the age of 14, when they become "young persons" until the 16th year is completed. A "young person" may be sentenced to imprisonment, though not to penal servitude, if he is so unruly that he cannot be detained in places of detention, to be provided under the Bill, and if no reformatory school will have him

The principle of "Children's Courts" is well understood The Magistrates are required to sit, when hearing juvenile cases either in a different room from that in which the police-court is held, or at a different time from the ordinary court hour. Members of the public will not be admitted to the children's court, though Press representatives will be allowed to attened, and all children will be excluded from the ordinary courts unless they are there as witnesses. With regard to London, the Bill says: "His Majesty may, by Order in Council, under the Metropolitan Police Courts Acts, 1839 and 1843, provide for the establishment of one or more separate juvenile Courts for the Metropolitan Police Court district and for assigning as a division to each such Courts such portion of that district as may be specified in the order."

CURRENT INDIAN CASES.

WADID, GANDHY & CO. *v.* PURSHOTAM, I. L. R 32 Bom. 1. *Attorney, application for costs by—Limitation Act, Sch. II, Art. 178.*

Art. 178 of Sch. II of the Limitation Act applies only to applications under the Civil Procedure Code and an application by an attorney for payment of his costs under the rules of the High Court is not barred by Art 178; there is no period of limitation for such an application.

LAXMANA *v* RAMAPPA, I. L. R. 32 Bom. 7. *Limitation Act Sch II, Art. 119—Adoption.*

Art. 119 of Sch. II of the Limitation Act applied to suits in which either the *factum* or validity of an adoption was denied.

EMPEROR *v.* HAZI SHAIKH, I. L. R 32 Bom. 10. *Emigration Act (XXI of 1883), sec. 107.*

A Presidency Magistrate has jurisdiction to try an offence punishable under sec 111 of Act X of 1902.

A master is liable under the Indian Emigration Act X of 1902 for an agreement entered into by his servant, in the ordinary course of business, without the master's knowledge or consent.

A person engaged to drive an engine on board a steamer is an artizan within the meaning of the Emigration Act.

CHUNI LAL *v.* BAROT, I. L. R. 32 Bom. 14. *Rule of the High Court, if* ultra vires*—Appeal—Limitation.*

No rule of the High Court can add to or modify the conditions and limitations of the law laid down in the Limitation Act. An appeal is validly presented if the memorandum is accompanied by the copies required by the Civil Procedure Code.

VRIJ BHUKAN DAS *v.* BAI PARVATI, I. L. R. 32 Bom. 26. *Hindu law—Inheritance—Funeral rites.*

Under the Hindu law as prevailing in Bombay a mother succeeding as heir to her son takes an absolute estate.

The duty of performing the funeral ceremonies of a mother is a religious injunction binding on her son —so much so that even though the son is a minor, and as such is not entitled to read the Vedas, he is competent to recite the *mantras* prescribed in the shastras.

If a Hindu woman dies, leaving a son and a daughter, and also stridhan property of the kind which the daughter is entitled to inherit in preference to the son, the fact that the daughter takes the

stridhan does not impose on her the obligation of performing the mother's funeral obsequies.

VRIJ BHUKAN DAS v. DAYARAM, I. L. R. 32 Bom. 32. *Mortgage.*

A reversioner who was allowed to recover property (which had been mortgaged without a legal necessity by a Hindu widow) was not made liable for the repairs made by the mortgagee.

GANESH v. VISHUN, I. L. R. 32 Bom. 37. *Contract Act sec. 16.*

The law of undue influence explained

RAGHAVAN v. ALAMELA, I. L. R. 31 Mad. 35. *Contract Act secs. 69, 70—Income tax paid for another's income.*

Secs. 69 and 70 of the Contract Act do not apply to a case where a party is bound to pay income tax for income which was received not by him but by another.

KOLINTA VITA v. KOLINTA VITA, I. L. R. 31 Mad. 7. *Civil Procedure Code, sec. 244.*

Sec. 244, C. P. C., has no application to a claim of an auction-purchaser for damages in respect of injury to the property committed (by the judgment-debtor and other persons not parties to the suit) before delivery of possession.

THE SESSIONS JUDGE OF MANGALORE v. MALINGA, I. L. R. 31 Mad. 40. *Cr. P. C., secs. 287, 288, 436.*

The words "order him to be committed" in sec. 436 of the Code of Criminal Procedure do not, mean more than "pass an order for his committal" and enable the District Magistrate himself, to make a committal, or to direct a Subordinate Magistrate to make a committal.

KRISTNA v. KRISHNA, I. L. R. 31 Mad. 43. *C. Cr. P., sec. 195.*

No sanction under sec. 195, C. Cr. P., is necessary for a complaint when an agent of a decree-holder is obstructed and assaulted when endeavouring to obtain execution.

MAYAN v. PATHUKUTTI, I. L. R. 31 Mad. 1. *Adjustment of suit on refusal to take oath.*

An undertaking by a party to a suit that if he failed to make a special oath the suit should be dismissed can be regarded as an adjustment of the suit.

SARALA SUBBA v. KAMSALA, I. L. R. 31 Mad. 5. *Limitation Act Sch II, Art 11—C. P. C., sec. 278.*

Art. 11 of Sch. II has no application to an order passed for default in a claim under sec. 278, C. P. C.

RANGASAMI v. AUNA MALAI, I. L. R. 31 Mad. 7. *Transfer of Property Act, sec. 78.*

What is gross negligence under sec. 78 of the Transfer of Property Act explained.

VENKATESWARA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, I. L. R. 31 Mad. 12 *Pensions Act XXIII of 1871, sec. 4.*

The Civil Courts have jurisdiction to entertain suits in respect of grants made by Government as endowments for religious or pious purposes.

RAMASWAMI v. SUNDARA, I. L. R 31 Mad. 28. *Dismissal of appeal, effect of.*

When an Appellate Court dismisses an appeal a party to whom a certain time was allowed by the 1st Court for a certain purpose does not get an extended period.

JIVARATHNAM v. SRINIVASA, I. L R. 31 Mad. 33. *Civil Procedure Code, secs. 232, 233—Transfer of Property Act, sec. 99.*

Where a decree-holder cannot put to sale a property on account of sec. 99 of the Transfer of Property Act, the transferee of such decree cannot also do so.

Reviews.

THE CURRENT INDEX OF INDIAN CASES 1907. Final Part, Section I—Criminal; Section II—Civil. *Compiled by T V Sanjiva Row, "Madhwa Vilas," Teppakulam, Trichinopoly.*

The "Current Index" for 1907 appeared monthly instead of quarterly as in previous years, each monthly issue dealing with cases of the month only. In the sixth part, however, the cases appearing in the first five parts were incorporated and now the final part incorporates cases reported during the whole year. We notice that the issue under review covers a wider area than its predecessors. The cases decided by the four High Courts, the Chief Courts at Lahore and Rangoon and the Judicial Commissioners of Oudh, Nagpur and Upper Burma would seem to cover a sufficiently wide area. But the indefatigable compiler has gone further afield and in this issue we find notes of cases reported in Vol. XXII of the Travancore Law Reports We cannot speak too highly of the industry and care displayed in the preparation of the present issue.

THE LAWYER'S COMPANION. Parts XVI, XVII and XVIII. *By T. V. Sanjiva Row, Madras, M. E. Press, Mount Road, 1907.*

The Lawyer's Companion, by the same compiler, has also been appearing with commendable regularity. Part XVI completes the Contract Act, and then follow the Negotiable Instruments Act and the Easements Act, which latter takes up a considerable portion of Part XVIII and now the Land Acquisition Act has been taken on hand. The notes of cases are being compiled with great care and thoroughness. To show the spirit which animates the compiler it need only be mentioned that a supplement has been recently issued to the notes on the Specific Relief Act (which appeared in Part XII) to make up for omissions which have since been, brought to the compiler's notice.

THE INDIAN EVIDENCE ACT (I of 1872), with the Case law thereon Part IA. *By Sanjiva Row, Madras. Indian Steam Printing Works, 1908.*

This is being worked up on the same lines as the other Acts annotated in the Lawyer's Companion series. So far only eight sections have been annotated. But from what we know of the author's industry and resourcefulness, there is no reason why this work should not progress side by side with the Lawyer's Companion. If the work be carried on in the manner in which it has been begun we may well look forward before long to having an edition of the Evidence Act which will be at last as useful as the Limitation Act which appeared in the Lawyer's Companion series.

Notes of Cases.

ENGLISH LAW COURTS.

KING'S BENCH DIVISION.—*Anglo American Oil Company (Limited)* v. *Manning.* Before CHANNEL, BRAY and SULTON, JJ. 19th December 1907.

Weights and Measures Act (1878) 41 and 42 Vict. C 49. sec. 25—False or unjust measure—Fraud of servant—Liability of master.

The Appellants used to send out tank wagons containing oil in charge of a driver who was in their employment, for the purpose of selling the oil to customers. Each driver of a tank wagon was supplied with two five-gallon measures. At each of their depots the Appellants employed an engineer, whose duty it was to examine all the measures used by the drivers, and, if any was found to be in any way faulty or unjust its use was at once discontinued, and it was put into a separate part of the premises so as to have the defect remedied, and a new measure was issued in its place. One of the drivers, to whom two correct five-gallon measures were issued fraudulently and for his own purposes substituted a defective measure, which had been discarded by the Appellants' engineer, for one of the correct ones and had it in his possession while going round to customers with the wagon. The Appellants were not cognizant of what the driver had done. An inspector of weights and measures seized the defective measures while the driver was going round with the wagon selling the oil. Upon an information charging the Appellants with having in their possession for use whilst hawking oil from the wagon a false or unjust measure contrary to sec. 25 of the Weight and Measures Act, the Magistrate convicted the Appellants and imposed a fine of 2s 6d and ordered the unjust measure to be forfeited. It was contended on behalf of the Appellants that they were not responsible under the Statute for the possession by the driver of the false and unjust measure, as he was not acting as the Appellants' servant or with their knowledge in the substitution of the false and unjust measure.

MR. JUSTICE CHANNEL in giving judgment observed —The case raised a very fine point, and one depending on very special circumstances. The Statute was one of those under which persons might be convicted of acts of their servants for which they were not in any real sense responsible. It was not a case where *mens rea* was an element in the offence, but it was one of those cases where the legislature had absolutely prohibited certain things being done. A nominal fine had been rightly imposed, because it was absolutely clear that the Appellants were not morally culpable. The problem the Court had to solve was whether in the circumstances the unjust measure was in the possession of the Appellants at the time when it was found in the actual physical possession

of the driver. Employers were not civilly liable for their servants' frauds when committed, not in the interests of the employers, but for the profit of the fraudulent servant, and the Court considered they were at liberty to apply that principle to this case so far as to say that the servant's possession must be deemed to be his own possession, and not that of the employers. The other learned Judges agreed and the appeal was accordingly allowed.

Appeal allowed.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.*

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before MITRA and HOLMWOOD, JJ. APPEAL FROM ORDER No. 200 OF 1906. WITH RULE No. 3610 OF 1907. AJODHYA PROSAD SUKUL, Appellant *v.* NURSING DASS AND OTHERS, Respondents. 8th January 1908.

Hearing and judgment after death of the sole Appellant—Abatement—Judgment, vacating of.

The appeal was heard and decreed *ex parte* on the 26th November 1906 by the High Court. On the 22nd November 1906, the sole Appellant died, but this fact was not brought to the notice of the Court. On the 14th December 1907 the Respondents applied and obtained a rule upon the legal representatives of the deceased Appellant to show cause why the judgment and decree of the High Court dated the 26th November 1906 should not be vacated on the ground that the Appellant died four days before the hearing of the appeal and no order for substitution of the heirs of the Appellant was made before the date of judgment.

Held—That the judgment and decree should be vacated and the appeal must abate.

Babu Sarat Chunder Basak for the Petitioner, Respondent in the appeal.

Babu Soroshi Churn Mitra for the Opposite Party, Appellant in the appeal.

A. T. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MITRA, J. APPEALS FROM APPELLATE DECREE Nos. 617, 694 TO 741 AND 829 TO 832 OF 1906. PAHALWAN SINGH AND OTHERS, Appellants *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL Respondent. Heard, 28th February 1908. Judgment, 12th March 1908.

Bengal Tenancy Act (VIII of 1885), secs. 104H and sub sec. (3) cls. (e) and (g), 111A—Specific Relief Act (I of 1877) sec. 42.—Limitation—Certificate—Conclusive evidence—Publication of record.

Village Rampore Dumra is a Government *khas* mehal. In September 1902, a notification under sec. 101 sub-sec. (2) clause (*d*) of the Bengal Tenancy Act was published in the Local Official Gazette for its survey and record of rights with the object of the settlement of land revenue. The Cadastral Survey and the settlement proceedings were carried on up till the month of August 1903. The Settlement Officer was Mr. Coupland and Babu Hem Chunder Chatterji was the assistant Settlement Officer in the District The latter was actually in charge and the settlement record was prepared by him. The record incorporating the Settlement Rent Roll as prescribed by sec. 104F sub-sec. (3) was finally published by him on the 22nd and 23rd August 1903, according to the provisions contained in sec. 103A sub-sec. (2). There was no evidence on the record to prove final publication in the village.

The suit which gave rise to the appeals were instituted by the tenants in occupation of the lands of village Rampore Dumra. They contested the correctness of the entries in the record of rights as to their status and they denied their liability to pay enhanced rents. They also alleged a custom or local usage entitling them to the whole of the wood of trees when felled down. The suits were instituted on the 15th April 1904, and after the expiration of the period of two months from the services of notices on the Defendant under sec. 424 of the Code of Civil Procedure.

On the 27th August 1903, Bhupendra Nath Gupta, a Revenue Officer, signed a certificate of final publication which contained the following words: "Certified that the record of rights of the above village (Rampore Dumra) was finally published under sec. 103A, (2) of the Bengal Tenancy Act III (B. C) of 1885 as amended by Act III (B. C.) of 1898, on the 22nd and 23rd August 1903. That record of rights is contained in this volume." Babu Bhupendra Nath, however, was not the Revenue Officer in charge of the Cadastral Survey and preparation and publication of the record of rights of the village Rampore Durma. He was an assistant Settlement Officer under Mr. Coupland but he was empowered to perform the functions of a Revenue Officer of a different district. The proper officer to sign the certificate was Babu Hem Chunder Chatterjee. On the 7th September 1903, Babu Hem Chunder directed that

the records of the settlement should be filed in the record room of the Collector, and he signed this order for the Settlement Officer. On 28th September 1903, the tenants were summoned to attend on 15th October for the purpose of receiving the *khatians* of their respective holdings.

Held—That the suits come under sec. 104H, sub-sec. (3) clauses (*e*) and (*g*) and even if they come under the more general sec. 111A, which must be read with sec. 42 of the Specific Relief Act, they would be barred under sec. 104H, sub-sec (2) if they were laid after the expiration of six months from the date of the certificate of final publication. The general rule of limitation applicable to suits under sec. 42 of the Specific Relief Act is not applicable.

Nasurulla Mia v *Amoruddi* (3 C. L. J. 133) referred to.

There was no certificate of final publication signed by the Revenue Officer from the date of which the period of limitation of 6 months could be calculated.

In applying the rules of limitation which forbid the trial of suits intended to discover the rights and liabilities of litigants, the facts and formalities which are the bases of the starting points for the calculation of time should be distinct and duly observed. The bar of limitation to be sucessful must rest on solid foundation. Casual acts which were not evidently intended to operate as a certificate of publication should not have the effect of such a certificate.

The existence of a certificate is a conclusive evidence of the publication of the record and the publication again is conclusive evidence that the record had been duly made.

Babus Umakali Mukerji and Gonee Dutt Singh for the Appellant.

Mr. O'kinealy (Advocate General) and Babu Ram Churn Mitra for the Respondent.

A. T. M. *Appeals decreed: Cases sent back.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SARFUDDIN, JJ. APPEAL FROM ORIGINAL DECREE No. 61 OF 1907. BHOLA NATH DAS AND ANOTHER, Appellants *v.* RAJA DURGA PROSAD SINGH, Respondent. 11th March 1908.

Permanent lease—Transfer of Property Act, (IV of 1882), sec. 108, cl. (j), *applicability of—Limitation Act (XV of 1877) Sch. II Arts. 110, 116.*

The appeal arose out of a suit brought to recover, with interest the minimum royalty due under a *kabuliat*, executed by the Defendant No. 1 in favour of the Plaintiff.

The facts of the case were as follows :—

The Plaintiff was a zemindar, who was the owner of certain lands in which coal was found. He leased by a deed dated the 19th July 1899, certain sub-soil rights in the lands owned by him. The lease conveyed a *mokurari mourasi* tenure It was stipulated in the *kabuliat* executed by the Defendant No. 1 that he was to pay a certain royalty for the raising of coal. Defendant No. 2 was assignee of the interest of the Defendant No. 1.

The Court below found in favour of the Plaintiff. The Defendants appealed to the High Court.

Held—Under sec. 108 cl. (*j*) of the Transfer of Property Act, the lessee is liable even if he transfers his right. The said clause of the said section applies to cases of permanent rights, in the absence of contract or local usage to the contrary.

Art. 116 and not 110 of Sch. II of the Limitation Act applies to a suit brought for the recovery of royalty.

Raniganj Coal Association v. *Judu Nath Ghose*, I. L. R. 19 Cal. 489 followed.

Babus Shib Chunder Palit and *Hera Lal Sanyal* for the Appellants.

Dr. Rash Behary Ghose and *Babu Golap Chunder Sarkar* for the Respondent.

A. T. M. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
1908.
4, February.

CHHATTRAPAT SINGH DUGAR, Appellant,
v.
MAHARAJ BAHADUR SINGH, and anr, Respondents.

Land Registration Act (VII B. C. of 1876) — Co-trustee, application by, for registration —Refusal by the Revenue authorities—Civil Court's authority to direct registration—Suit, maintainability of—Declaration of right to possession.

Where Plaintiff's application for the registration of his name as a co-trustee, under the Land Registration Act was refused by the Revenue authorities,

Held—*That a Civil Court is not competent to direct the action of the Revenue authorities under the Land Registration Act, and a suit brought by the Plaintiff with the object of obtaining an order from the Court which would bring about a re-consideration of the order passed by the Revenue authorities so as to obtain the registration of the Plaintiff's name as a co-trustee is not maintainable.*

Held, further, *on the construction of a compromise decree on the basis of which the suit was brought, that the Plaintiff was not entitled to a declaration of his right to the possession of the trust property jointly with the Defendant—this order, however, not affecting the right of the Plaintiff or any one else to take action in the case of any malversation by the Defendant.*

Appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated 1st February 1904, reversing a decree of the Court of the Subordinate Judge of Dinajpur, dated 22nd December 1899, and dismissing the Appellant's suit.

On 17th December 1866, a lady called Mahatap Kumari Bibi, the paternal grandmother of the Appellant and the first Respondent, executed a Will. After making various devises and bequests of other portions of her property she devised the property in suit "an 8 anna share of lot Sankarpur, Mahal No. 76 on the rent roll of the Collectorate" to trustees in trust to "spend the amount of profit thereof annually at Sidhayachalji and for the purpose of entertaining our castemen, for reparation of temples, &c., and for other good acts." By that Will she appointed her two sons, Rai Lachmipat Singh Bahadur, and Rai Dhanpat Singh Bahadur, the fathers of the Appellant and of the first Respondent respectively, trustees, along with 5 others. Mahatap Kumari Bibi died in August 1894. In the Collector's Registers, on the death of Mahatap Kumari Bibi, the names of both her sons, Lachmipat and Dhanpat Singh, were entered in her place in regard to the said property with the following remark. "These two persons are interested (in the properties) as trustees in an 8 anna share under a Will of their mother to perform religious acts."

On 24th May 1886, Lachmipat Singh died. Thereafter his son Chhattrapat Singh Dugar, the Appellant, applied to have his name entered in the Revenue Registers in place of his deceased father. That application was granted by the Deputy Collector but was rejected on appeal by the then Collector of Dinajpur.

On 23rd May 1892, the Appellant instituted a suit (No. 445 of 1892), against his uncle Dhanpat Singh in the Court of

CHHATTRAPAT SINGH DUGAR *v.* MAHARAJ BAHADUR SINGH.

the Subordinate Judge of Murshidabad for an account for administration of their mother's property and for a declaration in regard to the rights of the parties under her Will. That suit ended in a compromise effected on 24th March 1893 which provided *inter alia* as follows:—

"According to the Will of the late Mahatap Kumari Bibi, the paternal grandmother of the Plaintiffs and mother of the Defendant, an 8 anna share of lot No. 76 Sankarpur has been dedicated to religious purposes, and in respect of the same the names of both of us *i.e.*, of the Plaintiff and Defendant shall be and shall continue to remain registered as trustees. The said property shall remain in possession of the Defendant; and the Defendant shall have the charge of collecting rents for the same, institute suits and do everything in respect thereof; and I, the Plaintiff, Chhattrapat Singh, will get from the Defendant the total amount of Rs. 1,200 (twelve hundred) a year out of the profits thereof; and with the same I shall continue to defray the expenses on account of the temple of the God Bimalnathji, and of the temple Dadaji of the *Sadabrata* (charitable establishment for entertainment of mendicants) at Baluchar and other purposes. After deduction of the said amount of Rs. 1,200, the remaining amount of profits shall be used by the Defendant in defraying expenses for *dharamasalas* and *sadabratas*, and at Sidhyachalji, Bhagulpur, Calcutta, Azimgunj, &c. Besides the lot 76 Sankarpur the name of the Defendant will remain registered as trustee in respect of other properties, and they shall remain under the supervision of the Defendant.

"In the absence of the Plaintiff, his heirs, and in the absence of the Defendant, his heirs, who will remain in commensality with him, will become trustees like them respectively. On getting the amounts of profits in the manner aforesaid, they and their heirs in succession shall continue to maintain the aforesaid religious acts, regularly, as aforesaid in due order. If any of the parties do not spend the money, that will have been obtained for the prescribed purposes and appropriate the said money, he will become personally liable for the said money and the other party on performing the said acts will realize the same; and except that, none of the two parties shall be able to advance any claim for account against the other in future."

On 24th March 1893 a decree was made in accordance with that compromise.

In April 1896, the Appellant filed a petition for registration of his name jointly with the name of Dhanpat Singh in the registration department of the Collectorate of Dinajpur under the provisions of the Land Registration Act (VII of 1876 B. C.) but on 26th June 1897, on objections taken by the first Respondent who had succeeded his father Dhanpat Singh as his heir, that petition was rejected, the Deputy Collector holding that phrase "registration of name" in the above mentioned compromise meant some registration "other than the registration under Act VII of 1876." On appeal the Collector confirmed that order on 24th July 1897. On 1st July 1898 the Appellant instituted a suit against the Respondents in the Court of the Subordinate Judge of Dinajpur to recover from them the sum of Rs. 4,100

alleged to be due as arrears of the amount payable under the compromise and decree in suit No. 445 of 1892. A decree was made in favour of the Appellant.

On 7th July 1898, the Appellant instituted the present suit in the Court of the Subordinate Judge at Dinajpur against the Respondents representing the estate of Dhanpat Singh. The plaint after reciting the facts above mentioned alleged that the five persons appointed as trustees by Mahatap Kumari Bibi with her two sons having relinquished their office as executors and trustees, Dhanpat Singh was managing the estate as a trustee; that according to the Will dated 17th December 1866 and to the decision in the terms of the compromise in suit No. 445 of 1892 the Appellant was entitled to possession of the Mahal Sankarpur as a trustee thereof jointly with Dhanpat Singh in his life time, and since his death, with his son the first Respondent; that it was improper for the Deputy Collector to reject the Appellant's petition for registration of the name of the Appellant, to hold that by the words "registration of name" contained in the compromise, the registration of name under Act VII of 1876 was not understood; and that thereby the Appellant's right and interest in the said trust property had been affected. The Appellant prayed for the following reliefs :—

"That the Court may be pleased to pass a decree, declaring the Plaintiff's right and possession in the 8 annas share of the said Mahal, lot Sankarpur, as trustee thereof with the Defendant after determining same.

"The Court may be pleased to hold the permission given for registration of name on the petition of the abovementioned *solehnama*, made in the Court of the Subordinate Judge of Murshidabad, and in the decree passed in terms thereof as [permission for] the registration of name according to the Registration Act VII of 1876 of the Bengal Council, and to pass a decree declaring the same.

The Respondents in their written statement pleaded *inter alia* that Lachmipat Singh, father of the Appellant, virtually renounced his trusteeship, and that the property in suit ever since then and for upwards of 12 years before the suit, had been in the sole possession of the father of the first Respondent, that the Appellant never having had possession of the mahal, could not have a declaration of his possession and title to the same, nor could he have a declaration as to the registration of his name under the Land Registration Act, as contended, with reference to the terms of the compromise; that the Respondents were not bound by the compromise, and that the father of the Appellant having renounced his trusteeship in his lifetime, the Appellant could not be held to be a trustee in his place. Of the 12 issues framed it is necessary to mention here only the following :—

6th. "With what object and intention was the 'Namjari' used in the petition of compromise and decree in suit No. 445 of 1892, of the Subordinate Judge's Court at Murshidabad, and what is the meaning of that word in the same?

7th. "Whether the Plaintiff had any right to have his name registered in the Dinajpur Collectorate as a trustee

for the 8 annas share of lot Sankarpur bearing touzi No. 76?

8th. "Whether the Plaintiff is in possession of the property? If not, can his name be registered?

9th. "To what relief, if any, will the Plaintiff be entitled?" On 22nd December 1899 the Subordinate Judge delivered his judgment. He decided nearly all the issues in favour of the Appellant and made a decree in his favour in the terms following:—

"It is ordered that the suit be decreed with costs in the presence of both the parties; that the Plaintiff's right to the disputed property as co-trustee jointly with the Defendant be declared; that the Plaintiff has right to get from the Defendant Rs. 1,200 annually from the profits of the said property, and that it be declared that the Plaintiff should have possession only in that right; that it be further determined that the clause, 'The Plaintiff's name will be registered as a trustee in respect thereof and will continue to remain so' in the *solehnama* means that the Plaintiff's name will be registered in respect of the mahal in dispute under the provisions of Act VII of 1876 of the Bengal Council."

Against that decree the Respondents appealed to the High Court of Judicature at Fort William in Bengal. The High Court delivered its judgment on 1st February 1904 and decided that the Civil Court was not competent to direct the action of the revenue authorities under the Land Registration Act, and that the Appellant was not entitled in any way to bring the present suit. In the result the High Court set aside the decree of the Subordinate Judge and dismissed the Appellant's suit with costs in both Courts. The High Court gave for its decision the following reasons, which were approved and adopted by their Lordships of the Privy Council in upholding the decree of the High Court.

"The present suit is really to obtain an order from this Court which would bring about a re-consideration of the order passed by the revenue authorities so as to obtain the registration of the name of Chhattrapat as a co-trustee with that of Dhanapat.

"We may first of all observe, and this is admitted by both the learned pleaders who have appeared in the present case, that even if we were inclined to hold in favour of the Plaintiffs we are not competent to direct the action of the revenue authorities under the Land Registration Act. The prayer in the suit is also for a declaratory order in respect of the Plaintiff's right of possession in this property as trustee together with the Defendant.

"The Subordinate Judge decreed the Plaintiff's suit. He declared the Plaintiff's right in the disputed property as a trustee jointly with the Defendant and also that the Plaintiff had a right to get from the Defendant Rs. 1,200, annually, from the profits of Sankarpur that the Plaintiff should have possession of that property only as co-trustee, and he further found, for the purposes of the *solehnama*, that the Plaintiff's claim should be registered in respect of the mahal in dispute under the Bengal Land Registration Act. Now, in regard to the terms of the *solehnama*, we have no doubt it was intended that the management of

CHHATTRAPAT SINGH DUGAR *v.* MAHARAJ BAHADUR SINGH.

Sankarpur should continue entirely in the hands of Dhanapat, for it is provided that he should have possession and management of the property, and it also provided, apparently on an estimate of the probable assets that Chhattrapat should receive payment of Rs. 1,200 annually. So far, therefore, there was no intention in either of the parties that there should be any interference with the rights that Dhanapat had hitherto exercised during the lifetime of Luchmipat up to the time of the compromise. The terms of the deed in regard to the registration of the Plaintiff's name as co-trustee have given rise to the dispute between the parties.

"It seems to us that what was really in contemplation was that the rights of co-trustee which were given by the Will to Luchmipat, the Plaintiff's father and descended to him by inheritance in the same way as the Defendant has inherited the rights of Dhanapat should be preserved by some recognition of the opposite party so as not to interfere with any right of Chhattrapat's heirs or of his own, should it be necessary at any time to assert the same. It is not for us to consider what the effect of the refusal of the revenue authorities to register Chhattrapat's name under the Land Registration Act would be, nor have we any authority, as has been already pointed out, to direct, if we were so inclined, that the revenue authorities should so register him on their records. It is sufficient for us to state in the present case that the deed contemplated that there should be no interference with any act of Dhanapat and, therefore, of Dhanapat's heirs in the management of the property. We do not, of course, mean to say that this should restrain the Plaintiff, or any one else from taking any action in the case of any malversation. But it clearly contemplated that there should be no interference with the legitimate exercise of duties as manager of Sankarpur. There was no necessity for the Subordinate Judge to declare the Plaintiff's right to receive an annual allowance of Rs. 1,200 out of the property, seeing, as we are informed, that the Plaintiff simultaneously with the present suit, has brought a suit also for the arrears of this allowance which accrued due for some years past and has obtained a decree.

"The result, therefore, is that, in our opinion, the Plaintiff is not entitled in any way to bring the present suit for which no sufficient grounds exist. The decree of the lower Court will, therefore, be set aside, and the suit dismissed with costs in both Courts."

The Appellant, thereupon, preferred the present appeal to His Majesty in Council.

Mr. Ross for the Appellant.—The High Court misconceived the nature of the suit and failed to correctly interpret the terms of the compromise and the decree dated 24th March 1893 founded thereon. That Court erred in holding that no sufficient grounds existed for the suit and that the Appellant was not entitled to bring it. The Appellant was entitled to the relief claimed in the plaint. The decree of the Subordinate Judge granting the Appellant that relief was right. The High Court set aside that decree on insufficient grounds.

Mr. DeGruyther for the Respondents was not called.

CHHATTRAPAT SINGH DUGAR v. MAHARAJ BAHADUR SINGH.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—Their Lordships do not think it necessary to call upon the Respondents. They concur in the reasons stated in the judgment of the High Court.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The Appellant will pay the costs of it.

Solicitor: *Mr. G. C. Farr* for the Appellant.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

Appeal dismissed with costs.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 373 OF 1907.

FLETCHER, J. 1907. 18, December.

KEDARNATH MONDAL v. GONESH CHANDRA ADAK.

Inventions and Designs Act (V of 1888)—Sec. 4, (9) and (10)—"District" and "District Court," meanings of—"District Court," if it includes High Court in its Original Jurisdiction—Sec. 29 (2), (3) and (4) bars certain defences to an action—Secs. 30 and 31—Application for a rule to a High Court—Procedure—Intention of legislature.

The expression "District Court," as used in sec. 29 (1) of the Inventions and Designs Act (Act V of 1888) includes High Court in the exercise of its Ordinary Original Civil Jurisdiction, under sec. 4 (1) of that Act.

The legislature intended that objections indicated in sec. 29 (2), (3) and (4) should not be allowed to be raised in defence to an action for the infringement of an exclusive privilege acquired under Part. I of the Act but must be raised under the provisions of secs. 30 and 31 of the Act, by applying to a High Court for a rule to show cause why the Court should not declare that the exclusive privilege so acquired had not been so acquired, by reason of the objections mentioned in the two latter sections.

This was a suit instituted by the Plaintiff to restrain the Defendant from infringing the specification filed by the former on the 29th September 1906 under sec. 8 of the Inventions and Designs Act (V of 1888) regarding a hand-wheel Boomer Press, for pressing loose jute into bales. The Defendant filed a written statement in which he raised, amongst others, defences to the action of the nature mentioned in sub-secs. 3 and 4 of sec. 29 of the Act.

Mr. A. Chaudhuri (with him, *Messrs. B. Chakravarti, L. P. E. Pugh*, and *B. K. Lahiri*) for the Plaintiff, urged that both under the provisions of the old Act (Act XV of 1859) as also under sec. 29 (2), (3) and (4) of the new Act (V of 1888), the Defendant was not entitled to raise, in this action, the defence of the nature he purported to do.

Mr. Knight (with him, *Mr. Stokes*) for the Defendant, raised the point that sec. 29 of the Act applied only to suits filed in a "District Court," that the expression did not include High Court, and that, consequently, the restrictions to defence mentioned in that section did not apply to this case.

The JUDGMENT OF THE COURT allowing the Plaintiff's contention is as follows:—

FLETCHER, J.—This is a suit brought by the inventor against the Defendant

KEDARNATH MONDAL *v.* GONESH CHANDRA ADAK.

to restrain the infringement of an exclusive right of invention under the Inventions and Designs Act.

The Defendant in his defence has raised several defences as follows:—

(1). That the alleged invention at the date of the specification was not a new invention.

(2). That the Plaintiffs are not the inventors thereof.

(3). That the specification does not fulfil the requirements of part I of the Act.

(4). That the parts and materials are not new and that the new parts are distinguished from the old.

(5). That the invention was publicly used in British India.

(6). That the invention has been publicly sold and used in British India.

In opening his case, *Mr. Chaudhuri* raised an extremely novel point. That is, in my opinion, well founded. It arises in this way.

Sec. 4 sub-sec. 9 of the Invention and Designs Act of 1888 says that a District Court has the meaning assigned to that expression by the Code of Civil Pocedure. Now let us look at the interpretation in clause 2 of the Code of Civil Procedure. It says:—"District" means the local limits of the jurisdiction of the principal Civil Court of original jurisdiction (herein after called a District Court) and includes the local limits of the Ordinary Original Civil Jurisdiction of a High Court and then it says that "every Court of a grade inferior to that of a District Court and every Court of Small Causes shall for the purposes of this Code be deemed to be Subordinate to the High Court and the District Court." Now, a High Court as used in the Code of Civil Procedure means the highest civil court of appeal. In my opinion, when a High Court exercises its ordinary Original Civil Jurisdiction, it comes within the definition of a District Court as contained in the Civil Procedure Code.

Then going back to the Inventions and Designs Act, sec. 4 sub-sec. 10 defines a High Court and gives it the same meaning as is assigned to it by the Criminal Procedure Code in reference to proceedings against European British subjects. That simply means the High Court of Judicature at Fort William in the present case.

Then, sec. 29 of the Act enacts that "an inventor may institute a suit in the District Court against any person who, during the continuance of an exclusive privilege acquired by him under this part in respect of an invention, makes, sells or uses the invention without his license, or counterfeits or imitates it." Then it goes on to limit the defence in such a suit. Sub-sec. 2 says: "The suit shall not be defended upon the grounds of any defect or insufficiency of the specification of the invention, or upon the grounds that the original or any subsequent application relating to the invention or the original or any amended specification, contains a wilful or fraudulent misstatement, or upon the ground that the invention is of no utility." Sub-sec. 3 provides that:—Nor shall it be defended upon the ground that the Plaintiff was not the inventor, unless the Defendant shows that he himself is the actual inventor or has obtained from the actual inventor a right to make, sell or use the invention, or to counterfeit or imitate it, as the case may be."

KEDARNATH MONDAL v. GONESH CHANDRA ADAK.

Sub-sec. 4 provides that "nor shall it be defended upon the ground that the invention was not new, unless the Defendant or some person through whom he claims, has, before the date of the delivery or receipt of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention or that part of it with respect to which the exclusive privilege is alleged to have been infringed."

Then, under sec. 30, it is provided that "any person may apply to a High Court (that is as defined in sub-sec. 10 of sec. 4) for a rule to show cause why the Court should not declare that an exclusive privilege in respect of an invention to be specified in the rule has not been acquired under part I of the Act by reason of all or any of the defences that are shut out under sec. 29. The sections are not very skilfully or accurately drawn, but, I think, on the whole, that the legislature intended that these defences should not be raised in an action for infringement of an exclusive privilege but must be raised under secs. 30 and 31 when the various objections mentioned before fail. It follows that the Defendants cannot raise these defences in this suit. However *Mr. Knight* applies for a rule under sec. 30. He is entitled to a rule in the matter and to raise therein all the defences specified in his written statement.

I adjourn the case * to come on with the rule which will raise the defences contained in the written statement and the suit will stand over till a fortnight after the Christmas vacation.

I will reserve the costs of to day.

Messrs. T. H. Wilson & Co., Attorneys for the Plaintiff.

Messrs. Pugh & Co, Attorneys for the Defendant.

P. R. C.

* REPORTER'S NOTE.—The rule was made absolute, and this suit was eventually dismissed with costs by His Lordship on the 17th February 1908.

[CIVIL REVISIONAL JURISDICITION.]

RULE No. 2353 OF 1907.

MACLEAN, C. J.
COXE, J.
1908.
3, January.

S. M. SHILABATI DEBI, Petitioner,

MR. M. V. RODERIGUES, Opposite Party.

Bengal Tenancy Act (VIII of 1885), sec. 153—Value of suit—Withdrawal of portion of claim—Transfer of officer specially empowered—Power, if ceases.

Where in a suit for rent the claim originally made exceeded Rs. 50 but when the suit came on for trial the claim was reduced to Rs. 7-8, a certain portion of the claim having been withdrawn,

Held—*That for the purpose of an appeal under sec. 153 of the Bengal Tenancy Act the amount claimed in the suit should be considered to be less than Rs. 50.*

When a Munsif is empowered to exercise final jurisdiction under sec. 153, he does not cease to have the power by reason of his transfer from the station.

This was a rule granted on the 29th of July 1907, against an order of Mr. F. Roe, District Judge of Zillah Hughli, dated the 25th of April 1907, allowing the rent appeal preferred against the decree of Babu Atul Chandra Ghosh, Munsif, 1st Court Hughli, dated the 20th of December 1906 (which dismissed the rent suit) and decreeing the said suit,

S. M. SHILABATI DEBI v. MR. M. V. RODERIGUES.

The facts of the case material to this report are stated in the judgment.

Babu Monmotha Nath Mukerjee for the Petitioner.

Dr. Rash Behari Ghosh and *Babu Atulya Churn Bose* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is an application under sec. 622 of the Code of Civil Procedure, in which a rule has been granted, and the object of the rule is to have the decree of the District Judge of Hughli dated the 10th of May 1907, set aside on the ground that he had no jurisdiction to pass such a decree.

The suit was one for rent, and originally it was for a sum amounting to Rs. 117-6; but when the matter came on for trial in the Munsif's Court, the Plaintiff put in a petition withdrawing his claim to certain increased rent on the ground of alteration of area and asking for leave to bring a first suit for that: and, that application apparently was granted, the result of which was to reduce his claim, in the present suit to sue for rent, amounting only to Rs. 7-8. The Munsif held that the relationship of landlord and tenant did not exist, and dismissed the suit. Then there was an appeal to the District Judge: and the District Judge took the view, notwithstanding the objection of the Defendant, that he could entertain the appeal, on the ground that the question in appeal involved a right to receive rent. The question really was whether the relationship of landlord and tenant existed; but the District Judge dealt with the case, as I have said, upon another footing, which I think is not well founded.

It is now urged before us that the District Judge had no jurisdiction to deal with the matter, having regard to the language of sec. 153 of the Bengal Tenancy Act. I think it is quite clear that the decree passed by the Munsif in this case did not "decide any question relating to title to land or to some interests in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant." It only decided the question of whether or not the relationship of landlord and tenant existed. *Primâ facie* no appeal would lie. No attempt has been made by the opposite party on this application to support the view of the District Judge on the grounds stated by him. But two points have been taken; *first*, it is urged that the amount claimed in the suit exceeded Rs. 50. I have stated the facts. No doubt, the original claim was more than fifty-rupees, but when the suit came on for trial, the claim was reduced to Rs. 7 8. I think the consequence would be a little dangerous if we were to accept the Plaintiff's argument and say, in the circumstances such as these, that the claim exceeded fifty rupees.

Then, another point was taken, namely, whether the Munsif, who was a Munsif of Hughli when he tried this suit, was specially empowered by the local Government to exercise final jurisdiction under sec. 153 of the Bengal Tenancy Act. What happened is this. On the 31st of July 1896, this gentleman, who was then

S. M. SHILABATI DEBI *v.* MR. M V. RODERIGUES.

a Munsif of Baruipur, was specially empowered to exercise final jurisdiction under sec. 153 (*b*) of the Bengal Tenancy Act; but after that power had been conferred upon him he was transferred to Hughli. It is contended that he could not after his transfer to Hughli exercise the power which had been conferred upon him when he was a Munsif of Baruipur, and that fresh power ought to have been specially conferred upon him. I understand that for many years the practice has been in such and similar cases not to confer any fresh power and that it has always been regarded that the power having once been conferred, remains, vested in the Judicial Officer in question, notwithstanding he has been transferred from one district to another. It is very difficult for us, considering that many decisions have undoubtedly been passed upon this view which has been held for very many years, now to interfere. I am bound to say, speaking for myself, that looking at the language of sub-sec. (*b*) of sec. 153, there is nothing in it to suggest that, when a Judicial Officer has once been specially empowered by the Local Government to exercise final jurisdiction under the section, that power determines because he is transferred to another district, or that any necessity exists that he should again be specially empowered, by reason of such transfer.

For these reasons, I think the rule must be made absolute with costs, hearing fee two gold mohurs.

COXE, J.—I agree.

S. C. S. *Rule made absolute.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 2751 OF 1907.

MITRA, J.
CASPERSZ, J.
1907.
28, November.

NADIR CHAND SHAHA, Petitioner,

MR. WOOD, AGENT, ASSAM BENGAL RY., Opposite Party.

Indian Railways Act (IX of 1890), sec. 140—"May" means "must"—Notice of claim under sec. 77 on whom to be served—Service on Traffic Manager insufficient.

The word "may" in sec. 140 of the Railways Act means "must," and a notice of claim under sec. 77 of the Act for short delivery of goods must be served, when the railway is administered by a railway company, on the agent in India of the railway company.

THE EAST INDIAN RAILWAY COMPANY *v.* JETHMULL (1), THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* DIP CHAND PODDAR (3), GREAT INDIAN PENINSULAR RY. *v.* CHANDRA BAI (5) *approved.*

PERIANAN CHETTI *v.* THE SOUTH INDIAN RY. (4) *disapproved.*

Service of notice on the Traffic Manager was insufficient.

This was a rule granted on the 26th of August 1907, against the judgment and decree of Babu Hem Chunder Mukerjee, Subordinate Judge of Zillah Chittagong, passed in the exercise of his powers of a Court of Small Causes and dated the 19th of June 1907.

The facts of the case are fully set out in the judgment.

(1) I. L. R. 26 Bom. 669 (1902).
(3) I. L. R. 24 Cal. 306 (1896).
(4) I. L. R. 22 Mad. 137 (1898).
(5) I. L. R. 28 All. 552 (1906).

NADIR CHAND SHAHA *v.* MR. WOOD.

Babu Sarat Chandra Basak for the Petitioner.

Mr. Garth and *Babu Joy Gopal Ghosha* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is an application in a suit instituted in the Court of Small Causes at Chittagong by the Plaintiff for recovery of damages from the Assam Bengal Railway Company for short delivery, on different dates, of goods carried by the Railway Company under risk notes.

The plaint is extremely imperfect. It does not state the date or dates on which the notices of non-delivery were given to the defendant; it does not also state to whom the notices were given and when and how they were served. The plaint is also silent as to the dates when the delivery in each case was expected.

The Defendant who is the agent of the Assam Bengal Railway Company denied the receipt of proper notices and also denied the liability of the company even if the notices were duly served.

The learned Small Cause Court Judge came to the conclusion that the alleged notices of claim were insufficient, they admittedly having been served on the Traffic Manager and not on the agent of the Railway Company.

The main question argued before us in this rule is whether the notice to the Traffic Manager was a sufficient compliance with the provisions of secs. 77 and 140 of Act IX (I. C.) of 1890, the Indian Railways Act.

Sec. 77 of the act requires that before a person can sue for refund for loss or non-delivery of goods or for short delivery, he must prefer in writing a claim within six months from the due date of delivery by the Railway Company. Sec. 140 speaks of the mode of service of notices and the person to whom the notices are to be directed. It says "any notice or other document required or authorised by this act to be served on a Railway administration may be served, in the case of a Railway administered by the Government or a Native State, on the manager and, in the case of a Railway administered by a Railway Company, on the agent in India of the Railway Company." The present case is one of a Railway Company not administered by Government or any Native State; and the section requires that the notice shall be served on the agent in India. Admittedly the notice or notices in this case were served on the Traffic Manager.

The authorities in this Court as well as in the Bombay High Court are to the effect that the service of notice under sec. 77 of the Act must, in order to be effective, be served in the form and manner indicated in the act itself, *i.e.*, sec. 140 of the act. In the case of *The East Indian Railway Company* v. *Jethmull Ramanund* (1), Mr. Justice Tyabji held that sec. 140 of the Act was merely an enabling section and that the service of notice on the Traffic Superintendent or a person of that character would be sufficient. The Court of appeal, however, consisting of Jenkins, C. J. and Crowe, J. held that the formalities acquired by the legislature could not be dispensed with and they came to the conclusion that a notice in strict accordance with the

(1) I. L. R. 26 Bom. 669 (1902).

NADIR CHAND SHAHA *v.* MR. WOOD.

provisions of the Act must be served before an action could be brought. The learned Judges were of opinion that the fact that the East Indian Railway Company knew of the claim of the Plaintiff, and that intimation of the notice which in that case was served on the Bengal Nagpur Railway Company had been given to the East Indian Railway Company were not sufficient; and they followed the decision of that Court in *Ganga Persad* v. *The Agent, Bengal North Western Railway Company* (2).

In the case of *The Secretary of State for India in Council* v. *Dipchand Poddar* (3), this Court held that sec. 77 of the Railways Act required that the claim should be preferred to the Railway administration and that the words Railway administration mean, having regard to the provisions of sec. 3 of the Act, the manager in the case of a State Railway and that the service of notice to the Traffic Manager was not sufficient. The case of *The Secretary of State for India in Council* v. *Dipchand* (3) was one against a State Railway, but the principle of construction adopted by this Court was that the directions in sec. 140 must be strictly followed and the word "may" in that section must be construed as meaning "must" if a Plaintiff desire to make a claim.

Similar interpretation has been put on similar clauses in other enactments in which directions are given that notices should be served on a particular person in a particular manner. The case of notices under sec. 424 C. P. C. on the Secretary of State for India in Council may be cited as an illustration of this principle of construction.

We cannot agree with Tyabji, J., or the learned Judges of the Madras High Court who decided the case of *Perianan Chetti* v. *The South Indian Railway Company* (4), in the view they have taken as to the effect of the word "may" in sec. 140. In our opinion, the word "may" in this section means that, if a Plaintiff is desirous of serving an effective notice of claim the notice must be directed to the manager or agent as the case may be. This is also the view taken in *Great Indian Peninsular Railway* v. *Chandra Bai* (5), in which all the earlier cases have been cited and followed.

We are, therefore, of opinion that the judgment of the Small Cause Court Judge is correct and that this rule must be discharged.

The learned Vakil for the Petitioner, has contended that the case should be sent back to the lower Court for a finding on the question whether the Traffic Manager was authorised by the agent of the Assam Bengal Railway Company to receive notices, but the question does not arise on the pleadings and there is no evidence in the record on the point.

The rule is accordingly discharged with costs, five gold mohurs.

N. G. *Rule discharged.*

(2) H. C. Ry. Cas. 82.
(3) I. L. R. 24 Cal. 606 (1896).
(4) I. L. R. 22 Mad. 137 (1898).
(5) I. L. R. 28 All. 552 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 83 OF 1907.

MACLEAN, C. J. DOSS, J. 1908. Heard, 17, February. Judgment, 28, February.	KRISHNA PADA DUTT, Petitioner, Appellant, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL and another, Objectors, Respondents.

Hindu Law—Dayabhaga—Heirship—Sister's daughter—Sister's daughter's son—Succession Certificate Act (VII of 1889)—Primâ facie *title.*

When persons alleging to be the sister's daughter and sister's daughter's son of a deceased Hindu governed by the Dayabhaga law, applied for a certificate under Act VII of 1889 to collect the debts due to the deceased,

Held, *without expressing a final opinion on the question, that* primâ facie *a sister's daughter and a sister's daughter's son are not heirs under the Dayabhaga law, and are therefore not entitled to the certificate.*

This was an appeal preferred on the 4th of March 1907, against an order of Mr. F. Roe, District Judge of Zillah Hooghly, dated the 20th of December 1906, rejecting an application for a succession certificate, filed by the Petitioner and his mother on the 23rd of March 1906.

The petition for the certifiate averred that the deceased, Ishan Chandra Mitter, died in Falgoon 1312 B. S. at his own house in village North Bantra, thana Howrah, zillah Hooghly; that the deceased had no other nearer relatives than these Petitioners; that Petitioner No. 1 Kusum Kumari Dasi was the daughter of the sister of the deceased and Petitioner No. 2 Krishna Pada was the son of Petitioner No. 1. The Petitioners claimed to be the heirs of the deceased according to Hindu law, and as such entitled to obtain a succession certificate under Act VII of 1889.

A Petition of objection was thereupon preferred by Bhagabut Chandra Ghose alleging that the Petitioner No. 1 was not the daughter of the uterine sister of the deceased and Petitioner No. 2 was not his uterine sister's daughter's son and that neither of them was the heir of the deceased under the Hindu law, and consequently they could not obtain the certificate applied for; that the objector was the wife's brother of the deceased and it was with his money that deceased used to carry on a coal business. The money for the collection of which the certificate had been applied for was money due on account of that business and the objector was entitled to get the money. The Secretary of State for India in Council also objected to the grant of a certificate to the Petitioners stating that the claimants were not the heirs of the deceased under the Dayabhaga school of law, but that the Secretary of State was advised to claim the property in question.

The District Judge having rejected the application, the present appeal was preferred against his decision.

Babu Dwarka Nath Mitter for the Appellant.

Babus Ram Churn Mitter and *Brojo Lal Chuckerbutty* for the Respondents.

The JUDGMENT OF THE COURT was delivered by

DOSS, J.—This appeal arises out of an application under the Succession Certificate Act VII of 1889 for a certificate

to collect the debts due to the estate of one Ishan Chandra Mitter. The Petitioners are (1) the daughter of the sister of the deceased and (2) the son of that daughter. The Secretary of State opposed the petition on the ground that under the Dayabhaga school of Hindu law, by which the deceased Ishan Chandra Mitter was governed, the Petitioners are not heirs at all. The brother of the wife of the deceased raised a similar objection. He raised another objection also, to which, however, it is not necessary to refer.

The District Judge has rejected the application on the ground that under the Dayabhaga law, the Petitioners are not heirs, as they offer no funeral oblations to the ancestors of the deceased.

The Petitioners have appealed. We agree with the learned District Judge in his conclusion. It is unquestionable that under the Dayabhaga, sister is not an heir. The father's daughter's son, *i.e.*, the sister's son is, by the author of the Dayabhaga, declared to be an heir on account of his competency to offer oblations to the father of the deceased, in which oblations the latter participates (see Dayabhaga, Chap. XI, sec. 6, para. 9). The claim of the daughter of the sister who offers no such oblations cannot be placed upon a higher footing than that of the sister herself and indeed such a claim has not been advanced before us at all.

But it has been contended that, as the sister's daughter's son has been held in the case of *Umaid Bahadur* v. *Udoy Chand* (1) to be an heir under the Mitakshara, he ought similarly to be held to be an heir under the Dayabhaga law, because as has been further argued, wherever the Dayabhaga is silent the law is to be taken from the Mitakshara; and in support of this latter contention reliance has been placed upon some observations of the Privy Council in the case of *The Collector of Madura* v. *Moottoo Ramalinga* (2) and that of *Moniram Kolita* v. *Kerry Kolitani* (3).

We do not think that the passages cited bear out the broad proposition formulated before us nor have they any reference to any question of inheritance.

A sister's daughter's son has been held to be an heir under the Mitakshara law on the ground of community of corporal particles between him and the *propositus*. But if, competency to offer funeral oblations is, as indeed it has been declared by the author of the Dayabhaga, the principal ground for the succession of the father's daughter's son, *i.e.*, the sister's son, we fail to see how the son of the daughter of the sister can claim inclusion in the category of heirs upon any other ground. It is conceded that he does not offer any oblations to the ancestors of the *propositus*. Under the Dayabhaga law, a sister's son succeeds before the grandfather, and it is somewhat strange that her daughter's son should be postponed till after all the Samanodaks, that is, after all the ascendants and the descendants up to the fourteenth generation have been exhausted, and indeed no nearer position has been claimed on his behalf. No such anomaly arises under the Mitakshara, because

(1) I. L. R. 6 Cal. 119 (1880).

(2) 12 M. I. A. 397 (1868).

(3) L. R. 7 I. A. 115: s. c. I. L. R. 5 Cal. 776 (1880).

under that law, both the sister's son and the sister's daughter's son come in after the Samanodaks.

We are of opinion therefore that *primâ facie* a sister's daughter's son is not an heir under the Dayabhaga law. Moreover, the entire absence of any decided case directly in point, affirming the right now set up on behalf of the sister's daughter and sister's daughter's son, despite the fact that they are such near relations, is very significant and tells strongly against the validity of such a claim.

Having regard to the summary character of the present proceedings we refrain from expressing a final opinion on the question. All that we need say at present is that we are not satisfied by the arguments that have been advanced before us that they are heirs under the Dayabhaga law. They are therefore not entitled to the certificate they have asked for.

For these reasons the appeal must be dismissed with costs, 4 gold mohurs payable to the Secretary of State and 1 gold mohur to Bhagabat Chunder Ghose.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 84 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard, 24 and 25, February.
Judgment, 28, February.

DWARKA DAS KARNANI and another, Defendants, Appellants,
v.
CHUNI LAL DAGA Plaintiff, Respondent.

Partnership—Expulsion of one member by others, if causes dissolution—Contract Act (IX of 1872), sec. 253 (7)—Suit for account or dissolution by excluded partner—Limitation—Limitation Act (XV of 1877), Sch. II Arts. 106, 120.

Under the Indian law there is no dissolution of partnership when one partner expels the other.

A suit by the expelled partner for account or for dissolution of partnership and a share of the profits is not governed by Art. 106 but by Art. 120 of Sch. II of the Limitation Act, and is within time if brought within 6 years of the date of expulsion.

Under the Indian law a partner can be expelled only by an order of the Court.

This was an appeal preferred on the 15th of March 1907 against the decree of Mr. F. E. Piffard, Subordinate Judge of Zillah Darjeeling dated the 22nd of October 1906.

The facts of the case are as follows :—

The Plaintiff, Chunilal Daga and two other persons, Johuri Lal and Girdhari Lal, carried on, in partnership with the two Defendants who were father and son, a business at Sukia in the Darjeeling District. Johuri and Girdhari retired on 3rd November 1900. The Plaintiff and the Defendants then started business together and this went on till 28th March 1901 when, according to the Defendants' version, the Plaintiff also retired. The Plaintiff, however, instituted this suit on the 24th January 1906 treating the partnership as continuing up to the date of the suit and asking for an account of the business from 3rd November 1900, alleging that the accounts had been withheld from the Plaintiff. In the alternative, he prayed for dissolution of the partnership and for his half-share of the profits.

DWARKA DAS KARNANI v. CHUNI LAL DAGA.

The Defendants raised various objections, amongst others, that the suit was time-barred.

The Court of first instance was of opinion that the Plaintiff did not voluntarily retire as alleged by the Defendants, but had been illegally expelled by them from the 28th March 1901, that the Plaintiff did not thereby cease to be partner and was entitled to a half-share of the profits upon dissolution, and his suit was not time-barred.

The Defendants appealed to the High Court contending that the Plaintiff retired from business or at any rate tacitly abandoned it, that assuming that he was expelled, the suit had been barred by limitation and that in any event his share of the profits was $4\frac{1}{2}$ annas and not 8 as. as decreed.

Babu Sarat Chandra Ray Chowdhury, for the Appellants, argued that the finding of the Sub Judge that the Plaintiff was expelled from the partnership business by the Defendants on or about the 20th March 1901 is not supported by evidence on the record. The oral and documentary evidence would lead to the conclusion that the Plaintiff retired from the business after settlement of accounts about that time.

Assuming that the finding of the Subordinate Judge is correct, the present suit which has been brought more than 3 years after the expulsion is barred by limitation under Art. 106 of Sch. II of the Limitation Act. When a member is expelled or excluded from the partnership business by the other members the former "ceases to be a partner from any cause" and the partnership is dissolved within the meaning of cl. (7) of sec. 253 of the Indian Contract Act. The next three cls. (8), (9) and (10) clearly indicate, though not exhaustively, the several causes for which a partner may cease to be so and expulsion appears to be one of them. Cl. (4) also indicates that the expulsion has not the effect of cessation of the partnership except by order of Court where the partnership has been entered into for a fixed term. The case is governed by cl. (7) and therefore expulsion had the effect of cessation. The passage in Cunningham and Shepherd's Book quoted by the Judge is in reference to cl. (9) as would appear from the observations of the same authors under cl. (7) that a partnership is dissolved by one member being expelled from the business by the others. This is supported by Lindley on Partnership 7th Edition p. 553. See also *Noyes v. Crawley* (1), and *Barton* v. *North Staff. Ry. Co.* (2), but apart from these English authorities sec. 253 of the Contract Act clearly supports my argument.

Babu Sarat Chandra Basak, for the Respondents, submitted that "expulsion" by itself has not the effect of dissolution. See sec. 253 of the Contract Act and Cunningham and Shepherd's notes on that section. The word "ceasing" in the section does not include physical expulsion. It contemplates a juridical act. The expulsion must be either by the order of Court or by an express provision in the contract. When notice of expulsion is void, the Plaintiff does not cease to be a partner. Power of expulsion is construed strictly, *Blisset* v. *Daniel* (3).

(1) 10 Ch. D. 31 at p. 39 (1878).
(2) 38 Ch. D. 458 at p. 463 (1888).
(3) 10 Hare 493 at p. 538 (1853).

DWARKA DAS KARNANI *v.* CHUNI LAL DAGA.

Wood v. *Woad* (4). There is no provision in the Indian Contract Act which authorises one partner to expel another although there may be no express provision to that effect. The English law expressly denies such power. See Lindley on Partnership, p. 624 and 431, also English Partnership Acts.

Babu Sarat Chandra Chowdhury in reply.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit for accounts of a partnership business carried on at Sukia in the Darjeeling District. The Plaintiff Chuni Lal claimed 8 annas share in the business, and sought for an account or in the alternative for a decree for dissolution of partnership and a share of the profits. The Defendants, Dwarka Das and Sheo Protap, who are father and son, denied that the Plaintiff was a partner with them and contended that if he were, he had only a 4½ annas share and that his suit was barred by limitation. The admitted facts are that the Plaintiff, the Defendant Dwarka Das, and two other persons Johuri Lal and Girdhari Lal formerly carried on business together. Johuri and Girdhari retired on the 3rd November 1900. The Plaintiff and the two Defendants then started business together. On the 28th March 1901, the Defendants say the Plaintiff voluntarily retired and they have carried on the business by themselves ever since. The Plaintiff, however, maintains that he never retired, and that he is entitled to an account and a share in the profits.

The Judge has found (1) that the suit is not barred by limitation (2) that the Plaintiff did not voluntarily retire but that the Defendants illegally expelled him from the partnership on the 28th March 1901 (3) that the Plaintiff did not thereby cease to be a partner and (4) that the Plaintiff is entitled to a decree for dissolution of the partnership, and for an account and that the profits of the business are to be divided equally between the Plaintiff and the Defendants.

The Defendants appeal and on their behalf it has been urged (1) that on the Judge's finding that the Plaintiff was expelled from the partnership business on the 28th March 1901, the suit is barred by limitation (2) that the Plaintiff voluntarily retired from the business, or if he did not, he tacitly abandoned it and (3) that in any case the Plaintiff had only a 1½ as. and not an 8 as. share in the new business.

The Appellants' pleader relies in support of his first plea on articles 106 of the Limitation Act which provides that a suit for an account and share of the profits of a dissolved partnership must be brought within 3 years of the date of the dissolution. He contends that the Plaintiff "ceased to be a partner" within the meaning of cl. 7 of sec. 253 of the Indian Contract Act when he was expelled, that according to a note in Cunningham and Shepherd's Contract Act "any member may cease to be so either by death, or by retirement or by expulsion" and that according to Lindley on Partnership, "as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the statute of limitation begins to run" (7th Ed. p. 553). We think, however, that the expulsion

(4) L. R. 9 Ex. 190 at pp. 194, 202 (1874).

referred to in the note in Cunningham and Shepherd's Contract Act, must mean the expulsion referred to in cl. 9 of sec. 253, that is expulsion by order of the Court and the "exclusion" referred to in Lindley on Partnership must mean an exclusion in accordance with an express provision in the deed of partnership giving the majority of the partners power to expel a partner. There is no provision in the Indian Contract Act giving partners power to expel a partner without an order of the Court and it is clear from several passages in Lindley on Partnership (7th Ed. pp. 431, 461, 624) that no such power exists in England unless provided for by express agreement. Hence, an irregular expulsion, as the Judge finds took place in this case, cannot put an end the partnership, so, that there can be no limitation in such circumstances in a case like the present.

Even if according to Lindley limitation runs against an excluded partner from the date of his exclusion this is the result of the terms of the English statute of Limitation, which provides that an action such as this must be brought within 6 years of the date of the commencement of the action. The terms of Art. 106 of the Indian Limitation Act are different. They provide for a suit being brought within 3 years of the partnership. If, as the Judge has found, there was no dissolution of partnership, the article does not apply at all. The article applicable would be Art. 120, which allows 6 years for the suit and this suit has been brought within 6 years from the date of the Plaintiff's irregular expulsion by the Defendants.

The Appellant's next plea is that the Plaintiff voluntarily retired or tacitly abandoned his share in the business. This is entirely against the weight of evidence. The evidence oral and documentary satisfies us that the Plaintiff though called on to retire by the Defendants stoutly refused to do so. A letter marked Ex. M. shows that he relented and invited the principal Defendants to call on him and settle matters. He says the Defendants never did so. The Defendant maintains that he did settle matters and points to an entry in his books showing a settlement of accounts on the 28th March 1901. This entry is not signed by the Plaintiff. No receipt or writing was taken from him, as was taken on the retirement of Johuri Lal and Girdhari Lal on the 3rd November 1900, *i.e.*, a few months previously. And we accordingly agree with the Judge in the Court below that the Plaintiff neither voluntarily retired from, nor tacitly abandoned, his share in the business. The pleader for the Appellants does not press his third plea. On the contrary, he admits that he cannot successfully impugn the Judge's finding that the Plaintiff had a half share and the Defendants the other half share in the new business started on the retirement of Johuri and Girdhari Lal.

We therefore confirm the decree of the Court below and dismiss the appeal with costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 497 OF 1906.

MACLEAN, C. J.
COXE, J.
1908.
22, January.

KUMAR BUNWARI MUKUNDA DEB BAHADUR, Defendant, Appellant,
v.
BIDHU SUNDAR THAKUR and ors., Plaintiffs, Respondents.

Chakran *land—Resumption and transfer to zemindar—Recovery of same by* putnidar *—Suit for specific performance, if necessary.*

Where chakran *lands were included in the* putni potta *granted by the zemindars to the Plaintiffs before the resumption thereof under the Chowkidari Act.*

Held—*That upon resumption and transfer of the lands to the zemindars the remedy of the* putnidars *was to bring a suit for recovery of possession and not a suit for specific performance of a contract.*

RANJIT SINGH *v.* RADHA CHARAN CHANDRA (1) *not followed.*

KAZI NAWAZ KHODA *v.* RAM JADU DEY (2), HARI NARAIN MOZUMDAR *v.* MUKUND LAL MUNDAL (3) *referred to.*

This was an appeal preferred on the 3rd April 1906, against the decision of Babu Bepin Behari Chatterjee, Subordinate Judge of Murshidabad, dated the 2nd December 1905, confirming the decision of Babu Ashutosh Banerjee, Munsif of Kandi, dated the 17th May 1904.

The facts of this case are shortly these:—The Defendants Nos. 1 and 2 are the admitted zemindars of Mouza Kundala within Purgunnah Fatepur. Their predecessors let out in *putni* the entire village to the predecessors-in-title of both Plaintiffs and Defendant No. 3 under a *potta* dated the 2nd Bysakh 1230 B. S. The Plaintiffs Nos. 1 to 8 had ⅓rd share and the Plaintiff No. 9 another ⅓rd share in the *putni taluk* and the remaining one-third belonging to the Defendant No. 3 was let out in *durputni* to the Plaintiff No. 10, who was no other than the Plaintiff No. 3. By a deed the Plaintiffs Nos. 1 to 8 dedicated their one-third share to Thakur Giridhar Jeu and constituted themselves his *shebaits*. The lands in suit which are situated within the Mouza and were formerly held as Chowkidari Chakran lands were resumed by Government and settled with the zemindar Defendants Nos. 1 and 2 at an annual *jama* of Rs. 37-4-0 pies. And the suit was to obtain settlement of the same at the same *jama* from them and to recover *khas* possession thereof.

The only defence raised by one of the zemindar Defendant, Defendant No. 2, material to this report, is that the suit being virtually a suit for specific performance was not maintainable as all those entitled to the relief claimed had not joined as co-Plaintiffs.

The *putni potta* was as follows:—

"We make a *mufasali putni talukdari* settlement in respect of Mouza Kundal appertaining to the said *lat* at an annual *jama* of Rs. 1,056-3-8 gandas, for a consideration of Rs. 851. We received the total amount of consideration money. You shall hold possession of the Mouza as per Schedule, as well as *mal* land, *khamar* land, *chakran* land, *hasil* (culturable) land, *patit* land, *jungle*, *jalkar* and gardens and *falkar* and *bankar* and tanks and *bil* and *jhil* with all interests whatever there are within the zemindari.

(1) I. L. R. 34 Cal. 564 (1907).
(2) 11 C. W. N. 201: s. c. I. L. R. 34 Cal. 108 (1906).
(3) 4 C. W. N. 814 (1900).

KUMAR BUNWARI MUKUNDA DEB BAHADUR *v.* BIDHU SUNDAR THAKUR.

You shall have no connection with the *lakheraj* gardens, tanks, lands and trees which are purchased and held in *khas* by us, you shall year by year, month by month, and *kist* by *kist* pay into our *sudder kutchery*—Banwariabad, the amount of rent in full *sicca* weight. You shall not be able to get the *putni taluk* transferred from our zemindari on any account. If you or any of your heirs shall at any time apply for a transfer from our zemindari, the same will be invalid and be rejected. The *jama* at which the *muffasali putni talukdari* settlement is granted to you, will never be enhanced or abated on any account. Taking possession according to the terms of the *kabuliyat* and keeping the tenants satisfied, you as well as your sons and sons' sons, etc., in succession, shall continue to peacefully enjoy by paying the rent. The 2nd Baisakh 1230."

The suit was decreed in both the Courts below and the Defendant No. 2 preferred this second appeal.

Dr. Rash Behary Ghose and *Babu Khetter Mohan Sen* for the Appellant.

Babus Nil Madhub Bose and *Harendra Nath Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—The only point argued on this appeal is whether the Plaintiffs are entitled to recover judgment having regard to the frame of the suit. It appears that under a *potta* dated 1823, the then zemindar granted to the predecessors in tittle of the Plaintiffs a *putni* giving them possession of a certain Mouza including the *chakran* lands. It is clear upon the fact of the *putni potta* specially having regard to sec. 41 of Reg. VIII of 1793, that at the time of the *putni* the zemindar was the owner of the *chakran* lands and that these lands are included in and covered by the *putni*. The *chakran* lands were subsequently transferred to the zemindar who took the transfer, subject to the provisions of sec. 51 of the Village Chowkidari Act (Act VI of 1870 B. C.) and the Plaintiffs now bring the present suit to recover possession of these *chakran* lands. Plaintiffs Nos. 1 to 8 are entitled to an one-third share under the *putni*; Plaintiff No. 9 to another third; and Defendant No. 3 to the remaining third, and he, it appears, let out his interest in *dur-putni* to Plaintiff No. 10 who is the same person as Plaintiff No. 3 so that, we have before the Court all the persons who are interested in the *putni* and all the persons who are entitled to claim possession of the land in question, as against the zemindar: in other words, every body interested in the *putni* is before the Court, either as Plaintiff or as Defendant, the suit being one for possession of the *chakran* lands. Then it is said that this is not a suit for possession but is a suit for specific performance of a contract, and being a suit for specific performance of a contract, the suit cannot successfully prevail unless all the parties to the contract who seek to have it specifically performed are co-Plaintiffs. The answer to that appears to be two fold I do not think this is an action for specific performance of a contract. This is an action for possession of the *chakran* lands which were included in the *putni* to which I have referred. There is no agreement to grant a *putni* of these lands when

KUMAR BUNWARI MUKUNDA DEB BAHADUR *v.* BIDHU SUNDAR THAKUR.

they were transferred to the zemindar, of which it is necessary to obtain a decree for specific performance. The *putni* is a concluded contract, and there is no agreement of which specific performance can now properly be granted. There is no doubt authority for the opposite view in the case of *Ranjit Singh v. Radha Charan Chandra* (1). But with great respect I do not assent to the view expressed in that judgment which seems to me to be inconsistent with the previous judgments of one of the learned Judges who was a party to the later decision, namely in the case of *Kazi Nawaz Khoda* v. *Ram Jadu Dey* (2), and also in the case of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (3). The two decisions I have last mentioned appear to me to be inconsistent with the view taken in the case of *Ranjit Singh* v. *Radha Charan* (1); I do not notice they were referred to in the judgment in that case. If then it is a suit merely for possession under the contract contained in the *putni*, I think the suit is properly framed and agreeing with both Courts, I think the Plaintiffs are entitled to judgment.

As regards the other two points, the point as to whether the idol ought to have been made a party and the question what rent should be paid for the resumed lands, as no argument has been addressed to us on those points and they have been abandoned, I need say nothing about them.

The appeal fails and must be dismissed with costs.

(1) I. L. R. 34 Cal. 564 (1907)
(2) 11 C. W. N. 201 : s. c. I. L. R. 34 Cal. 109 (1906).
(3) 4 C. W. N. 814 (1900).

COXE, J.—I agree.

N. G. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICITON.]

REV. No. 1239 OF 1907.

RAMPINI, J. SHARFUDDIN, J. 1907. Heard, 11 and 12, December. Judgment, 17, December.	GOSHTA BEHARI SAHA and anr, Petitioners, *v.* THE EMPEROR, Opposite Party.

Excise Act (VII, B. C., of 1878), secs. 53, 59, 61—Offence under secs. 53 and 61—License for sale and possession at a certain place—Sale at a different place—Sec. 59 of the Excise Act, offence under—Servant's liability for the master's Act.

The servant who delivers ganja to purchasers at the bidding of his master who sells it and receives the price cannot be convicted of offences under secs. 53 and 61 of the Excise Act (VII, B. C., of 1898).

When a person having a license for the sale and possession of ganja at a certain place, sells it at a different place he commits an offence under sec. 59 and not under secs. 53 and 61 of the Excise Act.

This was a rule issued on the 12th November 1907 calling on the District Magistrate of Birbhoom to show cause why the order of Babu Bejoy Behari Mukherjee, Deputy Magistrate, Suri, dated 5th of June 1907, convicting the Petitioners under secs. 53 and 61 of the Excise Act (VII B. C. of 1878) and sentencing them each to pay a fine of Rs. 200 under each of the said sections (total Rs. 400 each) or in default to suffer simple imprisonment for two months each, which order was, on appeal, affirmed

5 weeks inspite of warrant of arrest issued. I therefore cannot accept further sureties before enquiry; the accused is committed to jail."

The Petitioner having been committed to jail, the Sub-divisional Magistrate made the reference under sec. 123, C Cr. P., to the Sessions Judge.

On the said reference being made to the Sessions Judge, the District Magistrate struck the appeal before him from off his file.

On the 12th March 1907, the Sessions Judge made the following order:—

"I have heard the arguments advanced on behalf of the accused. After a reference to the case *RamPershad* v. *King Emperor* (1) I think that the grounds given by the Magistrate for refusing to accept the sureties offered were not valid grounds for the refusal under sec. 123, cl. (*3*) of the Criminal Procedure Code. I therefore direct the sureties already offered by the Petitioner to be accepted. On any of the sureties ceasing to act the case must be again referred for orders."

The Petitioner then moved the High Court and obtained this rule.

Babus Dasarathi Sanyal and *Suresh Chandra Mukherjee* for the Petitioner.

Mr. Douglas White for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a rule on the Deputy Commissioner of Sylhet to show cause why either the appeal presented to him by the Petitioner or the reference made to the Sessions Judge should not be heard on its merits and why such orders should not be passed as to this Court may seem fit and proper.

The Petitioner was directed to furnish security for good behaviour and the term for which such security was required being in excess of one year the matter was referred to the Sessions Judge under the provisions of sec. 123, C. Cr. P. Previous to the making of this it appears that the Petitioner appealed to the District Magistrate under sec. 406 of the Code. That appeal has been "struck off." But on the reference made to him, the Sessions Judge did not arrive at any conclusion as to the merits. He directed that the sureties offered by the Petitioner for his good behaviour should be accepted by the Deputy Commissioner, although the Deputy Commissioner had already found these sureties to be insufficient. The order of the Sessions Judge purports to be passed under cl. (*3*) to sec. 123, but the sub-section clearly contemplates a decision by the Court on the merits of the order demanding security for good behaviour. It does not, in our opinion, authorise the Sessions Judge to consider the sufficiency of the security offered.

Under all the circumstances of the case we think that the proper order to pass would be that the Sessions Judge should proceed to hear and dispose of the reference made to him and we order accordingly.

The rule is made absolute in these terms.

N. G. *Rule made absolute*

(1) 6 C. W. N. 593 (1902).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MARCH 30, 1908. [No. 20

Contents.

NOTES

WE NOTE WITH PLEASURE THAT MR. S. P. SINHA HAS been appointed to officiate again as the Advocate-General of Bengal. This is the most responsible law office under the Crown in India and we are gratified that the Government's choice has fallen on an Indian member of the English Bar. Indians have long established their eminence in the profession of law, on the Bench and even as law officers of the Crown. Sir Bhasyam Iyenger as the first Indian Advocate-General of Madras reflected credit on his office by his almost unrivalled legal learning. Since then that office has been filled with credit by Mr. Sankaran Nair. In Calcutta Mr. Sinha has officiated before as Advocate-General and during such incumbency he discharged his duties to the satisfaction both of the Government and the public. Mr. Sinha by his forensic talent has made his way to the forefront of the legal profession and we have every confidence that he will fill this high office with credit to himself and the Bar to which he belongs.

LAST FRIDAY AT THE BUDGET MEETING OF THE Viceroy's Council, Sir Harvey Adamson laid before the public the long deferred scheme for the separation of the functions of the executive and judicial officers. The scheme is offered to the public at present for criticism. When matured it will be put into operation, to begin with, in Bengal and Eastern Bengal. The scheme proposes that there should be a district officer (executive) and a senior magistrate, (judicial) with a staff of subordinate officers under each in each of the districts. The district officer will have control over the revenue, the police and the peace of the district, and for the last purpose, will have jurisdiction in respect of preventive measures as contemplated under Ch. VIII to Ch. XII of the Code of Criminal Procedure (omitting sec. 106). It may be questioned whether this is not too wide a reservation of power in favour of the district officers. Such reservation will in effect afford no relief to the public against the abuse of the provisions of the Code of Criminal Procedure referred to which are not unfrequently resorted to by the Police and the executive in the mofussil without sufficient justification. So we may suggest that these proceedings may be initiated by the executive officers but in the interests of justice the trial should be by independent judicial officer.

THE DISTRICT JUDICIAL OFFICER ON THE OTHER hand, assisted by a suitable number of subordinate magistrates, is to be entrusted with the remaining criminal judicial work. The same division of judicial and executive functions is also to be observed in the subdivisions which are now to be called sub-districts. The districts and sub-divisions are to be re-divided on such lines and such redivision for the purposes of the executive and judicial jurisdiction of the respective classes of officers need not be co-terminous The division is to be effected with a view to provide each class of officers with enough work to do within their respective jurisdictions. The officers, be they members of the covenanted Civil Service or of the Provincial Civil Service, will have to choose at an early period of their career either the executive or judicial line. Although the executive and judicial officers will apparently be independent of each other yet the scheme says that both of them will be under the common control of the Divisional Commissioner. The weak point of the scheme lies here. If the judicial officers had been placed under the District Judge and the High Court and been independent of the Divisional Commissioner, the success of the scheme would have been assured. It is stated in the scheme, that the High Court will be freely consulted by the Divisional Commissioner in the matter of the transfer and promotion of judicial officers. But we apprehend that so long as the last word in these matters rests with the Commissioners the judicial officers will not be able to rise above the influence of the executive.

THE QUESTION WHETHER OMISSION ON THE PART OF a prior mortgagee to obtain the title deeds of the mortgaged property from the mortgagor does constitute such gross negligence as to postpone his mortgage to a subsequent mortgage of the same property, came up for decision before the Madras High Court in the case of *Rangasami Naiken* v. *Annamalai Mudali* reported at p. 7 of the current

volume of the I. L. R., Madras Series. Their Lordships Wallis and Miller, JJ., held that such omission does not ordinarily amount to gross negligence within the meaning of sec. 78 of the Transfer of Property Act. In this case the mortgagor after the execution of the mortgage deed delayed its registration and in the meantime, before the registration of the mortgage deed, he mortgaged the same property to another person who was shown the title deeds of the property which were still with the mortgagor. The mortgage was executed outside Madras and was in respect of property in the mofussil. Their Lordships held that if the mortgage transactions had taken place in the Presidency town where mortgages could be created by the deposit of title deeds, the failure on the part of the prior mortgagee to obtain the title deeds might be regarded as gross negligence within the meaning of sec. 78 Transfer of Property Act so as to postpone the prior mortgage to a subsequent mortgage. But where the transaction is in a place where no mortgage can be created by the deposit of title deeds, the mortgagee does not become guilty of "gross negligence."

THEIR LORDSHIPS OBSERVED "AS OBSERVED BY MR. (now Chief) Justice Jenkins in *Monindra Chandra Nundy* v. *Troyluckho Nath Barat*, 2 C. W. N. 750, "the existence of gross negligence within the meaning of sec. 78, Transfer of Property Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that in this country a universal system of registration exists." Although according to the view taken in this Court, registration does not amount to notice to subsequent incumbrancers, it does put them in a position, with the exercise of reasonable care, to find out whether there is any registered prior incumbrance or not, and this consideration goes far to show that failure on the part of the prior mortgagee to get possession of the title deeds is not, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence."

NO DOUBT IN A CASE LIKE THIS THE QUESTION whether there has been gross negligence or not on the part of the prior mortgagee for his omitting to get possesssion of the title deeds will depend for its solution upon the special circumstances of the case. If, in spite of negligence on the part of the prior mortgagee, the circumstances be such that the subsequent mortgagee could have, with the exercise of due deligence, discovered the existence of the prior mortgage, then he should not get priority over the prior mortgagee. For instance if the prior mortgage was registered, then the subsequent mortgagee should not get priority merely because the title deeds of the mortgaged property were allowed by the prior mortgagee to remain with the mortgagor The case of *Manindra Chandra Nundy* v. *Troyluckha Nath Barat* referred to in this judgment illustrates this principle. But can it be said that such a principle is applicable to the case decided by the Madras High Court? Here, after the execution of the prior mortgage, the title deeds were suffered to remain with the mortgagors by the mortgagee even though his mortgage was not then registered. The prior mortgagee ought to have known that by means of showing the title deeds to another person, the mortgagor would be able to create another mortgage on the property and the subsequent mortgagee would have no means of ascertaining by search in the registration office that there had been a prior mortgage of the same property.

WHIPPING IN INDIA.

Such is the title of a small pamphlet by Babu Hiralal Chakravarti, M. A. B. L. He has done a distinct service by compiling and presenting the facts on the above subject at the present moment in a connected and interesting form.

He deals with the subject historically, and very rightly too, as the history of Indian legislation on whipping forms a very interesting chapter in the history of criminal law. After referring to the prevalence of flogging under the East India Company's regime, the author sets out the preamble to Reg. II of 1834 to show how Lord William Bentinck, whose hallowed memory is an honour to the British administration in India, was far more enlightened and far-sighted than our modern rulers not only as a statesman but also as a legislator. The preamble is remarkable in enunciating principles, the truth of which is recognised to-day throughout the civilized world. Not only did Lord William Bentinck discontinue flogging but he earnestly set himself to the task of improving the prisons. The reasons given in the preamble of Reg. II of 1834 for the discontinuance of flogging is worth reproducing even to day.

> Whereas corporal punishment has not been found efficacious for the prevention of crime, either by reformation or by example; and whereas it is always degrading to the individual, and by affixing marks of infamy, which often are for ever indelible, prevents his return to an honest course of life; and whereas there is every reason to fear that it is in many cases injudiciously and unnecessarily inflicted, becoming a grievous and irremediable wrong; * * * whereas it has been deemed necessary to provide for the gradual introduction of a better system of prison discipline, the following rules have been enacted to be in force from the date of their promulgation throughout the territories subject to the Presidency of Fort William.

No less remarkable it is that the Indian Law Com missoners in presenting their draft Criminal Code in 1837 deliberately excluded flogging from the list of punishments. The Commissioners were no mere theorists of the Bentham school but included such men amongst them as Sir E. Ryan and Sir B. Malkin, respectively Chief Justice and puisne Judge of the Supreme Court at Calcutta. This omission is all the more remarkable when we take into

consideration the fact that the framers of the draft Code had the experience of three years, from 1834 to 1837, during which the punishment of whipping remained abolished. The reasons for the Law Commissioners' recommendation are thus stated in their report :—

We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is not necessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations in life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes, and to that extent, the arguments which we have used against public exposure apply to flogging * * * The moderate flogging of young offenders for petty offences is not open, at least in any serious degree to the objections which we have stated. * * * In countries where a bad system of prison discipline exists, the punishment of whipping has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill-regulated jail. It is our hope and belief, however, that the reforms which are now under consideration will prevent the jails of India from exercising any such contaminating influence, and if that should be the case, we are inclined to think that the effect of a few days passed in solitude or in hard and monotonous labour would be more salutary than that of stripes. Being satisfied therefore, that the punishment can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps and to re-establish throughout the British territories a practice which by a policy unquestionably humane, and by no means proved to have been injudicious, has recently been abolished throughout a large part of those territories."

It will be noticed that the Law Commissioners while remarking that it might be preferable in some instances to moderately flog juvenile offenders than to expose them to the contaminating influence of ill-regulated jails, they felt no hesitation all the same in recommending the wholesale abolition of whipping. Their reasons for doing so were that the jails were sure to be soon reformed and pending such reform they did not see their way to sanction the revival of a brutal form of punishment even temporarily.

Seventy years and more have rolled past since Lord William Bentinck and the Law Commissioners put flogging out of the statute books in India and advocated prison reform in its stead and to-day we find Sir Harvey Adamson, the Home Secretary to the Government of India, putting forward a plea for retaining whipping as a punishment for juvenile offenders on the selfsame ground of the Indian prisons being far from what they ought to be. May we ask if three quarters of a century is not time long enough for prison reform?

We are told by the Home Secretary that owing to financial difficulties the prison reform must remain further postponed and whipping as an alternative punishment in all cases except homicide must continue for juvenile offenders from want of suitable state arrangements for their correction or reformation.

It is interesting to note that Sir Harvey Adamson's plea for retention of whipping for juvenile offenders has not even the merit of novelty. In fact it is precisely on the same plea that whipping was revived in India in 1844. It is curious that the advocates of whipping should have taken shelter under the Law Commissioner's Report to revive whipping not merely for the benefit of juveniles but even as a general form of punishment. How the community was made to swallow this gilded pill has been well described by the author.

The Indian Law Commissioners had expressed a hope that the prison reform might be effected speedily, so that, whipping being forbidden, juvenile offenders might not be exposed to the contaminating influence of a bad prison system. That was found a convenient lever. Under the plea that it would take some time to reform the jails, which was an expensive matter and that, until this was done, it would be better, to let off youthful criminals and others convicted of petty larceny with a few strokes of the ratan, the legislature enacted Act III of 1844—"An act for legalising the infliction of corporal punishment generally, and when committed by offenders of tender age." In order to make this innovation rather palatable to the community, it was hemmed in with restrictions. It was provisional, or in the words of the Act, "until adequate improvements in prison discipline can be effected."

But this mild measure of whipping underwent a sudden and rather serious transformation on the outbreak of the Indian Mutiny. The Magistrates, we are told, "began to inflict flogging indiscriminately on all offenders as the result of breaking open of some jails." The writer rightly observes that the Mutiny was a military rebellion and the people took but little part in it. But in times of such panic the minds of the alarmed public and the alarmist newspaper men often get unhinged and magistrates succumbing to their influence indulge in brutal punishments even in defiance of the law. The Mutiny and subsequent events go to show the truth of this statement.

After the troubles of the Mutiny were over and the normal conditions of administration were being restored, the Indian Penal Code came into force in 1861. This masterpiece of legislation drafted by eminent men, contained no provisions for flogging. The vulgar mind found in this a loophole for letting in all their evil passion. The result was the Whipping Act of 1864. A short account of its genesis from this little book is quite worthy of perusal.

The draft Penal Code, prepared by Law Commissioners, was revised and introduced into the Council. It was attempted to introduce flogging as a legitimate mode of punishment into the draft Code but the attempt proved abortive. The result was, that when the Code which did not sanction flogging, came into operation in 1861, there was a general cry for its revival. In response to it a select committee of the Council prepared a draft which was introduced into the Council, and passed. Its provisions were so stringent and oppressive that the Governor-General refused his assent to it. In 1862

flogging bill was introduced into the Council in a milder form, in the hope of securing Lord Canning's assent to it. Mr. Beadon (afterwards Sir Cecil) brought it in, but it had the instinctive support of the majority of the members. The statement of Objects and Reasons gave a short history of the subject, at once frigid and uninstructive, but did not give any reason in its support. * * * The Bill was referred to a select committee consisting of Messrs. Beadon, Ritchie, Cowie and Harrington (the last-named member had introduced the previous bill) and Raja Deo Narain Singh. Inspite of the fact however, that there was almost unanimity among the Members in the select committee, it was not submitted to the Council till 1864. In the meantime the English Parliament, in a fit of popular panic, legalised flogging at home, and this fact was taken as an argument in favour of its supporters in India.

Although we relish the good natured humour and the literary flavour that occasionally enlivens this interesting essay, yet we must say for the guidance of the author who, we presume, is young, that in dealing with a subject of this kind he should have been historical in his method up to the finish and not broken off into a discussion of matters of more or less academic interest before presenting us with the developments of the Whipping Act subsequent to 1864. The changes introduced in the law since then have by no means mitigated its rigour.

In reviewing the history of the Act of 1864 it must be said to the credit of the Calcutta High Court, that the Hon'ble Judges in an able minute asked the legislature to stay their hands for four or five years and watch how the new Penal Code worked without the ratan. But on the old plea that the jails would be overcrowded and that the resources of the state will be unequal to bear the burden, most of the members of the Viceroy's Council supported the flogging bill which became law on the 17th of February 1864. We wonder when we shall hear the last of this plea.

A Bill has recently been introduced into the Viceregal Council obviously with the object of purging the Act of 1864 of its more barbarous provisions. We would recommend, however, its wholesale abolition. The reasons furnished by the Indian Law Commissioners on this behalf so far back as 1837, have curiously enough become the accepted creed of the civilized world to day.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL APPELLATE JURISDICTION. Before GEIDT and WOODROFFE, JJ. CRIMINAL APPEAL No. 1 of 1908 THE DEPUTY LEGAL REMEMBRANCER on behalf of the Government of Bengal v. RASH BEHARI DAS, Accused. 4th March 1908.

Indian Penal Code, sec. 477A—False entries made with intent to conceal fraud previously committed.

This was a Government appeal against acquittal. The prosecution story was that in the months of March and November 1906 certain sums of money had been received at the Habigunj Munsifi for payment into the Government Treasury. The accused Rash Behari Das was the accountant in the Munsif's Court and it was his duty to have made entries of the receipt in the Chalan register; this he failed to do. Sometime afterwards when the register was found to be irregularly kept, an enquiry was held, and the allegation against the accused is that the sums were never paid into the Government Treasury and that after the commencement of the enquiry, for the purpose of concealing the non-payment he made entries in the register showing that these sums had been "paid" to the credit of the Collector's account. The accused was tried on a charge under sec. 477A, I. P. C., but was acquitted by the Sessions Judge on the ground that as these entries were made not for the purpose of defrauding Government but for the purpose of concealing the fraud that had been previously committed the case did not fall within the purview of sec. 477A. In support of this view the Sessions Judge relied on the rulings reported in I. L. R. 5 All. 221, I. L. R. 8 All. 653 and I. L. R. 13 Cal. 349.

The High Court held.

Per GEIDT, J.—"It seems to me that in making the entries which are charged against him, the accused was in reality furthering the fraud that had already been committed If the accused had been successful, the moneys to which Government was entitled, would have continued to be kept out of the possession of Government. Having regard to this consideration I have no hesitation in holding that the accused, if the case for the prosecution is true, acted fraudulently &c, &c., &c."

Per WOODROFFE, J.—"In my opinion the case is covered by the rulings reported in I. L. R. 22 Cal. 313 and in Vol. I Weir p. 554 which have not been referred to by the Sessions Judge. He should therefore have considered the facts. In my opinion, even if the intention with which the false entries were made was to conceal a fraudulent or dishonest act previously committed, the intention would be to defraud and the case would fall within sec. 477A of Indian Penal Code.

Mr. Orr, Deputy Legal Remembrancer for the Crown.

Babus Dasarathi Sanyal and *Suresh Chandra Mukherjee* for the Accused.

B. C. *Acquittal set aside and retrial ordered.*

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER, HYDERABAD ASSIGNED DISTRICT.]

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1907.
Heard, 18, 19 and 20, November.
1908.
Judgment, 12, February.

PESTONJI JIVANJI and others, Appellants,
v.
SHAPURJI EDULJI CHINOY and others, Respondents.

Native State, location of British troops in—Power of cantonment authorities as to grant or user of land—Treaty, absence of—Power restricted to military purposes—Land belongs to State—Parsi Tower of Silence, grant of land for—Control of cantonment authorities.

The Hyderabad Subsidiary Force, which had its head-quarters in the Secunderabad cantonment, was a force in the employment of the East India Company and commanded by the Company's officers, but maintained, by agreement, in Hyderabad territory for the protection of the Nizam. There never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the military commander commanding the Hyderabad Subsidiary Force on the other, with respect to the management, control, and disposition of the cantonment and the land comprised in it. When the Nizam's government admitted a British force within its territory, and allotted to it Secunderabad cantonment as its head-quarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency and the discipline of the troops, the peace and good order and convenient use of the cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops was empowered to alienate, in perpetuity, land forming part of the cantonment and undoubtedly Hyderabad territory for a purpose wholly unconnected with military requirements.

The Appellants, who were members of the Parsi community, claimed that the founders of the Parsi Tower of Silence, which stands on a portion of certain land situated in the Secunderabad cantonment, were in their life-time owners of the land in question, and that the property had devolved upon themselves as descendants, and representative in title, of the original founders. The Respondents, who were also members of the Parsi community, contended that the land in question had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of the community generally for all time by the cantonment authority. The most important document relied upon by the Appellants was issued by an officer of the Hyderabad State and purporting to express a transaction, by which the State had assented to the grant of the land in question to the founders, and directed possession of it to be delivered to them. Another document in evidence also obtained on behalf of the founders, through their agent, purported to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force, and to certify that the Parsis of Secunderabad had permission to enclose the land in question, which was given for a tower to be built on it;

Held—*That the considerations set out above must be borne in mind in estimating the effect of the two documents: that the first, emanating from the State, purported to deal with, and enforce, a grant of the*

PESTONJI JIVANJI v. SHAPURJI EDULJI CHINOY.

land to the founders by name, and the delivery of possession to them; that the second document, emanating from the cantonment authorities, did not deal with title or possession, but gave permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land, which were matters obviously within the discretion of the commanding officer, and that the effect of the two documents was to show a good title in the founders, and not in the Parsi community.

This was an appeal from a judgment and decree of the Court of the Judicial Commissioner, Hyderabad Assigned Districts, dated the 12th December 1901, which reversed a judgment and decree of the Court of the Superintendent Residency Bazars, Hyderabad, dated the 25th March 1901.

The principal question involved in the appeal was the title to a plot of land on which stands a Parsi Tower of Silence situate in the south-eastern corner of the Cantonment limits of Secunderabad.

The facts giving rise to the present dispute date back to the year 1837. In that year two brothers, Viccaji Meherji and Pestonji Meherji, were carrying on a business at Hyderabad, and determined to reside there permanently. They wished to have for themselves and their family a proper place of burial, together with the due observance of usual and proper religious ceremonies, and for this purpose first made arrangements with the Parsi High Priest at Poona to send Parsi priests to Hyderabad, who were to be the paid servants of the brothers, with liberty to add to their salaries by the receipt of fees for services performed for other members of the Parsi community resident in the neighbourhood. When these arrangements were completed an application was made to the Nizam's Government for the grant of a plot of land on which to erect a temple and Tower of Silence or "Dukhma." This application was granted, and though no grant in terms was produced (probably none was ever made) an order reciting the application and the sanction of the Nizam's Government thereto and directing the delivery of possession of the land granted to the two brothers was produced, dated June 1838, and is as follows:—

"Ijat asar Balkishta Reddy, Mucaddum of the Village of Bholuckpore, in the District of Hoosain Saugar, may you be well, year 1248 Sal, *i. e.* Fasli. The reason of writing this is that the Bankers Pestonji and Viccaji having applied, and Government having sanctioned the grant to them of the Hill, which is near Gattula Naganna Kunta in the Devini Bhavi Kancha within the boundary of the said village, for depositing bones, the Talukdar Raja Rang Rao Bahadur has sent order, and therefore it is hereby written that you deliver up the said Hill to the said Bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul-awal 1254 (*i.e.* June 1838).

"IBRAHIM KHAN, NAIB."

This exhibit is referred to in the Record as Ex. L, and the land referred to is the land now in suit.

Before proceeding to erect buildings on the said land, as it was to be used as a place for the disposal of the dead and was situate close to the cantonmen

PESTONJI JIVANJI *v.* SHAPURJI EDULJI CHINOY.

at Secunderabad, the consent of the General Commanding at that place was deemed advisable, and permission was duly accorded by an order made on the 15th January 1839.

The brothers then erected a fence round the land granted, and began building operations. Priests had already come over from Poona, and were installed in a house bought by the brothers. There they remained as servants, and from time to time received orders as were necessary, and as occasion required, reported matters of importance to their masters.

This plot of land, the Plaintiffs alleged, was private property and in the year 1841 by special permission certain Parsis were allowed to dispose of the bones of their fathers within the said area, and up to the year 1847, no indication is to be found that any claim was ever advanced challenging the sole proprietory rights of the brothers.

In September 1847, the Fire-temple was completed entirely at the expense of the brothers, who on the 12th of that month at a solemn ceremony of consecration endowed the said temple with the income derived from a house owned by them.

Up to the year 1861, the descendants of the brothers maintained the buildings on the said plot and at their own expense, performed all ceremonies, and kept priests for the purpose as their paid servants.

In the year 1859 the family were in monetary difficulties and at the end of the year 1861 the endowed house was sold and the proceeds entrusted to the priest in charge to apply the income derived therefrom to the purpose of the temple.

The brothers and their descendants had allowed other Parsis to use the Tower of Silence, and in the year 1863, a masonry wall was built round the Tower itself by public subscription, the cost being far more than the family would be likely to spend for the purpose.

In the year 1869, a subscription was raised to provide an extra watchman, and in the year 1885, to sink a well to provide water for mourners.

In the meantime the rights of the family were recognised in any matter of importance, and no claim in derogation of their ownership was ever advanced.

In the year 1882 the Parsi community with a view to place the funds contributed by them on a legal basis appointed a Committee who were to act as trustees. The President of the Committee was the High Priest, at the Temple Behramji Jamastji, and the Vice-President was another priest, Ruttonji Jamaspji. Owing to the influence of the position and the increase in the number of the family of the owners of the said plot of land, there was not much interference with them in the performance of their ceremonial duties at the Temple.

In the year 1895, Bezonji Ardeshir, the Secretary of the Committee, wished to erect a new hall on the said land, but was opposed by some members of the owner's family. Later in the year he and some other Parsis wished to erect a new Tower of Silence on the said land, and a memorial to the High Priest Behramji, who had died. This was also opposed, except subject to restrictions recognizing the rights of the owner's

family. The new High Priest sided with the Secretary. About one hundred Parsi members of the community sided with the owners. The Committee neverthe less resolved to build on the said land, and in consequence the Appellants Nos. 1 to 4 and five other persons instituted the present suit on the 19th December 1895, in the Court of the District Judge of Secunderabad. The plaint alleged a title to the land in suit derived by inheritance from Vicoaji Meherji and Pestonji Meherji, and the trespass by the commencement of building operations. It prayed for a perpetual injunction restraining the Defendants from "encroaching upon" the said land and an order directing the removal of the building material brought on the said land with a restoration of the land to its original condition.

The original Defendants to the said suit were the Respondents Nos. 1, 2, 3, 7, 10, 11, 15, and four other persons. Of these the Respondents Nos. 1, 2, 3 and 10 filed a written statement in defence. They denied the title of the Plaintiffs to the land in suit, alleged that a grant of the said land was made to the Parsi community in general, and further asserted that if the title at any time was in Viccaji Meherji and Pestonji Meherji they had, in October 1839, dedicated the property in suit, since which time the Parsi community in general had been in possession and enjoyment of the same.

The Court then took proceedings under sec. 30 of the Code of Civil Procedure so as to bring the whole Parsi community on the record as Defendants, and on the 12th November 1896, ninety-nine Parsis filed a written statement confessing judgment, and disclaiming the defence already filed by the said Respondents Nos. 1, 2, 3 and 10, who were members of the new Tower Committee.

On the pleadings the District Judge fixed several issues all of which are not now material. The real points for decision were (1) Whether, when the land in suit was first granted, it was granted to Viccaji Meherji and Pestonji Meherji, or to the Parsi community in general, and (2) Whether, if granted to the said brothers, they had dedicated the same to the Parsi community and transferred the title from themselves.

The case was subsequently transferred for trial to the Court of the Superintendent of Residency Bazars, Hyderabad, and after recording most voluminous oral and documentary evidence, the said Superintendent delivered his judgment on the 25th March 1901. He decided that a grant of the land in suit was made to the said brothers personally and not to the Parsi community, and that there never had been any dedication of the said property so as to constitute the Parsi community owners thereof, or the brothers trustees for the said community. The action of the Respondents was therefore wholly unjustifiable, and he accordingly made a decree granting the Plaintiffs the reliefs claimed by them with costs.

Against the said decree the present Respondents appealed to the Court of the Judicial Commissioner, Hyderabad Assigned District, making all the present Appellants Respondents to the said appeal. On the 12th December 1901, the said Judicial Commissioner delivered his

PESTONJI JIVANJI v. SHAPURJI EDULJI CHINOY.

judgment. He agreed with the Court below that there had been no dedication by the said brothers to the Parsi Community, but disagreed with him as to the nature of the original grant. He concluded his judgment as follows :—

"Finally I am bound to say that when the Plaintiffs do not know so much about their title as to be able to say whether it is oral or documentary, it seems strange that they should profess to know so much about it as to be able to say that the title was given to them personally and not for the benefit of the Parsi community. To sum up, I find that the Plaintiffs have failed to prove any grant, oral or documentary, by which they acquired an exclusive title over the hill in dispute, and I also find that they have failed to support such alleged title by conclusive proof of exclusive possession, and still more they have failed to prove that they have acquired any title by exclusive possession."

In accordance with the said findings, he made a decree reversing the decree of the Court below, and dismissing the said suit with costs.

Mr. Jardine, K. C. and *Mr. DeGruyther* for the Appellants, contended on the evidence that title in the land was in the founders, Viccaji and Pestonji, personally.

Mr. Ross for the Respondents, contended that the Appellants failed to prove any grant, oral or documentary, by which they acquired an exclusive title to the land in question, or any portion of it and that the evidence on the record, taken as a whole, proved that the property belonged to the Parsi community and not to the Appellants exclusively.

Reference was made to sec. 90 of the Indian Evidence Act (I of 1872).

Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—The controversy out of which this appeal arises lies between various members of the Parsi community, and relates to certain land situated in the Secunderabad Cantonment, on a portion of which stands a Parsi Tower of Silence.

In or about the year 1895 the Respondents, purporting to act on behalf of the Parsi community, resolved to erect on the land in question a second Tower of Silence in addition to that already there. The Appellants objected to this proceeding, claiming as descendants, and representatives in title, of the original founders.

Negotiations for a settlement having failed, the Appellants filed the present suit. They alleged that the founders were in their lifetime the owners of the land in question, and that the property had devoloved upon themselves, and they proceeded to complain of the Respondents' encroachment.

The Respondents, who were Defendants in the suit, asserted that the land had been granted to the whole Parsi community for a public purpose, and, to enure for the benefit of that community generally for all time, by the Cantonment Authority.

In the Courts in India the Defendants further set up, that, if the grant had been to the founders, the latter had subsequently dedicated the land to the pur poses of the Parsi community generally. It was also contended that a title, good

against the founders and their representatives, had been acquired by adverse possession. On both those points the Courts in India found against the Defendants, and their Lordships have not been asked to review those findings. The sole question discussed on the argument of the appeal was that of the original title to the property.

The Judge who tried the case decided in favour of the Plaintiffs, now Appellants, and granted an injunction. On appeal the Judicial Commissioner reversed the decision and dismissed the suit. Hence the present appeal.

The founders, already mentioned, were two brothers, Parsis, Pestonji Meherji, and Viccaji Meherji, who in 1837 and afterwards carried on business as bankers at Hyderabad and in other places. It appears from the correspondents that, at about that time, they had made up their minds to make Hyderabad their home, and they determined at the same time to establish a Tower of Silence; for which purpose it was necessary both to obtain the ground on which the Tower could be built, and to establish the necessary priests for carrying on the services and ceremonies required by the Parsi religion.

It is clear that with regard to the establishment of priests everything was done by the brothers Pestonji and Viccaji. They found the proper persons, and arranged with them to come and settle at the spot to be selected. They undertook the responsibility for their salaries, though the priests were to be at liberty to receive fees for the performance of ceremonials from other Parsis.

Pestonji and Viccaji also, through their agent at Secunderabad, made all necessary arrangements for obtaining the site required. It is not necessary to examine all the contemporary papers in evidence. The most important document relied upon by the Plaintiffs is the following;—

"Ijat asar Balkishta Reddy, Mucaddum of the Village of Bholuckpore, in the District of Hoosain Saugar, may you be well, year 1248 Sal *i.e.*, Fash. The reason of writing this is that the Bankers Pestonji and Viccaji having applied and Government having sanctioned the grant to them of the Hill which is near Gattula Nagauna Kunta in the Devmi Bhavi Kancha within the boundary of the said village, for depositing bones the talukdar Raja Rang Rao Bahadur has sent order and therefore it is hereby written that you deliver up the said Hill to the said Bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul-awal 1251 (*i.e.*, June, 1838).

"IBRAHIM KHAN, NAIB (In Persian),
Peith Mashirabad."

This document was held by the Judge who tried the case to be a genuine document, a finding for which he assigned cogent reasons. The learned Judge who heard the case on appeal pointed out a variety of circumstances which, he thought, threw suspicion upon the document. But he did not overrule the finding of the first Court that it was genuine. Their Lordships see no sufficient reason why they should reject that finding.

The next document of high importance is the following:—

"This is to certify that the Parsis of Secunderabad have permission by order of Brigadier Wahab, C. B., Commanding Hyderabad Subsidiary Force to enclose the Hill by name Nomavunghutt for a Burying place, the circumference of which is about (18) eighteen hundred feet, and immediately adjoining the south end of Newganah's garden and near the public Bearer's line in rear of the Cantonment of Secunderabad.

PESTONJI JIVANJI *v.* SHAPURJI EDULJI CHINOY.

"This Hill is given for a Tower only to be built on its summit.

"H. F. F. CONSIDINE,
Assistant Q. M.-General,
Hyderabad Subsidiary Force.

"Assistant Q. M.-General's Office,
Head-quarters Hyderabad
Subsidiary Force."

"Secunderabad, 15th January 1839."

That document was actually obtained on behalf of the two brothers, through their agent, but it is the matter upon which the Respondents chiefly rest their case. Their contention is that that document formed the real root of title to the land in question, and that by its terms the grant was one to the Parsi community generally, and not to the two brothers personally.

Before examining these two documents and their relation one to the other, it is well to consider the authority from which each document issued, and the relation of those authorities one to the other. The first of two documents clearly was issued by an officer of the Hyderabad State, and it purports to express a transaction, by which the State had assented to the grant of the land to the two brothers, and directed possession of it to be delivered to them. The second document purports to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force, a force which had its headquarters in the Secunderabad Cantonment,

The establishment of the Subsidiary Force, and its modification from time to time, may be collected from Aitchison's Treaties, Vol. 8, at and after p. 264, and from the various treaties and agreements which follow. It was a force in the employment of the East India Company, and commanded by the Company's Officers but maintained, by agreement, in Hyderabad Territory for the protection of the Nizam.

The research of Counsel was unable to discover any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the Military Commander on the other, with respect to the management, control, and disposition of the Cantonment and the land comprised in it. And it appears clear that no such treaty ever was in existence.

When the Nizam's Government admitted a British Force within its territory, and alloted to it the Secunderabad Cantonment as its Headquarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control, and management incident to maintaining the efficiency and the discipline of the troops, and the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the Cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements. These considerations must be borne in mind in estimating the effect of the two documents which have been cited.

There appears to be no real difficulty in reconciling the two documents, and appreciating their effect. The first, emanating from the State, purports to deal with, and enforce, a grant of the land by the State to the two founders by name, and the delivery of possession to them. The second document, emanating from

PESTONJI JIVANJI *v.* SHAPURJI EDULJI CHINOY.

the Cantonment Authorities, does not deal with title or possession, but gives permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land. These are matters obviously within the discretion of the commanding officer, for they might affect the convenient occupation of the Cantonment. The effect of the two documents is to show a good title in the founders, and not in the Parsi community.

What happened afterwards only confirms this view. The founders admittedly enclosed the land and erected a Tower of Silence upon it, at their own expense. About the same time, or shortly afterwards, they erected a Fire Temple upon land which they acquired by private purchase, and endowed it.

The evidence as to the possession, management, and control of the Tower of Silence and of the land on which it stood, shows these to have been in the founders. The only question being who were the original grantees, the events of the early years, after the acquisition of the land and the erection of the Tower, are much more important than those of later years, when the circumstances of the parties had somewhat changed. And in those early years we find, from the correspondence, that the priests referred such difficulties or questions as arose for the orders of the founders, and obeyed those orders.

The founders certainly, down to the year 1863, bore the whole expense of the establishment, and all costs of maintenance and repair. During those years the Parsi community were not represented by any Committee or other organization. Therefore during those years, the founders had no rivals in respect of possession and control; for the suggested possession and authority of the head priest is negatived by his own letters to the founders.

After 1863, the Parsi community from time to time subscribed money in aid of additions and improvements, and from 1882, onwards there was a Committee representing, in some sense, the community. But what happened in these later years can throw but little light upon the nature of the grant of, or soon after, 1837.

Their Lordships are of opinion that the view of the case taken by the Judge who tried it was correct. They will humbly advise His Majesty that the decree of the Judicial Commissioner should be discharged with costs, and that of the Court of the Superintendent restored. The Respondents will pay the costs of this appeal.

Solicitors: *Messrs. Payn and Lattey* for the Appellants.

Solicitors: *Messrs. Lattey and Hart* for the Respondents.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL SIDE
No. 49 OF 1907.

MACLEAN, C. J.
HARINGTON, J.
FLETCHER, J.
1907.
Heard,
3, December.
1908.
Judgment,
3, January.

THE INDIAN PUBLISHERS, LD., Defendants, Appellants,
v.
SAMUEL CHARLES ALDRIGE, Plaintiff, Respondent.

Limitation Act (XV of 1877), sec. 14—"Unable to entertain" and "unable to decide," distinction between—"Some other cause of the like nature," what is—Act VIII of 1859—Non-suit—Misjoinder of parties and causes of action—"Prosecuted with due diligence."

A Plaintiff cannot be said to have prosecuted a suit with due diligence within the meaning of sec. 14 of the Limitation Act (XV of 1877) when, owing to his own negligence or default, the suit is so framed that the Court cannot try it out on the merits.

An improper joinder of parties or of causes of action is not "a case of a like nature" contemplated to fall within the meaning of sec. 14.

CHUNDER MADHAB CHAKRABUTTY *v.* BISSESSUREE DEBEA (1), BAI JAMNA *v.* BAI ICHHA (5) *followed.*

DEO PROSAD SING *v.* PERTAB KAIREE (2), MATHURA SINGH *v.* BHOWANI SING (6) *dissented from.*

MULLICK KEFAIT HOSSAIN *v.* SHEO PERSHAD SING (3), ARSAN *v.* PATHUMMA (4) *Distinguished.*

(1) 6 W. R (Civ. R.) 184 (1866).
(2) I. L. R. 10 Cal. 86 (1883).
(3) I. L. R. 23 Cal. 821 (1896).
(4) I. L. R. 22 Mad. 494 (1897).
(5) I. L. R. 10 Bom. 604 (1886).
(6) I. L. R. 22 All. 248 (1900).

The facts of the case, taken from the judgment of his Lordship the Chief Justice, are as follows:—

"This is an action for libel.

"So far as the merits are concerned, it is governed by the judgment delivered in the case of *Lahiri* v. *The Indian Daily News*:* and I need not say anything more about that.

"The only question argued on this appeal is whether or not the suit is barred by limitation. The facts are these:—

"On the 20th January 1906, the present Plaintiff with five other members of the Calcutta Police Force, instituted a suit for libel against the Defendants, claiming an aggregate sum for damages. To that suit, the Defendants by their defence, dated the 28th March 1906, pleaded misjoinder of parties and of causes of action, and that plea was upheld by Mr. Justice Chitty on the 22nd April 1907. He, however, gave the Plaintiffs leave to elect which of their number should continue the suit, the other Plaintiffs, with their causes of action, being struck out. The Plaintiffs elected that Inspector Lahiri should continue that suit, and the other Plaintiffs were struck out. They have filed five separate suits, with one of which, that of Superintendent Aldrige, we are now concerned.

"This suit, which is against the proprietor of the newspaper alone, was instituted on the 1st May 1907: the libels were published on the 17th and 19th July 1905: unless the period during which the present Plaintiff was prosecuting the former suit can be excluded, the present suit is clearly barred. This is the question we have to decide."

* See *A. S. Barrow* v. *Hem Chandra Lahiri*, post.

THE INDIAN PUBLISHERS, LD. v. SAMUEL CHARLES ALDRIGE.

The judgment of the lower Court deciding the question in favour of the Plaintiff is as follows :—

CHITTY, J.—This and the four following suits have been filed by the five Plaintiffs, who elected to be struck out of Suit No. 93 of 1906, in which judgment has just been delivered. They now in these five suits severally claim damages for the same libel as that complained of in the earlier suit. There is a slight difference in the form of suit in as much as in these five suits the editor of the *Indian Daily News* has not been made a party Defendant. The suits are against the Proprietors alone. The first point which arises, which, being common to all five suits, may be conveniently disposed of in one judgment, is that of limitation. The libels complained of were published on the 17th and 19th July 1905. These five suits were filed on 1st May 1907. If, therefore, the period during which these five Plaintiffs were prosecuting the former Suit No. 93 of 1906, is not excluded, these suits are clearly barred. If it is to be excluded, the plea of limitation fails. I may say at once that the earlier suit was, in my opinion prosecuted with due diligence. It was suggested that the point of misjoinder having been taken in the written statement filed on 28th March 1906 and so brought to Plaintiffs' notice on that date, the Plaintiffs should have taken immediate steps to have it decided. I cannot see that there was any obligation on them to do this. The suit took its natural course, and the point came up for decision at the proper time, namely, as a preliminary point after settlement of issues. There was no want of *bonâ fides* in the course taken by the Plaintiffs and no want of diligence on their part in the prosecution of the former suit. The sole point, then, for determination on this issue is whether a misjoinder of parties and causes of action is to be regarded as a "cause of a like nature" to "defect of jurisdiction," within the meaning of sec 14 of the Limitation Act (XV of 1887). Were the matter *res integra*, I might have been inclined to accept the Defendants' contention. It would, at any rate, be an arguable point not wholly free from difficulty. The matter is however, so far as I am concerned, concluded by authority. In *Deo Prasad Singh* v. *Pertab Kairee* (2) it was distinctly laid down by a Divisional Bench of this Court that misjoinder of causes of action were causes of a similar nature to defect of jurisdiction. The same view was taken in *Mullick Kefait Hossain* v. *Sheo Pershad Singh* (3), where however different causes of action against different sets of Defendants were improperly joined in one suit. The decision first above cited has been unreservedly accepted by a Full Bench of the Allahabad High Court in *Mathura Singh* v. *Bhowani Singh* (6). The Madras High Court has also now adopted the same view, though their decisions have not throughout been uniform. (See, *Venkataratuddu Naidu* v. *Ramaraju* (7), and the earlier cases discussed by the Allahabad Court in the ruling above cited). Under these circumstances, it is clear that my decisions in these five suits on the point of limitation must be in favour of the Plaintiffs. . . . . . .

The Defendants appealed against the above judgment and the decree made thereon.

Mr. Morison (with him *Messrs. E. P. Ghosh* and *L. P. E. Pugh*) for the Appellants, argued that the Plaintiffs were not entitled to avail themselves of the provisions of sec. 14 of the Limitation Act in excluding the period during which the former suit was going on. He cited in the course of his argument *Deo Prosad Sing* v. *Pertab Kairee* (2), *Mullick Kefait Hossain* v. *Sheo Pershad Sing* (3), *Mathura Sing* v. *Bhawani Sing* (6), *Venkataratnam* v. *Ramaraju* (7), *Chunder Madhab Chakrabutty* v. *Bissessuree Debea* (1), *Tirtha Sami* v. *Seshagiri Pai* (8), *Venkiti Nayak* v. *Murugappa*

(1) 6 W. R. (Civ. R.) 184 (1866).
(2) I. L. R. 10 Cal 86 (1883).
(3) I. L. R. 23 Cal. 821 (1896).
(6) I. L. R. 22 All. 248 (1900).
(7) I. L. R. 24 Mad. 361 (1900).
(8) I. L. R. 17 Mad. 299 (1893).

Chetty (9), *Jema* v. *Ahmad Ali Khan* (10), *Ram Subhag Das* v. *Gobind Prasad* (11).

Mr. Garth (with him *Messrs. Chakravatti, Sinha, B. C. Mitter*, and *N. Sircar*) for the Respondent, replied.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—(After stating the facts already set out). The question we have to decide depends upon the true meaning of sec. 14 of the Indian Limitation Act. That section runs as follows:—

"In computing the period of limitation prescribed for any suit, the time during which the Plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the Defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

What is meant by the words "a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it?" The language is not, "unable to decide upon it," as in Act XIV of 1859. It is clear that the Court in which the first suit was brought had ample jurisdiction to deal with that suit. It exercised that jurisdiction by striking out the present Plaintiff as one of the Plaintiffs in that suit. We cannot say that "from defect of jurisdiction it was unable to entertain it." It did in fact entertain it, and held that the suit could not proceed, not from any lack of jurisdiction in the Court, but because the suit was improperly framed.

Can it then be said that the Court was unable to entertain the first suit, "from some other cause of a like nature to defect of jurisdiction?"

One of the meanings attached to the word "entertain" in Webster's International Dictionary is "to receive and take into consideration." The Court did receive the first suit, and did take it into consideration, and held that, in its then form, it would not lie. In my opinion, the Court was able to, and did in fact, entertain it, though it could not decide it on its merits.

There is a marked difference between the language of the Act of 1859, and that of the existing Limitation Act. In the present Act the words are "unable to entertain:" in the previous Act the words were "unable to *decide* upon it." A Court may be able to entertain a suit in its inception, but be unable to decide the same owing to some defect, not in jurisdiction, but in procedure. There must have been some reason for this change of language: and a possible reason is that the legislature intended to limit the benefit of the section to cases where the Court had no power to embark upon the case at all.

Assuming, however, the Court was unable to entertain it, can it be properly said that it was unable to entertain it by reason of a cause of a nature like to that of defect of jurisdiction? The cause here was the improper joinder of parties and of causes of action : it would, I think, be straining the language of the section to say this was a cause of

(9) I. L. R. 20 Mad. 48 (1896).
(10) I. L. R. 12 All. 207 (1890).
(11) I. L. R. 2 All. 622 (1880).

THE INDIAN PUBLISHERS, LD. v. SAMUEL CHARLES ALDRIGE.

a like nature to defect of jurisdiction. But, I think, a more conclusive answer to the Respondents' contention is that the Court could entertain, and did entertain, the suit, though it could not decide it on the merits. It is not unworthy of notice that the present Plaintiff knew, on the 28th March 1906, from the defence, that the objection which prevailed to have the pleadings amended by striking his name out as a Plaintiff, he would have had plenty of time within which to bring his present action. The Court could have entertained that application, and so entertained the suit for that purpose.

The learned Judge in the Court of first instance seemed to think that the case was concluded by authority: let us see how they stand.

An early and important Full Bench decision of this Court, which, if in point, is binding upon us, does not seem to have been cited. I am referring to the case of *Chunder Madhab Chakrabutty* v. *Bissessuree Debea* (1). There it was held by a majority of the Court, including the Chief Justice, Sir Barnes Peacock, that a Plaintiff is not entitled to deduct the time occupied by him in prosecuting a former suit in which he was non-suited.

There the Chief Justice says :--"It appears to me that, where a Plaintiff is non-suited, he cannot be said to have prosecuted *bonâ fide*, &c., with due diligence. Further, I am of opinion that the words, 'or other cause,' must mean a cause of like nature. Defect of jurisdiction would be a cause "that would not include any neglect on the part of the Plaintiff either in stating his case or in other respects. For instance, if the Plaintiff should fail to appear or produce his witnesses on the day fixed for the hearing, the Court would be unable to decide upon his cause of action. But that would not be a cause for which time ought to be deducted under the section for it could not be said that the Plaintiff was prosecuting his suit *bonâ fide* and with due diligence, or that the Court was prevented by want of jurisdiction or other cause not connected with the Plaintiff's own negligence from deciding upon the case"

I do not think that a Plaintiff can be said to have prosecuted a suit with due diligence when, owing to his own default, the suit is so framed that the Court cannot try it out on the merits.

The language in sec. 14 of the Act, XIV of 1859, is not altogether similar to sec. 14 of the present Limitation Act. The dissimilarities for the purposes of the present discussion are "other cause," instead of "other cause of a like nature," and "shall have been unable to decide upon it," instead of "unable to entertain it." This change of language does not tell in favour of the present Plaintiff.

The next case in this Court is that of *Deo Prosad Sing* v. *Pertab Kairee* (2). It is difficult to reconcile this decision with the Full Bench one, which was binding on the Divisional Bench.

The next case is that of *Mullick Kefait Hossain* v. *Sheo Pershad Sing* (3). This is in favour of the Plaintiff; but the Court there declined to lay down any

(1) 6 W. R. (Civ. R.) 184 (1866).

(2) I. L. R. 10 Cal. 86 (1883).

(3) I. L. R. 23 Cal. 821 (1896).

general proposition on the subject. These are all the cases in this Court.

The cases in the Madras High Court are somewhat conflicting: but the later cases [I may refer to *Arsan* v. *Pathumma* (4)], support the view taken in *Mullick Kefait Hossain* v. *Sheo Pershad Sing* (3). In *Arsan* v. *Pathumma* (4), the Full Bench case in this Court was not cited. The only case I can find in the Bombay High Court is that of *Bai Jamna* v. *Bai Ichha* (5), where Sir Charles Sargent, C. J., appears to have supported the principle of the Full Bench case in this Court.

In the Allahabad High Court, there have been differences of opinion, but in the latest case, *Mathura Singh* v. *Bhowani Singh* (6) the Court took the same view as in the case of *Seo Prosad Singh* v. *Pertab Kairee* (2). In the Allahabad case, the Chief Justice read "unable to entertain," as substantially identical with "unable to decide." But, I have pointed out the distinction in language in the two statutes.

In this conflict of judicial view, I feel constrained to express my opinion with considerable diffidence. I, however, agree with Sir Barnes Peacock and Sir Charles Sargent, and I do not think that the section was intended to apply to a case in which the first suit had failed entirely by reason of the negligence and laches of the Plaintiff himself: in other words, I do not think that an improper joinder of parties or of causes of action is "a case of a like nature" within the meaning of sec. 14 of the Limitation Act, so to hold, would be putting a premium on carelessness and laches. If a Plaintiff, with the Code staring him full in the face, and through his own negligence, so frames his suit as to prevent the Court from deciding it on the merits, which to my mind is a different thing from entertaining it in its inception, I do not think, he can claim the benefit of sec. 14. I am not much impressed with the argument that, if a Plaintiff brings his suit in a Court which cannot entertain it through a defect of jurisdiction, such selection of the Court is as much attributable to his own negligence, as say, a misjoinder of parties. In India, it is often a very nice question which Court has jurisdiction: and a Plaintiff may make a *bonâ fide* mistake in his selection of a Court: and it is to meet that class of case that sec. 14 was enacted. But these considerations cannot apply to the case of a misjoinder of parties or causes of action, when the law and the practice are so well established.

For these reasons, I consider this suit is barred by limitation. The decree of the Court of first instance must be discharged, and the suit dismissed with costs, both here and in the Court of first instance.

HARINGTON, J.—I agree.

FLETCHER, J.—I also agree.

Messrs. G. C. Chunder & Co., Attorneys for the Appellants.

Messrs. Ghosh and Kar, Attorneys for the Respondents.

P. R. C. *Appeal allowed.*

(2) I. L. R. 10 Cal. 86 (1883).
(3) I. L R. 23 Cal. 821 (1896).
(4) I. L. R. 22 Mad. 494 (1897).
(5) I. L. R. 10 Bom. 604 (1886).
(6) I L. R. 22 All. 284 (1900).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 107 OF 1906.

MACLEAN, C. J.
COXE, J.
1908.
Heard, 5 and 10, February.
Judgment, 21, February.

HEMENDRA NATH MUKERJI and others, Plaintiffs, Appellants,
v.
KUMAR NATH ROY and others, Defendants, Respondents.

Bengal Tenancy Act (VIII B. C. of 1885), secs. 11 and 12—Release by co-sharer, if transfer—Stamp—Registration—Non-payment of landlord's fee if invalidates transfer—Bengal Tenancy (Validation) Act (I B. C. of 1903), sec. 1—Breach of covenant—Cesser of liability.

Certain co-sharers in a permanent tenure by a deed, dated 2nd December 1893, which was registered in Book I, under sec. 51 of the Registration Act, relinquished all their right, title and interest and claim in the tenure in favour of the remaining co-sharer who, it was stipulated, was to remain in possession and was to be entitled to sell the tenure. He was also to pay certain debts mentioned in the deed for which the other co-sharers were to be under no liability. The deed was stamped with a five rupee stamp as a release. No landlord's fee was paid as required by sec. 12 of the Bengal Tenancy Act;

Held—*That the deed was a transfer within the meaning of sec. 12 of the Bengal Tenancy Act and the transfer was complete as soon as the document was registered. The non-payment of landlord's fee did not render the transfer invalid owing to the operation of sec. 1 of Act I of 1903, B. C.*

Held, further, *that the liability of the co-sharers under the lease ceased with the transfer.*

KRISTO BULLUV GHOSE v. KRISTO LAL SINGH (1) and CHINTAMONI DUTT v. RASH BEHARI MONDAL (2) *followed.*

This was an appeal from the decision of Babu Barada Charan Mitter, Subordinate Judge of Nadia, dated the 14th of December 1905.

The facts of the case material to this report are as follows :—

On the 21st of Assar 1288 Rai Jadu Nath Roy Bahadur, the predecessor in title of the Defendants Nos. 4 to 7 and elder brother of Defendants Nos. 1 to 3 executed a *kabuliyat* in favour of the Plaintiffs (Appellants in this appeal) in respect of certain *putni* and *durputni* properties belonging to the latter. By this *kabuliyat* the executant undertook to pay to the Plaintiffs Rs. 1,800 per annum as munafa or profit rents and Rs. 3,191-12-3 per annum as the rent payable by the Plaintiffs to their superior landlords. It was further stipulated that if on failure of payment by the executant of the amounts payable as aforesaid to the superior landlords the latter should sue the Plaintiffs and recover decrees against them, the Plaintiffs were to be at liberty to sue him for arrears of rent and to recover from him the amount with interest and costs by sale of the *durputni* and *seputni* taluks created by the lease. The Plaintiffs alleged that the *kabuliyat* was executed at a time when the executant and his brothers, Defendants Nos. 1 to 3 were living in joint mess and estate, that all the Defendants were equally bound by its terms, Jadu Nath Roy having executed the *kabuliyat* as the *kirta* of the family, that the Defendants defaulted in

(1) I. L. R. 16 Cal. 642 (1889).
(2) I. L. R. 19 Cal. 17 (1891).

HEMENDRA NATH MUKERJI *v.* KUMAR NATH ROY.

paying rents to the superior landlords for certain *kists* of the years 1303 and 1304 B. S. with the result, that the latter recovered decrees against the Plaintiffs and the Plaintiffs had to satisfy those decrees. The Plaintiffs then instituted the present suit for the recovery of Rs. 5,733 as damages for the breach of the covenant in the lease whereby the Defendants had undertaken to pay the rents payable by the Plaintiffs to the superior landlords.

The Defendant No. 1, Kumar Nath Roy, *inter alia*, pleaded a waiver of the covenant by the Plaintiffs and also payment. But the defence of the other Defendants was mainly this, that by a registered deed of release or disclaimer, dated 2nd December 1893 (Augrahayan 1300), the Defendants Nos. 2 to 7 had transferred their *durputni* and *seputni* interest under the aforementioned *kabuliyat* in favour of Defendant No. 1, that the default complained of occurred after the date of the release, that the Plaintiffs knew of this deed of release from before 1303 B. S., and that they have since 1304 recognised a transferee from Defendant No. 1 alone as their tenant. Under the circumstances they claimed that their liability under the *kabuliyats* had ceased before 1303 B. S. The material provisions of the deed are set out in the judgment.

The lower Court gave the Plaintiffs a decree against the Defendant No. 1 alone but dismissed their suit as against Defendants Nos. 2 to 7.

The Plaintiffs appealed to the High Court.

Mr. S. P. Sinha (with him *Babu Hara Prosad Chatterjee* for the Appellants) submitted that the release did not operate to put an end to the liability of Defendants Nos. 2 to 7. Jadu Nath Roy executed the *kabuliyat* on behalf of the joint family of which Defendants Nos. 1 to 3 were also members. The question really is, was the release a transfer which the landlords were bound to recognise. No landlords' fees were paid. The release was merely an arrangement between the Defendants *inter se*. It did not affect third parties. It merely settled the best way in which the debts of the family were to be paid off. The stamp was only for Rs. 5. No notice was served on the landlords as required by sec. 12 of the Bengal Tenancy Act. The transfer was not under sec. 12 of the Bengal Tenancy Act. Mere knowledge on the part of the Plaintiffs would not be enough. *Surendra Nath* v. *Tin Cowrie* (3), *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), *Chintamoni Dutt* v. *Rash Behari Mondal* (2).

Babu Nalini Ranjan Chatterjee for the Defendants Nos. 2 to 7, said that the release was a transfer of all their right, title and interest to the Defendant No. 1 and was registered as such in Book I. See sec. 51, Registration Act. As regards the stamp, mere payment of insufficient stamp duty cannot alter the character of the document. See Stamp Act, sec. 36. The transfer is complete as soon as the document is registered. *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1), *Surendra Nath* v. *Tin Cowrie* (3), *Chintamoni Dutt* v. *Rash Behari Mondal* (2), *Raman Kapuria* v. *Ananta Ram Laha* (4). The

(1) I. L. R. 16 Cal. 642 (1889).
(2) I. L. R. 19 Cal. 17 (1891).
(3) I. L. R. 20 Cal. 247 (1892).
(4) 10 C. W. N. 270 (1905).

question was really concluded by the provisions of the Bengal Tenancy Validation Act I of 1903 B. C., sec. 1, the payment of landlord's fees being no longer indispensable. The Act has retrospective operation.

No notice is required in the case of transfer of tenures; see sec. 73, Bengal Tenancy Act which requires notice in the case of transfer of occupancy holdings. Compare secs. 11, 12.

Babus Shiva Prosonno Bhuttacharjee and *Nogendra Nath Ghosh* for the Defendant No. 1.

Mr. Sinha in reply.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is an appeal by the Plaintiffs. The Subordinate Judge gave judgment against Defendant No. 1 only: the Plaintiffs contend that there ought to have been a judgment against all the Defendants. The solution of this question depends, admittedly, upon the effect of a registered deed dated the 2nd December 1893, by which the Defendants Nos. 2 to 7 surrendered all their interests in the *durputni* and *seputni* in favour of Defendant No. 1, who subsequently, as has been pointed out in the other appeal, sold them to Bidu Bhusan Biswas. By that deed, which is called a deed of disclaimer, the Defendants Nos. 2 to 7 relinquished all their right, title and interest and claim in the properties in favour of Defendant No. 1, who was to remain in possession and was to be entitled to sell them. Defendant No. 1 was to pay the debts mentioned in the deed: Defendants Nos. 2 to 7 were to be under no liability for those debts. It is contended for the Plaintiffs that this deed is not a transfer within the meaning of sec. 12 of the Bengal Tenancy Act. We think, upon its true construction, that it was. It is true it is not stamped with an *ad valorem* stamp, but only as a release, and that the landlord's fee was not paid. But it was registered, and the fact that the landlord's fee was not paid does not render the transfer invalid (see sec. 1, Bengal Act, No. I of 1903) and it was registered in Book I, vol. 25 under sec. 51 of the Indian Registration Act. Sec. 11 deals with the case of a transfer of a share in a permanent tenure. The transfer is complete as soon as the document is registered. *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (1) and *Chintamoni Dutt* v. *Rash Behari Mondal* (2). It has not been contended for the Appellants that, if the deed operated as a registered transfer, Defendants Nos. 2 to 7 would be liable for any subsequent payments to be made under the *kabuliyat*. Moreover the Plaintiffs were aware of this transfer in 1899 and after its execution the Plaintiffs never asked for any rent from the Defendants Nos. 2 to 7. They seem further to have recognised the transfer as a valid one for they certainly recognised Bidu Bhusan Biswas as the purchaser direct from Defendant No. 1.

For these reasons we think the appeal must be dismissed with costs, hearing fee, five gold mohurs, payable to Babu Nalini Ranjan Chatterjee's client.

COXE, J.—I agree.

N. G. *Appeal dismissed.*

(1) I. L. R. 16 Cal. 642 (1889).
(2) I. L. R. 19 Cal 17 (1891).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE, No. 81 OF 1906.

MITRA, J.
CASPERSZ, J.
1908.
Heard,
30, January.
Judgment,
10, February.

SARAT CHANDRA ROY CHOWDHURY, Appellant,
v.
RAJONI MOHAN ROY and ors., Respondents.

Surety of guardian—Liability—Contract Act (IX of 1872), sec. 128—Property not specified in the application for appointment of guardian, dealings with—Guardians and Wards Act (VIII of 1890), sec. 35—Assignment of bond, if must be in writing—Mistake and misrepresentation, if ground for avoiding bond—Minor—Estoppel.

When the bond executed by a surety on the appointment of the guardian of a minor's properties under Act VIII of 1890 did not impose any limits,

Held—*That his liability extended to the guardian's dealings with properties other than those specified in the petition for the appointment of the guardian.*

Estoppel cannot be pleaded against a minor.

An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court.

DEBENDRA NATH DUTT AND BANKU BEHARY BANERJI *v.* THE ADMINISTRATOR-GENERAL OF BENGAL (1) *followed.*

The liabilty of the guardian extends to profits actually received or profits which could have been received but for his gross and wilful default. He is not liable for the profits of property in the wrongful possession of a stranger.

The law does not require a written assignment by the District Judge of a guardian's bond.

This was an appeal from the decision, dated 9th February 1906, of Babu Uma Nath Ghosal, Subordinate Judge of District Noakhali.

The Plaintiff in this case was appointed administrator of the estate of one Durga Charan Mukherjee deceased, on the 23rd August 1904, He stated in his plaint that Durga Charan, who died in Assar 1305 leaving as his sole heir his only son Modhusudan, during his life time carried on an extensive money-lending business at Feni with funds acquired by himself and had also acquired other properties moveable and immoveable of which he was the sole owner.

It appears that on the death of Durga Charan a dispute arose as to the share, if any, of Durga Charan's two surviving brothers, Hari Charan and Bishun Charan, in the properties left by him. The dispute was at the time settled by an instrument in the nature of a family arrangement executed by Hari Charan and Bishun Charan and Raj Lakshmi Debi, the mother and guardian of Modhusudan, whereby a 4½ as. and a 3½ as. share in the properties were recognised as belonging to Hari Charan and Bishun Charan respectively.

On 26th March 1900 Bishun Charan was appointed guardian of Madhusudan's properties under Act VIII of 1890. He also obtained a certificate to collect debts due to the deceased under Act VII of 1889. The order appointing him guardian was set aside on appeal to the High Court by Raj Lakshmi on 28th January 1902. The Plaintiff being subsequently appointed administrator to the estate of

(1) 10 C. W. N. 673: s. c. I. L. R 33 Cal. 713 (1906).

SARAT CHANDRA ROY CHOWDHURY *v.* RAJONI MOHAN ROY.

Durga Charan applied to the District Judge by petitions praying for assignment to him of the bonds executed by Bishun Charan (Defendant No. 1) and his sureties in the proceedings under Act VIII of 1890 and Act VII of 1889. On these petitions the District Judge passed orders directing the bonds to be made over, as prayed, to the Plaintiff. The Plaintiff then instituted the present suit against Bishun Charan and the sureties, asking for an enquiry into the correctness of the accounts submitted by Bishun Charan and for a decree for such sum or sums of money as might be found due on taking accounts and for the recovery of the same from Bishun Charan or the surety Defendants. He asked for an account of the Defendant No. 1's dealings with the whole 16 as. of the properties left by Durga Charan alleging that the Defendant No. 1's claim of a 3½ as. share for himself and the claim of Hari Charan of a 4½ as. share was based on a fraudulent *nirnoya patra* produced by Defendant No. 1, and that in point of fact they had no share or interest whatever in the properties.

The Subordinate Judge decreed the suit in Plaintiff's favour directing accounts to be taken by a Commissioner.

The surety Defendant No. 2, Sarat Chandra Roy Chowdhury, preferred this appeal to the High Court on the 16th March 1906.

Dr. Preo Nath Sen for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Hari Bhusan Mookerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

Durga Charan, Bishun Charan, and Hari Charan were three brothers, sons of one Ram Sundar Mukherjee. Durga Charan died in July 1898 leaving a son, Modhusudan, who was then a minor, and his widow Raj Lakshmi, mother of Modhusudan. Shortly after the death of Durga Charan, a dispute arose as to the share, if any, of Bishun Charan and Hari Charan to certain properties which they claimed to be the joint properties of the family. On the 5th October 1898 an instrument, in the nature of a family arrangement, was executed by Bishun Charan, Hari Charan and by Raj Lakshmi, on behalf of Modhusudan, by which Modhusudan's share was fixed at 8 annas, Hari Charan's share 4½ annas, and that of Bishun Charan 3½ annas. It does not distinctly appear how the properties covered by the instrument were possessed from 1898 to the year 1900, but it would seem that they were possessed in the shares indicated in the instrument of 5th October 1898.

Thereafter, Bishun Charan applied for the appointment of himself to be the guardian of the property of the minor, Modhusudan. An order was made on the 26th March 1900, by the District Judge of Noakhali appointing him guardian. On appeal, however, to this Court, the order of the District Judge was set aside on the 28th January 1902, and this Court expressed its opinion to the effect that an administrator to the estate of the deceased Durga Charan should be appointed instead of a guardian of the property of the minor. In the proceedings which took place in the lower Court subsequent to the order of this Court, the Plaintiff Rajani Mohan Roy was appointed administrator, and he practically became, by such appointme

SARAT CHANDRA ROY CHOWDHURY v. RAJONI MOHAN ROY.

guardian of the properties of Modhusudan. Rajani Mohun took possession as such administrator, on the 26th February 1902, of the properties of the minor. Thereafter, Bishun Charan submitted his account to the District Judge for the period of his management of the minor's estate, that is, from 18th June 1900 to 26th February 1902.

The present suit was instituted on the 2nd January 1905, by Rajani Mohon Roy for the purpose of an enquiry into the correctness of the account submitted by Bishun Charan, for a decree for such sum or sums of money as might be found due on the taking of account, and for recovery of the same from Bishun Charan or from the other Defendants who had become sureties for Bishun Charan in the proceedings for realization of the debts due to the estate of Durga Charan, under Act VII of 1889, or for management of the minor's properties, under Act. VIII of 1890.

Bishun Charan is the Defendant No. 1 in this case. The Appellant Sarat Chandra Roy is the Defendant No. 2, and he executed a bond for twenty thousand rupees as surety of Bishun Charan for his due administration of the estate of the minor. The bond is dated the 13th June 1900 and runs as follows :—"The condition of the aforesaid bond is this, that, the said Bishun Charan Mukhopadhya renders a just and true account of the credits received on account of the properties of the said Modhusudan Mukhopadhya when the same will be called for from him, and if the said Bishun Charan Mukhopadhya abides by, observes and carries out all the orders of the Court of the said District Noakhali with respect to the estate of the said minor and goods etc., of his estate and with respect to any money and estate that may be received by the said Bishun Charan Mukhopadhya as such guardian, and if he acts properly in all matters; then the bond or deed of liability mentioned above shall become null and void; otherwise, the same shall be in force and effect." The other Defendants, namely, the Defendants Nos. 6 and 7 stood sureties for the Defendant No. 1 for realisation of debts under Act VII of 1889.

Various pleas were raised in the suit by the Defendants in the lower Court, but it is not necessary to refer to them for the purposes of the present appeal. The Defendants, other than Defendant No. 2, have, apparently, accepted the judgment of the Subordinate Judge directing an account to be taken by a Commissioner according to the directions given in that judgment.

The Defendant No. 2 has appealed from the order of the Subordinate Judge but his contention before us is limited to the ground that as surety he is not bound to pay any amount that may be found due by the Defendant No. 1 on account of the income and disbursements with respect to such share of the properties which under the instrument of the 5th October 1898, came into the hands of Bishun Charan and Hari Charan. The lower Court held that the properties covered by this instrument exclusively belonged to Durga Charan, and that Bishun Charan and Hari Charan had no share in them, and that the instrument was executed by Raj Lakshmi when she was very young and did not understand

SARAT CHANDRA ROY CHOWDHURY *v.* RAJONI MOHAN ROY.

the true import and effect of it and was, therefore, of no effect. The lower Court, therefore, directed that Bishun Charan must render an account of the income and disbursement with respect to the whole of the property left by Durga Charan irrespective of the shares alloted to Bishun Charan and Hari Charan.

The learned Vakil for the Appellant has not questioned the finding of the lower Court as to Durga Charan having himself acquired the properties covered by the instrument of 1898, nor has he questioned the finding as to the want of capacity of Raj Lakshmi to execute that instrument. We must hold that, for the purpose of the present suit, Bishun Charan had no right to receive for himself the income of the share alloted to him.

The substantial grounds urged before us are that Bishun Charan having been appointed guardian of the property of Modhusudan such as was described in the petition for the appointment of guardian, the Appellant, as surety, is responsible only for the conduct of Bishun Charan with respect to such property and not any share of the property which was not covered by that petition, and that the District Judge having found, in the proceeding appointing Bishun Charan as guardian, that the three brothers Durga Charan, Bishun Charan and Hari Charan were joint, there is bar in the nature of estoppel to any claim as against a surety for any money with respect to the share that came to Bishun Charan and Hari Charan by the deed of 1898.

The terms of the security bond are very wide. The Appellant became surety for the credits received on account of the properties of the minor and not of any specified properties. He bound himself, as such surety, in respect of any money that might be received by Bishun Charan on account of the estate of the minor. There was no limitation to the Appellant's liability under the bond, up to Rs. 20,000. If a contrary view were taken, the result would be serious to the minor. The guardian might derive income from the minor's property not mentioned in his petition, and to hold that the guardian's surety would not be bound to indemnify for such receipts would seriously prejudice the minor and contravene the provisions of sec. 128 of the Contract Act. Bonds executed in proceedings under Act VIII of 1890, as, in fact, administration bonds generally, must be construed according to the conditions contained in them. This ground of the Appellant must therefore fail.

The plea of estoppel is equally untenable. There was no representation made by the Court and certainly none by the minor. The ground of estoppel cannot be pleaded against an infant. The ground of misrepresentation by the Court, and mutual mistake of the Court and the surety, was raised in *Debendra Nath Dutt and Banku Behary Banerjee* v. *The Administrator-General of Bengal* (1) as a defence to an action on an administration bond. Three out of the five learned Judges who decided the case were of opinion that the bond could not be invalidated on the ground of mutual mistake, and as regards the ground of misrepresentation all the five Judges were unanimous in the view that it was untenable.

(1) 10 C. W. N. 673 : s. c. I. L. R. 33 Cal. 713 (1906)

SARAT CHANDRA ROY CHOWDHURY *v.* RAJONI MOHAN ROY.

We are, therefore, of opinion that the Appellant as surety is bound to pay for any wrongful conduct of the Defendant No. 1, with respect to all the properties to which the minor was entitled. But if a third person was wrongfully in possession, as Hari Charan was, of a share of 4½ annas, and Defendant No. 1 did not receive the profits with respect to such share, neither he nor his surety would be liable for them. The liability extends to profits actually received, or to profits which could have been received but for gross and wilful default of the Defendant No. 1.

We may add that the argument somewhat faintly pressed before us, that the bond was not properly assigned to the Plaintiff, to enable him to sue the sureties, is clearly untenable. The law does not require that there should be written assignment by the District Judge (sec. 35, Act VIII of 1890).

Subject to the limitation indicated above, we dismiss this appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 288 OF 1907.

RAMPINI, J. SHARFUDDIN, J. 1908. Heard, 11, February. Judgment, 24, February.

GADADHAR PANDA and anr., Judgment-debtors, Appellants,

v.

SHYAM CHURN NAIK and ors., Decree-holders, Respondents.

Civil Procedure Code (Act XIV of 1882), secs. 258, 244—Satisfaction of decree not certified owing to decree-holders' fraud—Application after time to have certified.

Sec. 258 of the Civil Procedure Code prevents an executing Court from taking cognizance of an uncertified adjustment of a decree.

DINOBANDHU NUNDY *v.* HARIMATI DASSEE (1) *explained.*

RAMDOYAL *v.* RAM HARI (2) and BAIRGULU *v.* BAPANNA (3) *followed.*

Where, however, the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance, till within a month of their application, of the fact that the satisfaction of the decree had not been certified,

Held—*That the matter could be investigated under sec. 244 of the Civil Procedure Code.*

PRASANNA KUMAR SANYAL *v.* KALI DAS SANYAL (4) *followed.*

This was an appeal preferred on the 15th of July 1907, against an order of J. J. Platel, Esq., District Judge of Zillah Cuttack, dated the 6th of April 1907, reversing that of Babu Debendra Nath Sarkar, Munsif of Bhadruck, dated the 15th of December 1906.

The material facts will appear from the judgment.

Babu Bepin Chandra Mullik for the Appellants.

Babus Shamatul Chunder Dutt and *Satish Chandra Mukerjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is a second appeal in an execution case.

(1) 8 C. W. N. 395 : s. c. I. L. R. 31 Cal. 480 (1904).
(2) I. L. R. 20 Cal. 32 (1892).
(3) I. L. R. 15 Mad. 302 (1892).
(4) I. L. R. 19 Cal. 683 (1892).

GADADHAR PANDA *v.* SHYAM CHURN NAIK.

The second Appellants are the judgment-debtors who when the decree-holders applied to execute two decrees obtained against them presented an application under secs. 244 and 313, C. P. C., alleging that the decree-holders' decrees had been satisfied by the execution of as mortgage bond by the principal judgment-debtor, Gadadhar Panda, on the 1st May 1903 in favour of Sadanunda, the father of the decree-holders. The decree-holders admitted execution of this bond, but alleged that the arrangement fell through owing to one of the judgment-debtors, Ganesh, refusing to ratify it, and that accordingly the bond was returned to the judgment-debtor, Gadadhar.

The Munsif held that the decree-holders had not been able to prove their allegations as to the return of the bond. He found that the decree-holders' decrees had been satisfied and disallowed the decree-holders' applicaton for execution.

On appeal to the District Judge, the application for execution was allowed on the ground that the satisfaction of the decrees by the execution of the fresh mortgage bond of the 1st May 1903 had not been certified to the Court under sec. 258 and therefore could not be taken cognizance of by the executing Court.

The judgment-debtors now prefer this second appeal. It can only lie under sec. 244. There can be no second appeal against an order under sec. 313.

The grounds urged on behalf of the Appellants are (1) that no decree had been passed under sec. 90 of the Transfer of Property Act and so execution of the decrees against the other properties of the judgment-debtors should not be allowed: (2) That sec. 258 does not apply to mortgage decrees; and (3) that if sec. 258 does apply to mortgage decrees, then the judgment-debtors' present application is still maintainable under sec. 244, C. P. C. and should be allowed, as the decree-holders by fraud prevented the judgment-debtors from applying in time under sec. 258, C. P. C.

The first two grounds of appeal must fail. The decrees which it is now sought to execute are not mortgage decrees but money decrees passed under sec. 90 of the Transfer of Property Act. The decrees were decrees under secs. 88 and 90 of the Act, for it was provided in them that if the proceeds of the sale of the mortgaged properties were insufficient to satisfy the decrees, the decree-holders were at liberty to proceed against the other properties of the judgment-debtors. The mortgaged properties have been sold. The proceeds of the sale have not satisfied the decretal amounts. The decree-holders are now proceeding against the other properties of the judgment debtors. The decrees which it is now sought to execute are therefore money decrees.

In support of his third ground of appeal, the pleader for the Appellants relies on the case of ***Dinobandhu Nundy* v. *Harimati Dassee*** (1), in which according to the head-note it has been ruled that sec. 258 of the Code does not restrict the operation of sec. 244. The pleader for the Appellants contends that according to this ruling when an application under sec. 244 is made to a Court executing a decree, such Court is not pre-

(1) 8 C. W. N. 395 : s. c. I. L. R. 31 Cal. 480 (1904)

GADADHAR PANDA *v.* SHYAM CHURN NAIK.

vented by the provisions of sec. 258 from taking cognizance of an uncertified adjustment of a decree. But though there are some observations in the judgment in this case, which lend support to this contention, we would observe (1) that what was decided in the case was only that a separate suit for a declaration that a decree has been satisfied by an uncertified agreement out of Court will not lie, and (2) that the learned Judges who decided that case do not dissent from or refer to a Full Bench decision in *Ramdoyal* v. *Ram Hari* (2), which lays down the contrary, and which appears to be in accord with the express terms of sec. 258.

The case of *Bairgulu* v. *Bapanna* (3), which is referred to in the judgment in *Dinobandhu* v. *Harimati* (1) is also to the effect that a separate suit for a declaration that a decree has been satisfied by an uncertified agreement is barred. In this case it is said: "The effect of sec. 258 is only to exclude proof of an uncertified agreement in execution proceedings. It does not limit the operation of sec. 244."

It would seem therefore that the rule laid down in *Dinobandhu* v. *Harimati* (1) that sec. 258 does not restrict the operation of sec. 244 must be understood in this sense, and not, as interpreted by the pleader for the Appellants.

The Appellant's pleader, however, urges that his clients raised a plea of fraud which the District Judge has taken no notice of. His clients complained that the decree-holders had by fraud kept them in ignorance till within a month of their application of the fact that the satisfaction of their decrees by the execution of a fresh bond had not been certified to the Court. He contends that the lower Court was bound to inquire into this matter. This argument in our opinion must prevail. It is in accordance with the views of the Privy Council as expressed in the case of *Prasanna Kumar Sanyal* v. *Kalidas Sanyal* (4) We must therefore remand the case to the lower Appellate Court to have the Appellants' allegation of fraud inquired into and determined. If the judgment-debtors do not establish their plea to this effect to the satisfaction of the District Judge, the execution should be allowed to proceed If they do, then the District Judge should consider and determine whether or not the decrees have been satisfied and whether their satisfaction cannot be certified now. Costs will abide the result. We assess the costs of this hearing at 3 gold mohurs.

Appeal allowed.

(1) 8 C. W. N. 395: s. c. I. L. R. 31 Cal. 480 (1904).
(2) I. L. R. 20 Cal. 32 (1892).
(3) I. L. R. 15 Mad. 302 (1892).
(4) I. L. R. 19 Cal. 683 (1892).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 890 OF 1907.

MITRA, J.
FLETCHER, J.
1907.
21, August.

BALAJIT SINGH, 2nd Party, Petitioner,
v.
BHOJU GHOSE and ors., 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145 or sec. 107—Dispute relating to a fishery, proper section to proceed under.

In the case of a bonâ fide *dispute likely*

BALAJIT SINGH *v.* BHOJU GHOSE.

to cause a breach of the peace existing between two parties relating to a fishery right, the proper section to proceed under for preventing a breach of the peace is sec. 145, Cr. P. C, and not sec. 107.

The words of sec. 145 are mandatory while those of sec. 107 are discretionary.

Where a dispute likely to cause a breach of the peace arising between two parties concerning a fishery, the Magistrate drew up a proceeding under sec. 107, Cr. P. C., with the result that one of the parties was bound down to keep the peace,

Held—*That the order under sec. 107, Cr. P. C, is bad and ought to be set aside. If there is still a likelihood of a breach of the peace the Magistrate may proceed under sec. 145, Cr. P. C., if he thinks fit*

DOLE GOBIND CHOWDHURY *v.* DHANU KHAN (1) *followed.*

This was a rule granted on the 30th of July 1907, against an order of Babu Banku Behari Singh, Deputy Magistrate of Bhagulpur, dated the 20th of May 1907, directing the Petitioner to execute a bond in the sum of Rs. 200 with two sureties in the sum of Rs. 100 each to keep the peace for one year under sec. 107, C. Cr. P., which order was on revision affirmed by Mr. F. P Lyall, District Magistrate of Bhagulpur on the 29th June 1907.

The facts of the case are shortly these :—

A dispute arose about a *jalkar* of some 9 bighas in area situated within the ambit of village Phulont. The village was stated to belong to Raghunandan Lal, the first party but the *jalkar* which was situated near its southern extremity was claimed by the second party as being a portion of *jalkar* Baneedut appertaining to taluka Bikrampur Chakrami which the second party alleged was their property irrespective of the village in which the *jalkar*, which was some 20 miles in length, may lie. The Petitioner, Balajit Singh, was a servant of the second party and the present proceeding under sec. 107, C. Cr. P., was instituted against him on the ground that he was likely to forcibly assert his master's right to fish in the *jalkar* and the Deputy Magistrate Babu Banku Behari Singh made an order on the 20th May 1907 directing him to execute a bond in a sum of Rs. 200 with two sureties in Rs. 100 each to keep the peace for one year, in default to undergo rigorous imprisonment for one year.

On appeal before the District Magistrate, the main ground taken before him was that proceeding under sec. 145 ought to have been instituted in the case. The District Magistrate observed as follows :—

"It is possible this might have been a preferable section to act under but I think it is clear in the light of recent High Court rulings that it is certainly open to the Criminal Courts to come first to a finding as to the possession and then to bind down the party who is endeavouring by force to interfere with existing possession to keep the peace. It is undoubtedly true that the case has been determined solely on the point of possession and both parties have been well aware of the point at issue being solely one of possession. But I do not think there is anything illegal in it and as the case has been most carefully tried and a decision arrived at solely on mate-

(1) I. L. R. 25 Cal. 559 (1897)

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, APRIL 6, 1908. [No. 21

Contents.

NOTES

IN AN ARTICLE PUBLISHED BELOW A LEARNED FRIEND from England raises the question whether the people of India would like to have a Federal Court of Appeal for all India as they have in Australia. We do not think that any such Court of Appeal is either necessary or would be useful in India. In the High Court in each Presidency or Province we have already a Court of Appeal. Each of our Presidencies or Provinces, is ordinarily larger in size and in point of population than any other member of the British Empire. The distances between the Provinces are great and the laws also vary considerably. The decisions of the High Court in each Province is ordinarily considered as final. The reason for this is simple enough. The appeals to the High Court in each Presidency or Province are either (1) from High Court Judges sitting as Courts of first instance, (2) appeals from Subordinate Judges in the Mofussil, who are judicial officers of very mature experience; (3) second appeals on points of law from appeals heard by Subordinate Judges from Munsifs, who are civil judges of first instance in the Mofussil with limited jurisdiction. It is but natural that people would regard a first appeal from a judge of experience and ability or an appeal from the appellate judgment of such a judge as final.

IT IS ONLY IN CASES OF VERY SPECIAL IMPORTANCE or of very far-reaching consequences that people in India prefer an appeal before the Judicial Committee of the Privy Council. The judges who sit in the Judicial Committee of the Privy Council or of the House of Lords are supposed to be the best judges in the Empire and their decisions are held in great respect in India. Indian public opinion will therefore warmly support any proposal for the constitution of a final Court of Appeal for the Empire by the fusion of the Judicial Committees of the Privy Council and the House of Lords. None of the eminent judges who are available in England to constitute a final Court of Appeal for the Empire can ever be expected to come out to India. The high standard of such a Court as also its immunity from local prejudices and influences will make it immensely more popular than any local Court of Appeal for the whole of the Indian Empire. Such a Court in England and increased efficiency of the High Courts and the District Courts of India will increase the popularity of British justice which forms, in fact, the most valuable asset in the good-will of the people towards the British rule in India. In the final Court of Appeal for the Empire, eminent Indian experts may be appointed to take their seats with eminent English judges. Australia is a self-governing Colony and she has a freehand in the choice of her judges. But India is very differently situated and there it is where our learned friend's analogy fails.

WE INVITE ATTENTION TO THE CASE OF *Janki Prosad Singh* v. *Baldeo Prosad Tewari* a report of which appears at p. 163 of the current volume (V) of the Allahabad Law Journal. In this case one J was the *benamdar* of B in respect of certain properties. A creditor of B and others, in execution of a money decree against them attached these properties. J preferred a claim to those properties alleging that the properties belonged to him, but his claim was rejected by the Court. J then filed a regular suit under sec. 283, C. P. C., against both the creditor and B and others, the judgment debtors, for a declaration that he was the owner of the properties and the properties were not liable to be sold in execution of a decree against B and others. This suit was dismissed, and the decision was upheld on appeal by the District Judge. Then J, to save the properties from sale, paid from his own pocket the money due to the creditor of B and others under the decree and brought a suit against B and others to recover the money he paid to their creditor.

THE QUESTION AROSE FOR DECISION WHETHER UNDER the circumstances of the case J was entitled to recover the amount from B and others. It is evident

that J by paying this amount to the creditor had saved the properties of B and others from sale and B and others thus got the benefit of the payment made by J. But were they bound to repay the money to J?

THIS WOULD DEPEND UPON WHETHER J WAS A PERSON interested in the payment of the money. No doubt B and others were bound by law to pay the money but their liability alone would not make them bound to repay the money to another who made the payment on their behalf. Here J had no interest in the property; if the property was sold, he would not have suffered any loss. But still he made the payment, voluntarily without being asked by B and others to do so. Their Lordships of the Allahabad High Court (Stanley, C. J., and Burkitt, J.) therefore held that the *benamdar* had no right to be reimbursed by B and others in regard to this payment under sec. 69 of the Contract Act. As regards the contention on behalf of J that he was entitled to recover the money under sec. 70 of the Contract Act their Lordships observed "it was held by a Bench of this Court that by the use of the word "lawfully" in sec. 70 of the Contract Act, the Legislature had in contemplation cases, in which a person held such a relation to another as either directly to create or as would justify the inference that by some act done for another person the person doing the act was entitled to look for compensation to the person for whom it was done." Surely by doing something for a person without his request or consent, you cannot force upon him an obligation to make compensation to you. As has been observed by an eminent Judge "liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law." *Falke* v. *Scottish Imperial Insurance Co.*, 34 Ch. D p. 234, per Lord Justice Bowen.

THE ALLAHABAD HIGH COURT IN THE CASE OF *Lachman Das* v. *Apprakash* reported at p. 144 of the current volume of the Allahabad Law Journal held that when a Court appoints an arbitrator under sec. 507, C. P. C, but does not fix the time within which the award is to be filed, the award is wholly void, even though the arbitrator files the award that very day. The reason for the decision is stated to be that sec. 508 is mandatory and the Court under provisions of that section is bound to fix the time within which the award is to be filed.

WHERE THE COURT THROUGH OVERSIGHT OR OTHERwise has not fixed the time within which the award is to be filed it seems to us that the Court would be competent to fix the time before the award has been filed by the arbitrators, on its attention being drawn to the omission, and if the award is filed within that time, the award will be a good award. If the Court can extend the time for the filing of the award, it can also rectify its own omission in fixing the time, by fixing the time subsequently to the order appointing the arbitrators. So the omission to fix the time does not appear to us to be such an illegality as to render the award altogether invalid, even though it is filed within a reasonable time.

BUT THEIR LORDSHIPS BASE THEIR DECISION ON THE ruling of the Privy Council in the case of *Raja Har Narain Singh* v. *Chaudhurain Bhagwant Kuar and anr.*, L. R. 18 I. A. 55. The Privy Council case, however, does not appear to us to lend support to the decision of their Lordships of the Allahabad High Court. In the Privy Council case a suit was referred to arbitration without fixing the time within which the award was to be filed. Subsequently the Court corrected this mistake and extended the time to the 20th of March 1885. The award was filed on the 24th of March, that is four days after the appointed day. The Privy Council held that this award was void as it was not filed within the time fixed by the Court, that is to say, the 20th of March 1885. If the award were filed within the 28th of March we presume it would have been valid even though in the original order of reference no time for filing the award was fixed. Lord Morris who delivered the judgment of the Judicial Committee observed "sec. 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that the section would be rendered inoperative if sec. 508 is to be merely treated as directory. In the present case, however, the Subordinate Judge repeatedly made orders enlarging the time and in those orders fixed the time within which the award was to be made, although he did not do so in the original order of reference, and their Lordships are of opinion that it was competent for the Subordinate Judge to do so under sec. 514 of the Code which enables the Court to grant a further time, and from time to time enlarge the period, for the delivery of the award." This shows that the mere omission in the original order of reference to fix the time within which the award is to be filed is not fatal to the validity of the award provided the award is filed within the time subsequently fixed by the Court.

IN THE ALLAHABAD CASE THE AWARD WAS FILED on the very day the order of reference was made, so that it could not possibly be suggested that there was on the part of the arbitrator any delay or disobedience of the Court's order. All that the Privy Council case decided is that "no award shall be valid unless made within the period allowed by

the Court" but it could hardly be said that it laid down any rule of law as to the validity or otherwise of an award like the one under discussion. It would not be inopportune to quote here the words of Lord Halsbury in *Quinn* v. *Leathem*, (1901) A. C. 495 (506) with reference to the authority of judicial opinion. "Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. . . . A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

JUDICIAL APPEALS TO ENGLAND.

(BY R W. RIPPON; B.C.L, BAR-AT-LAW).

British India being a dependency of the Crown of England it is not unnatural that Indian affairs (legislative, executive and judicial) should tend to find their ultimate consideration and decision in England, by the Councils of the Emperor of India On the other hand history clearly indicates that a participation in the Government of a country tends towards its people possessing high intellectual and moral attributes. That these two tendencies in Indian affairs are hostile and operate in opposite directions is manifest. The art of government is to control and adjust them.

By the Government of India Act 1858 and by the Indian Councils Acts 1861 and 1892, India is unified for legislative and executive purposes but not for judicial purposes; there does not exist any Viceregal Judicial Council. There is no Supreme Court of Appeal for India. Would such an institution tend towards the better government of India?

Law reformers in all countries and ages have fulminated their anathemas against tribunals and systems of judicature, whenever

1. Inefficiency or corruption has sat upon the throne of Justice or

2. Unreasonable delays of the law have exasperated or disgusted the litigants and legal ingenuity has become misdirected towards adjournments, extensions, postponements, amendments, variations, quashings, appeals, and ambulations from one Court to another, or

3. The bills of costs have become so inflated that the poor litigant has sunk down exhausted before the final stages have been reached.

Would not a Supreme Court of Appeal for India tend towards

1. Efficiency in appeals.
2. Expeditious judgments on appeal.
3. Economy in appeals.

Let us cast our eyes upon the other judicial systems within His Majesty's territory.

(i) Before the Australian Commonwealth Act 1900, there were in Australia several separate Colonies *e.g.* Victoria, New South Wales, &c. &c., each having a separate and distinct Governor, legislative and executive bodies and a High Court, appeals from each High Court going to the Judicial Committee of the Privy Council as in India: but by the Act of 1900 a central Government was set up with a Governor-General but not as in the Viceregal establishment in India for legislative and executive functions only, but also for judicial purposes, the new tribunal being the High Court of Australia and a litigant defeated in the High Court of any Australian Colony can appeal either to the new High Court of Australia or as previously to the Judicial Committee of the Privy Council.

(ii) In England a party defeated in an action originating in the High Court of Justice can appeal to the Court of Appeal and the party defeated in the Court of Appeal can appeal to the House of Lords.

(iii) Similarly in Scotland and in Ireland there is no direct appeal to the House of Lords in England, but only through the appellate tribunals in Scotland and Ireland.

In all these four territories most litigants consider the decisions of their own Court of Appeal as sufficient and final.

The House of Lords (Judicial Committee) is the highest appellate tribunal in cases originating in the British Islands and the Privy Council (Judicial Committee) is the highest appellate tribunal in cases originating in the Colonies or in India There are thus two supreme appellate tribunals for the British Empire distinct in history and constitution.

Statesmen within the British Empire are tending to a consensus of opinion that a written constitution is now expedient to keep firmly and justly together the many semi-States of which the King-Emperor's dominions are composed, and that in such a written constitution the two present final Courts of ultimate appeal, *viz.*, House of Lords (Judicial Committee) and the Privy Council (Judicial Committee) should be fused into one august tribunal and that to this Court only matters of the gravest import should be taken, and that as far as practicable each semi-State must dispose of its own appeals.

The question then arises is India to be in an exceptional condition or in the same position as the other parts of the British Empire?

Would not a Court of Appeal for India be welcomed alike by the legal professions in India and by the people of India?

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before GEIDT and WOODROFFE, JJ. CRIMINAL REVISION No. 94 OF 1908. KORAP ALI PRAMANICK, Petitioner *v.* HADI MOLLA, Opposite Party. 26th February 1908.

Criminal Procedure Code, sec. 199—Indian Penal Code, secs. 497 and 498—Conviction under sec. 498, I. P. C. where the complaint was of offence under sec. 497, legality of.

The material facts of the case were these:—

The complainant Hadi Molla laid a complaint before the Magistrate under secs. 494 and 497, I. P. C., against the Petitioner and others. The Magistrate held a preliminary enquiry into the complaint and passed the following order. "Examined 3 witnesses, and there is no evidence of offence under sec. 494, I. P. C., but from what these witnesses have said, I am of opinion that the accused Korap Ali may be summoned under sec. 498, I P. C." The Petitioner was then tried by the Magistrate who convicted him under sec. 498, I P C. and sentenced him to undergo rigorous imprisonment for six months and to pay a fine of Rs. 100. On appeal the Sessions Judge upheld the conviction and sentence. This rule was obtained by the Petitioner to set aside the conviction and sentence

Their Lordships observed:—

WOODROFFE, J.—"In this case the charge which was made was one under sec. 497, I. P. C. The offence of which the accused has been convicted is one under sec. 498, I. P. C. In my opinion, the complaint referred to under s. 199, Cr. P C. is a complaint in respect of the specific charge of which the accused is convicted, and as he has been convicted in this case under sec. 498, I. P. C. in respect of which there was no complaint, the conviction is bad and should be reversed."

GEIDT, J.—"I have a little doubt whether the conviction is bad as a complaint had been made under sec. 497 though not under sec. 498, I. P C. But I don't think it necessary to differ from my learned brother

"The rule will, therefore, be made absolute. The fine, if paid, will be refunded."

Babu Harish Chandra Roy for the Petitioner.

No one for the Opposite Party.

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM ORDER No. 446 OF 1906. SAYED SHAH HABIBUR RASUL ABUL FAIZ, Appellant *v.* ASHITO MOHAN GHOSH AND OTHERS Respondents. Heard, 24 March 1908. Judgment, 27 March 1908.

Co-owners, partition between—Partial partition, suit for, if maintainable.

The parties were co-owners of an estate. The Plaintiff sought for the partition of the chowkidari chakran lands of one village of the estate. Three of the Defendants did not object. The Defendant No. 1 did. The defence was that there could be no partial partition of some of the chowkidari chackran lands of the estate.

The Court below held that as the partition sought for was partition between co-owners of an estate, and not partition between members of a joint Hindu family of joint family property, the partition might take place.

The Defendant No. 1 appealed to the High Court.

Held—The reason which refuses partial partition in case of joint family property has no application to the case of property of co-owners,

Ram Mohon Pal v. *Mulchand* (I. L. R. 28 All. 39) followed.

Parbati Charan Deb v. *Anindin* (I. L. R. 7 Cal. 577) distinguished.

Radha Kant Saha v. *Biprodas Roy* (1 C. L. J. 40 referred to.

Babu Ram Chunder Mojumder for the Appellant.

Babu Khetra Mohun Sen for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM ORIGINAL DECREES NOS. 205 TO 209 OF 1906. GOLAP KUMARI SAHEBA Appellant, *v.* SHAIKH MAHAMMED KHUDIRUDDIN AND OTHERS, Respondents. Heard, 17 and 25 March 1908 Judgment, 27 March 1908.

Settlement Registration of 1872, secs. 5 & 8—Court-fee, on institution if payable.

A suit was instituted before the Settlement Officer. He had referred the suit to the Civil Court under the provisions of sec. 5 of the Settlement Regulation of 1872. The Subordinate Judge called on the Plaintiff to pay in the Court-fees leviable on the institution of the suit, The Plaintiff did not pay, so the suit was dismissed.

The Plaintiff appealed. It was admitted that the suit was properly instituted before the Settlement Officer, and, under sec. 8 of the Regulation, no Court-fee was payable on the plaint. According to sec. 5, the Civil Court may proceed to try and determine such suit under the same rules and in the same manner as if the suit had been originally instituted therein.

Held—The Court is to proceed to try the suit as if it had been properly instituted before it, and as, under sec. 1 of the Regulation, the suit, when instituted before the Settlement Officer, was subject to no institution Court-fee, no institution Court-fee has to be paid when it is transferred to the Civil Court, though after its transfer Court-fees are payable.

Babu Brojo Lal Chuckerbatti for the Appellant.

Babu Ram Chunder Mitra for the Respondents.

Appeal allowed:

A. T. M. *Case remanded.*

BALAJIT SINGH *v.* BHOJU GHOSE.

rials in the record, for me to refer the matter back for action under sec. 145 would be to do nothing more than cause a second record on identically the same facts being made and practically certainly a similar finding arrived at."

As regards the question of the likelihood of a breach of the peace, he observed: "It is quite true Balajit Singh has not gone to any very desperate length in attempting to assert his master's right, but it is clear that before the Police intervened he did on two occasions use threats. It is clear from the way the case has been contested that the parties are both keenly asserting their rights to the *jalkar* and there can be little doubt that if preventive measures are not taken a breach of the peace will occur. Balajit can then, I think, in the light of the two instances on which he proceeded to the *jalkar*, fairly be bound down, if the finding is that his attempt to assert his master's right was a wrongful one. This will, of course, depend on the main points at issue in the case and that is the question of possession." On this question he held upon a review of the evidence, oral and documentary that the first party was in possession and he accordingly upheld the order of the Deputy Magistrate.

Balajit Singh then moved the High Court and obtained this rule.

Mr. Huq and *Babu Sarat Kumar Mitter* for the Petitioner.

Mr. Caspersz and *Babu Joy Gopal Ghose* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

The dispute in this case concerns water and the word water includes fisheries. The police recommended in their report that a proceeding under sec. 145, C. Cr. P. should be drawn up between the parties; but the Deputy Magistrate thought otherwise and he drew up a proceeding under the directions of the District Magistrate under sec. 107 of the Code. The result has been that the petitioner, the second party, has been bound down to keep the peace for one year.

It is clear from the judgment of the Deputy Magistrate as well as that of the District Magistrate that a dispute in this case is a *bonâ fide* one relating to a fishery right and a large number of documents has been put in on either side to prove the rights of the respective parties and the right of possession of each. In the case of *Dole Gobind Chowdhury* v. *Dhanu Khan* (1) which is a case very similar to the present case, the learned Judges directed that the order under sec. 107, C. Cr. P. binding down one of the parties should be set aside and they expressed their opinion that a proceeding under sec. 145, C, Cr. P. was the proper proceeding. Looking to the words used in sec. 107 and in sec. 145, we have no doubt that the proper course for the Magistrate in a case like this was to proceed under sec. 145 of the Code. The words in sec. 145 are mandatory. That section says "whenever a Magistrate of the district............is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water .... he shall make an order in writing" etc., etc. Sec. 107 contains

(1) I. L. R. 25 Cal. 559 (1897).

BALAJIT SINGH *v.* BHOJU GHOSE.

words which are discretionary ; the Magistrate may institute proceedings binding down either of the parties.

We are of opinion that this is a case which comes within the rule laid down in the case of *Dole Gobind* v. *Dhanu Khan* (1) referred to above. We accordingly make the rule absolute and direct that the order of the Deputy Magistrate binding down the petitioner under sec. 107 of the Code be set aside. It would be competent to the Magistrate, if he thinks it necessary, that is to say, if there is still likelihood of a breach of the peace, to draw up a proceeding under sec. 145 of the Code.

B. C. *Rule made absolute*

(1) I. L. R. 25 Cal. 559 (1897).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL SIDE

No. 480 OF 1907.

MACLEAN, C. J.
HARINGTON, J.
FLETCHER, J.
1907.
Heard, 27, 28 & 29, November.
1908.
Judgment, 3, January.

A. S. BARROW and anr., Defendants, Appellants,
v.
HEM CHANDRA LAHIRI, Plaintiff, Respondent.

Newspaper libel—Publication for public benefit—Fair and bonâ fide *comment, what constitutes—Administration of justice, how far matters for comment—Allegations of facts to be distinguished from comments—Imputation of criminal offence not comment—Privilege—Matters* per se *libellous—Want of justification, effect of—Defamation of a class—Rights of individuals of the class—Limitation—Judge of fact and law, duty of.*

The administration of justice is a matter for fair and bonâ fide *discussion, but newspaper writers have to be careful as to the language they use and it is essential for them to differentiate between comments and allegations of fact, in which latter case, either the truth of such allegations or privilege must be established in order to successfully defend an action for the publication of the libel. Imputing to a person the commission of a criminal offence does not come within the range of fair comment.*

WOODGATE *v.* REDOUT (1), R. *v.* TANFIELD (2), DAVIES *v.* SHEPSTONE (3), HUNTER *v.* SHARP (4), POPHAM *v.* PICKBURN (7) *followed.*

In the case of a libel against a class of persons, if the description in the libel can be shown to be applicable to one of such persons, that person may bring an action for damages for the libel.

LE FANU *v.* MALCOMSON (5) *followed.*

Several Plaintiffs joined to institute a suit well within the prescribed period of limitation : on an objection being raised as to misjoinder of parties and of causes of action, the plaint was amended by striking out the names of all the Plaintiffs but one, who elected to continue to carry on the suit so instituted within time : Held, *the suit was not barred.*

SANDES *v.* WILDSMITH (6) *followed.*

Per HARINGTON, J.—*A Judge in this country exercising the function of a jury*

(1) 4 F. and F. 202 at p 223 (1865)
(2) 42 J. P. P. 424.
(3) 11 App. Cas. 187 at p. 190 (1886).
(4) 4 F. and F 983 at p. 1006 (1866).
(5) 1 H. L. C. 637 (1848).
(6) (1893) 1 Q. B 771.
(7) 31 L. J. Ex 133 at p. 136 (1862).

A. S. BARROW v. HEM CHANDRA LAHIRI.

would be bound to direct his mind to those considerations to which, had he been summing up to a jury, he would have been bound to direct their minds to.

Suit against the editor and proprietor of the *Indian Daily News* to recover rupees two thousand as damages for libel.

One Joggesswar Ahir, otherwise called Girish Goala, was prosecuted and tried on a charge of murder or abatement of murder of one Ganga Goala at the High Court Criminal Sessions, on the 12th, 13th, 14th and 15th July 1905 on which last date, the special jury, after a consultation of four minutes, returned a unanimous verdict of not guilty, on both the charges on which the accused was tried. On the 17th and the 19th July 1905, the *Indian Daily News* published two articles on the murder case as also reproduced, on the latter date, an article which originally appeared in the *Statesman*. The articles are reproduced below :—

"The sensational murder case which has been known as the 'Sova Bazar Tragedy' came to a conclusion on Saturday when the jury returned a unanimous verdict of 'not guilty' against the accused, one Jogessur Ahir, *alias* Giris Chandra Goala. The fact of the case it is unnecessary to enter into at any great length, since the story has been so very fully told in the law reports during the week. The accused was a servant who was supposed to have murdered a fellow servant for the sake of a few very trumpery articles. Men have murdered one another before now for apparently very inadequate motives; but in this particular case, the surrounding circumstances were of so very suspicious a nature that, in spite of his Lordship the Judge in his summing up having indicated that he could not believe that the whole fabric of the prosecution's evidence was a diabolical plot to hang an innocent man, the jury held other views and have, by their verdict, said that it does not strain their credulity to believe that this case was a particularly diabolical conspiracy. When first the crime was discovered, a sufficiently long time after its commission to make identification of the body almost impossible, one Kumar Sovendra Krishna Deb was arrested. This gentleman is a member of the Sova Bazar Raj family. Immediately afterwards certain articles, alleged to be the property of the murdered man, were found in the possession or custody of Girish Chandra Goala. 'All these articles,' to quote Mr. E P. Ghosh, the learned leader for the defence, 'were found after the Kumar's arrest, and as soon as they were found, the Kumar was released.' Counsel suggested that the police, in conjunction with the dependents of the Kumar's family, had got some sort of evidence against the accused. The police were frequently in the habit of getting men to admit or make confessions when they found there was no evidence against them. Mr. Ghosh suggested that the police used to summon the accused frequently and that it was quite easy to put these articles, during the accused's absence, in these places where they were found.

"The wretched Giris was then arrested, and we heard during the course of the trial the customary story of how the police endeavour to get a man to tell the story that they want him to tell. It is scarcely necessary to say that the details in this case are not less infamous than usual. Girish, however, starved and tortured as he was, proved stubborn : he refused to put his neck into the noose which the police, and those behind them had so neatly tied for his accommodation. He stoutly asseverated his innocence, at the same time inculpating some one else. The jury took exactly four minutes to consider their verdict. It is an eloquent comment upon the story as put forward by the prosecution. The question which the public is now asking is 'what is the real story, and is the culprit ever to be brought to justice?' They also are interested to know how far this story which the prosecution brought into Court has been bolstered up and aided by the police, and whether there were any monetary transactions between the police and any other person or persons with regard to the case. There is a particularly sensational version

A. S. BARROW v. HEM CHANDRA LAHIRI.

of the story of this murder current in Calcutta, but we presume that since everyone professes to know it, no one ever will know it, and that the murdered man, be he who he may, whether Ganga, the Ooriya servant, or some one else, will be unavenged. The case is not without a parallel in the criminal records of Calcutta, and we have no doubt that some of our readers could point to a very similar case in which a heavy sum in blood money was paid for."—*Indian Daily News, 17th July 1905.*

"In another column we publish an article on the Sova Bazar murder case which appeared in the columns of our contemporary, the *Statesman*, yesterday, and with which and with the severe comments contained therein upon the conduct of the Calcutta Police in connection with this case, we desire to express our full accord. The true story of this clumsy police conspiracy is that the police thought that the unfortunate Jogesseur Ahir would be undefended, and that this mass of trumpery evidence might throw dust in the eyes of the Judge and the Jury when backed by the hard-swearing of the detective officers and policemen The police overreached themselves badly, but it is only due to the fine defence of the prisoner's Counsel that this dastardly scheme to hang an innocent man did not succeed. As those who have made any study of the average murder case in India well know, there is always the inevitable knife, sometimes it is blood-stained and sometimes it is not There is also the almost equally inevitable lady of frail character in whose house the knife and other incriminating articles is found. It is one of the tenets of the police belief that it always "looks better," for these articles to be found in the presence of some respectable person. Respectable persons, however, are not fond of mixing themselves up in the schemes of the Calcutta Police. When this is so, the police find it necessary to manufacture the respectable person. They endeavoured to do so in the present case, but the thing was not well done They produced a gentleman who described himself first of all as a zemindar. He was gorgeously apparelled; the stages unities were excellently well preserved for the part he had to play. The trouble commenced when Mr. E. P. Ghosh got hold of him and cross-examined him. The learned Judge did not permit Counsel to go as far as he desired with the witness, but the object was subsequently attained by a police witness falling into a little trap laid for him and admitting that the 'zemindar' was the son of a prostitute and was resident in a brothel. The question which broke up the 'zemindar' of high respectability, who had been procured by the police to preside at the finding of the incriminating articles, was a bow drawn at a venture and took the police officer off his guard. Tribute has already been paid to the Counsel who defended the prisoner, Messrs. E. P. Ghosh, S. Roy and D. K. Mullick, for their public spiritedness in taking up the case without any fee, but the public owe these gentlemen an even deeper debt of gratitude for having so successfully exposed one of the greatest scandals of the times" —*Indian Daily News, 19th July 1905.*

"We have already dealt briefly with the Sova Bazar murder trial which ended on Saturday in the acquittal of the accused. The verdict, as we have said, amounts to a serious indictment of the Calcutta Police, on whose evidence the case for the prosecution rested, and we propose on the present occasion to call attention to a number of the circumstances which render the case in question a matter of urgent public importance. For the sake of clearness we recall the principal incidents and dates. On or about the 24th of May last, a murder was committed in the compound of No 2-7, Raja Nobokissen's Street, a house belonging to the Sova Bazar Raj family. On Sunday, May 28th, the dead body of a man was found in a disused bath-room. The body showed signs of having been done to death in a peculiarly barbarous manner, and although in a very advanced stage of decomposition, it was identified as that of Ganga Ram, an Ooriya servant in the employ of the Raj family. Two days later, on the 30th, a tank in the garden was dragged, a bundle containing certain articles of clothing was fished out, and upon the statement of Jogessur Ahir—*alias* Girish—one of the two servants who had discovered the body, Kumar Sovendra Krishna Deb, a member

A. S. BARROW v. HEM CHANDRA LAHIRI.

of the Raj family, was arrested. The Kumar was detained in custody for two days, and was then released. During those two days the Police had, it appears, been in frequent communication with the members of the Raj family, and they had searched the house of the woman Kusum, the mistress of Girish, finding therein some silver, a *chudder*, a blanket, and, on a latter visit, a cup—all of which articles it was sought to connect with Girish and the murdered man. In the event, the Kumar was released on bail, and Girish was arrested. Among the points to be especially noticed so far are these: that a man had been murdered within the precincts of a house inhabited by many people, without, apparently, his cries being heard by any of the inmates; that a body had been decomposing for several days without its presence being reported or detected; that after one person had been arrested on suspicion and while he was in custody, the police were accumulating circumstantial evidence against another person who was in the meantime being used as a witness, and that all this was being done with the assistance of a number of persons connected in one way or another with the *Rajbari*.

"So much for the first stage of the proceedings. The matter as it affects the Police is to be considered in two aspects—first, as regards the proceedings in the Police Court, and, secondly, as regards the preparation of the evidence. On the 30th of May, the day of Sovendra's arrest a statement was obtained from Girish, who at that time was given to understand that he would be treated as a witness. The statement implicated Sovendra and purported to describe certain circumstances under which the murder was committed. This statement was sent to the Commissioner of Police, and by him forwarded to the Chief Presidency Magistrate, when, a day or two later, Girish was arrested and charged with the crime. Mr. Kingsford sent the case down to the third Presidency Magistrate whose procedure, on the 3rd of June, is open to the strongest criticism. On this occasion, the accused was asked in the first place whether he wished to make any confession. He replied that he had no confesssion to make as he had committed no crime. Thereupon the Magistrate asked whether he wanted to make any statement, omitting, as he afterwards confessed, to give the accused due warning that any such statement might be used against him As a consequence, the accused made a second statement, which, while in the first part substantially repeating the first statement, materially diverged in the second part and implicated the accused himself as an abettor of the murder. The facts disclosed appear to show that in the process of obtaining this statement, Maulvi Bazlal Karim was guilty of a grave irregularity Disregarding the principle that confession must in all cases be voluntary, he put definite and repeated pressure upon the accused. The record of the statement leaves no room for doubt that it was extorted from the accused under a process of cross-examination Further, instead of being recorded in open Court, the statement was taken with closed doors, according to the highly questionable practice which has gained for the Maulvi, the *sobriquet* of the "*purdanashin* Magistrate." It remains to be added that everything supports the belief that while he was extorting this series of admissions, the Maulvi had the accused's first statement before him. It is not necessary to point out the flagrant irregularity of this procedure. A Police Court is a public place, and it is not open to the Magistrate to have it cleared whenever he may think it prudent to conduct its business in private. Moreover apart from the illegality of pressing an accused person to make a statement inculpating himself, it has to be noticed that the present instance furnishes more than one extremely suspicious circumstance. Thus, although he had already stated, at least three times, that at the time of the murder he caught hold of Ganga for the purpose of rescuing him, Girish on this occasion contradicted himself, apparently under pressure, explaining his failure of memory by the statement that *he had not taken food for four or five days while he was detained in the thana.* In cross-examination, Maulvi Bazlal Karim admitted that upon hearing this statement from the accused he did not think it necessary to call for any explanation of the circumstances under which the accused had been detained. One inference only seems pos-

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

sible, namely, that the Police, in order to force the accused into making an incriminating statement, had resorted to certain not unfamiliar forms of torture, had kept him from his friends in order to preclude his obtaining defence, and had found in the third Presidency Magistrate a useful, if not actually a consenting, ally. In these circumstances, the public will ask what possible security there can be for the individual so long as the power and character of the Police remain what they are to-day, so long as the law is administered by Magistrates of the calibre of Maulvi Bazlal Karim.

"So much for the Police Court procedure, about which a good deal more might, and possibly may, be said. Let us look now at a few facts in connection with the evidence put forward by the prosecution In the first place, it is worthy of remark that, apart from persons directly connected with the Police and the *Rajbari*, there were only three witnesses. Of these, the first was a woman of the town, the second a man living in a house of ill-fame, the third a *poddar* whose shop is within the immediate sphere of influence of the Police. Much importance was attached by the prosecution to the knife which was alleged to have been found in the bundle taken from the tank and which, according to the corrected impression of the Police Surgeon, might possibly have caused the wounds on the body of the murdered man. More than one witness for the prosecution admitted that he did not see the knife with the clothes taken from the tank. There was no blood mark on the knife, although blood of some sort was found on the *dhotis*. Further, two cuts on one of the *dhotis* were proved to the jury by ocular demonstration not to have been made with the knife exhibited, while the attempt of one important witness to identify the knife as the one which he had seen in use by Girish proved a ludicrous failure. Again: the prosecution laid particular stress upon the pieces of silver found in the woman Kusum's house. According to the list drawn up after the first search by Inspector H. C. Lahiri, these pieces were six in number. In the Police Court, three only were produced and mentioned, the object being to identify these with three pieces alleged to have been bought from the *poddar* by Ganga, and presumably to have excited the cupidity of the accused. When challengd on this point in cross examination at the Sessions, the Inspector took refuge from the difficulty in the statement that the remaining three pieces had afterwards been found to be base metal. It may here be observed that the witness, Dutta Hari, who stated that he accompanied Ganga to the *poddar* for the purchase of the silver, is employed as a punkha-puller at the Police Court. The remainder of the circumstantial evidence built up by the Police is of a piece with the foregoing, and we need not therefore examine it in detail. One further illustration, however, of the methods resorted to may be given. The *bati*, a brass cup, of a kind sold in every *bazar* in Bengal, was stated by the prosecution to be a cup of Ooriya pattern bought specially for Ganga at Puri. Several witnesses swore that they had seen the cup in use by him; and yet, when exhibited to the jury, it was found to show no signs of use, and, not only so, but to be still bearing the vendor's mark. It may be mentioned, as further indicating the character of the Police inquiry, that two of the Police Superintendents who had taken an important part in the early stages of the investigation, were not called as witnesses.

"In commenting on the charge to the jury, we pointed out that it revealed considerable reluctance or inabilty on Mr. Justice Stephten's part to believe in the existence of a Police conspiracy diabolical enough to account for the whole of the evidence brought forward by the prosecution. We wish it were possible to share the Judge's scepticism. But the facts are too strong for the public, as they were for the jury. Two great facts confront the authorities. First, a crime has been committed under circumstances of the most revolting character, and in connexion with which one person still remains formally under arrest, secondly, a protracted trial in the High Court has revealed the outlines of a scandalous conspiracy on the part of the Calcutta Police, a conspiracy which in the judgment of the public at large is calculated to justify the harshest strictures of the Police Commission. Two things, therefore, remain to

A. S. BARROW v. HEM CHANDRA LAHIRI.

be done, if the public sense of justice is to be satisfied. One is that the guilty persons shall be brought to account. The other is that a fearless and unsparing investigation shall be made into every aspect, every stage, every fact of the case connected with the conduct of the Police. As Chairman of the Police Commission, Sir Andrew Fraser insisted upon the truth, or a good part of it, being told. In the case now before the public, His Honour has an opportunity of showing that the sternness of his condemnation is backed by a determination to attack in practice the evil which he has been driven by overwhelming evidence to denounce as a national danger and disgrace."—*Statesman, 18th July 1905.*

The Plaintiff, who was one of the six* officers of the Calcutta Police Force in charge of the investigation and trial of the murder case, filed this suit for the recovery of damages for the publication of the articles, which, he alleged, were defamatory of him, the articles charging him with having conspired with five others to run an innocent man in, with the manufacture of false evidence, with having, by means of torture, extorted a confession of guilt from an innocent person, with having accepted bribes in order to screen the real offender and with other corrupt and illegal practices.

The Defendants admitted publication but did not seek to justify the allegations in the articles. They pleaded, in defence, that the suit was barred by limitation and bad for misjoinder, that the articles were published without any malice for public benefit, that the statements therein constituted fair and honest discussion of or comments upon matters of public interest, that they did not nor were they intended to refer or were defamatory of the Plaintiff and that the Plaintiff had not suffered any damage or been injured in credit or reputation.

The judgment of the lower Court decreeing the Plaintiff's case is as follows :—

CHITTY, J.—This is a suit by Inspector Hem Chandra Lahiri of the Calcutta Police to recover from the Defendants, the Editor and Proprietors of the newspaper known as the *Indian Daily News* the sum of Rs. 2,000 as damages for libel. The alleged libel is contained in three articles, one in the *Indian Daily News* of 17th July 1905, and the others in the issue of the 19th. Of the last two articles, one is of the Defendants newspaper and the other a reproduction of an article on the same subject, which had appeared in the *Statesman* of the 18th with which the writer of the *Indian Daily News* article expresses himself as "in entire accord." The Defendants admit publication of the articles in question, and plead (1) that this suit is barred by the law of limitation (2) that the articles do not and were not intended to, refer to the Plaintiff (3) that the articles were published in respect of matters of public interest, and are a fair and honest discussion of and comment upon the proceedings in the trial of Jogessur Ahir *alias* Girish Goala and on the reports of the said proceedings published in the daily press, that is to say, *The Englishman, Indian Daily News, Statesman, Bangalee* and *Amrita Bazar Patrika.* The question of limitation may be disposed of in a few words, for in my opinion, in this suit, it really does not arise at all. The suit was in the first instance filed by this Plaintiff and 5 other members of the Calcutta Police Force claiming one aggregate sum of Rs. 20,000 as damages for the libel alleged to be contained in these three articles. The Defendants pleaded

* REPORTER'S NOTE.—The suit was originally instituted by all the six persons as Plaintiffs jointly : the Defendants raised the preliminary objection of misjoinder of parties and of causes of action : the objection was allowed by Chitty, J., [see *Aldridge* v. *A. S. Barrow*, 11 C. W. N. 680]: the Plaintiffs were given the option of either selecting one of them to go on with the suit or to allow the suit to be dismissed : the present Plaintiff elected to continue the suit, after the necessary amendment of the plaint.

A S. BARROW v. HEM CHANDRA LAHIRI.

a misjoinder of parties and of causes of action, and by my judgment delivered on 22nd April 1907, I upheld that plea, I permitted the Plaintiffs to elect which of their number should continue this suit, the other Plaintiffs with their cause of action being struck out, and the necessary amendments made. The Plaintiffs elected that the present Plaintiff, Inspector H C Lahiri, should proceed with the original suit . . . . The suit of the present Plaintiff is, therefore, in my opinion, the original suit filed on 26th January 1906, *i.e.*, well within the year allowed by law. If however, by any means, it could be regarded as a fresh suit, filed at the date of the amendment, I should still be of opinion that it was within time. My reasons for that opinion I purpose to give in detail in the suit of Superintendent Aldridge (No 317 of 1907) and I will not here do more than refer to my judgment in that suit.* The first issue must be decided against the Defendant

Of the other two issues, it will be more convenient to discuss the 3rd before the 2nd. There are now several copies of the articles in question before the Court and I do not purpose to set them out at length in this judgment. They may be referred to as Exs. J, K1 and K2 Nor do I propose to go at length into all the details of the Sovabazar Murder Case and the trial of Girish Goala at the Criminal Session of this Court in July 1905. Much of that ground was traversed by Defendants' counsel in their cross-examination of the Plaintiff and his witnesses, five of whom were originally his co-Plaintiffs and the learned counsel who addressed me for the defence discussed the former proceedings in minute detail. The Defendants have not raised the plea of justification, that is to say, they have not set up the defence that the defamatory words, if any, in the articles are true. The burden of proving that to be the case would lie upon the Defendants and in the absence of such proof, the presumption is that the defamatory words are false. It is not easy, therefore, to see what precise bearing the elaborate investigation of those details had upon the present trial. If it be urged that the Defendants might, by here exposing the conduct of the police in the trial, justify the inferences of fact which they drew in the articles complained of, I see no real distinction between that and a formal plea of justification. It is not within my province to try Girish Goala over again or to express my concurrence in or dissent from the unanimous verdict of the jury. Nor indeed do I intend to place the police on their trial with regard to their conduct in that matter. This could only have been necessary had the Defendants raised the plea of justification in this case. It will, however, be well that I should briefly state one or two conclusions at which I have arrived with reference to that case. That it was a weak case against the accused, a very weak case, there can be no doubt. At the same time, it was a case which the Standing Counsel thought should be proceeded with and laid before a jury. It is also clear that when the case came before the Court, its weakness was soon apparent. The witnesses in several instances broke down and the discrepancies in the evidence were many and serious. There could be little doubt in the face of such evidence what the verdict would be. But that the verdict did more than acquit Girish Goala would be a most dangerous assumption. The jury were not trying Kumar Sovendra or any person other than Girish for the murder, still less were they trying the Police with regard to their conduct of the case. All that they were required to do, and all that they were empowered to do was to express their opinion on the guilt or innocence of Girish Goala. I turn then to the articles complained of, to consider the question whether they can be said to be a fair comment on the proceedings. That it was a matter of public interest, may be at once conceded. The administration of justice has always been so regarded, and it is obviously essential that there should be the free right of discussion of all cases, whether civil or criminal decided by the Courts. Such discussion and criticism, however, must not go beyond the bounds of fair comment. The articles must each be read as a whole and, in fairness, I think that all these should be read together. So reading them, I think that there can be little doubt that they are *per se libellous*, in which case,

* See, *Indian Publishers Ld. v. Aldridge*, 12 C W N. 474.

A. S. BARROW v. HEM CHANDRA LAHIRI.

nothing but a plea of justification and a satisfactory evidence of their truth would avail the Defendants. They distinctly charge the police with misconduct of the very gravest description, amounting in several respects to a criminal offence, and assume that the charges thus made are true. For instance, the police are said to have entered into a conspiracy (whether among themselves or with other persons is not quite clear) to hang an innocent man and screen the guilty. The conspiracy is characterised as "Diabolical," "scandalous," and "clumsy," "a dastardly scheme." It is insinuated that they have taken bribes, that they have subpoenaed witnesses, and that to attain their object, they would not stick at perjury, for that I take to be meant by the expression "hard swearing." They are further charged with having starved and tortured the accused in order to extract a confession or confessions from him. This is all stated as fact. How can it then be said to be fair comment? There are numerous cases which show that the person who takes upon himself to criticise, be he a journalist or a private citizen, must not impute base or sordid motives, and still less criminality to others [see *R.* v. *Sullivan* (8), *R.* v. *Tanfield* (2). *Campbell* v. *Spottiswood* (9)]. No doubt, inferences of fact are permissible, and the statement of one fact may be a fair comment on another fact but the inference must be a reasonable one and in such a case as this, it would have, I think, to be the only one possible. Even then it is doubtful whether it could be regarded as a good excuse for a libellous statement. The inferences, however, which were drawn in this case against the police were by no means the necessary or only ones. That which is drawn from the verdict, namely that the jury accepted the suggestion of the conspiracy is, as I have intimated above, wholly unjustifiable, for the verdict could only mean what it said, that Girish was not guilty, and nothing more. The case of *Cooper* v. *Lawson* (10), affords a good instance of such an inference being regarded as libellous. The truth is that, in such a case, the comment ceases to be a comment and becomes a statement of fact, for which the Defendant must be held responsible. I have been unable to find any case (nor has any been cited at the Bar) where an imputation of a criminal offence has been held justifiable as coming under the head of fair comment. The unfairness of the thing is obvious. The article in the *Statesman* (Ex. K 2) professes to call for an enquiry into the conduct of the police. The Defendants in their Written Statement (para. 8) maintain that the object and gists of the said articles were to impress upon the Local Government that the circumstances brought out at the said trial necessitated an impartial and searching enquiry into all the incidents of the proceedings in the said murder case. The atrticles, however, assume as proved against the police the very facts which such an enquiry would have been held to elucidate; in other words, they pronounce judgment before the trial. I do not wish to be understood as expressing any approval of the conduct of the police in the murder case. It is unnecessary for me to express an opinion one way or the other. It may be that their conduct was open to criticism, and that an enquiry into it was essential in the interest of justice. But, I find nothing on the record of the murder case, as I have it before me, (the same record presumably as was before the writers of these articles) which could possibly justify the imputation of criminality cast upon the police by these articles, criminality stated as a fact, before any enquiry was as could be held. It may be convenient here to state that in considering the question of fair comment, I have assumed that the reprint of counsel's notes of the Sessions trial is a substantially accurate report of what took place. It is, no doubt, defective in some particulars, *e.g.*, the learned Judge's charge to the jury which took two hours, is comprised in little more than 5 pages of print. It is, however, the best that is now available. My conclusion on the 3rd issue is that the articles are in themselves defamatory, and that they cannot be excused as fair or honest comments on the proceedings of the Sova Bazar Murder Case. The question whether the articles apply to the Plaintiff presents rather more difficulty. "The defamatory words" (says Mr. Odgers at p. 141 of his work on Libel and

(2) 42 J. P. 423.
(8) 11 Cox C. C. 44 at p. 57 (1868).
(9) 3 B. & S. 769 (1863).
(10) 8 A. & E 746 (1838).

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

Slander) "must refer to some ascertained or ascertainable person and that person must be the Plaintiff"...........…"Where the words reflect on each and every member of a certain number or class, each or all can sue." Here the articles are no doubt impersonal. No individual is named. Throughout, the expression "the Police," is used and four times it is "the Calcutta Police." The leading case on this point is *Le Fenu* v. *Malcomson* (5), decided by the House of Lords in 1848. There the Lord Chancellor expressed his opinion as follows:—"If a party can publish a libel so framed as to describe individuals, though not naming them and specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here, and if those who must be acquainted with the circumstances connected with the party described, may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to, and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in such a state which would prevent the party being protected against such libels." And in the same case, Lord Campbell, C. J., said,—"The first objection is that this libel applies to a class of persons and that, therefore, an individual cannot apply it to himself. Now I am of opinion that, that is contrary to all reasons and is not supported by any authority. It may well happen that the singular number is used; and where a class is described it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint." The question is eminently one for a jury but it falls to me sitting both as Judge and jury to decide it. Now reading the articles carefully, it requires no extraneous evidence to see that "the police" must refer to the police engaged in the investigation of the murder case. It would be unreasonable to take the writers' remarks as reflecting on the conduct of members of the Force who had no connection whatever with the matter. That narrows down very considerably the class at which the libels are aimed. It may well be that the writers were unaware which individuals formed that class. It has however been clearly proved that the six officers who now appear as Plaintiffs, Superintendents Aldridge, Ellis, Rai Bahadur B. N. Chatterjee and Inspectors Yusubuddin, Nripendra Nath Ghosh and Hem Chandra Lahiri were the police officers who were directly connected with and took part in the investigation. The Commissioner himself took some part. He was present at the dragging of the tank on 30th May 1905 and it was he who ordered Sovendra's release. Below the officers named, there were also Jamadars and constables engaged, but these six were the only officers between the ranks of Superintendent and Inspectors who took part in the investigation. Superintendent Bowen who has been called as a witness, was only present at the trial at the Sessions. I shall deal with the other five Plaintiffs in deciding their suits. At present, I am only concerned with Inspector H. C. Lahiri. He has probably more right to complain of the libels than any of the others, for he was concerned in the case from first to last and was, under the order of his superior, in charge of the investigation throughout. The murder took place within the jurisdiction of his thana, the Shampukur thana. He was first called in, and took the earlier steps. He was called as a witness at the trial, and his name, therefore, came before the public as engaged in the case. He is mentioned too by name in one of these very articles though not, be it noted, in a libellous portion. Mr. Bowen stated that he read these articles and took them to refer to the Plaintiff and the other officers. Hem Sankar Sen employed in the Bengal Secretariat and a friend of the Plaintiff says that he too read the articles and understood that the Plaintiff was

(5) 1 H. L. C. 637 (1848).

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

referred to. It is difficult to understand how any one knowing Plaintiff and knowing that he was so much engaged in the case could do otherwise than consider the articles to convey a reflection on his character In the case of *Baurke* v. *Warren* (11), Abott, C. J., in summing up to the jury, said,—"The question for your consideration is whether you think the libel designates the Plaintiff in such a way as to let those who knew him understand that he was the person meant It is not necessary that all the world should understand the libel; it is sufficient if those who know the Plaintiff can make out that he is the person meant." After giving the question my best consideration, I have come to the conclusion that the Plaintiff is sufficiently indicated and that he is entitled to recover.

Before considering the question of damages, there are one or two things which I must mention to show that they have not been forgotten, though, in my opinion, they have no real bearing on the case. The first is the document which has been throughout called "the explanation" though it is in truth the report submitted by Superintendents Aldridge and Ellis in compliance with the orders of Government. It is dated 24th July 1905, subsequent to the publication of the articles complained of. Though it was signed by the two Superintendents abovenamed and though Superintendent Aldridge was mainly responsible for the wording and most of the opinions expressed, all six officers have accepted responsibility for the document, for it was prepared after all had met in consultation. It may be that the document is not entirely ingenuous and that it contains imputations on others which had far better been omitted. Still, it cannot in my opinion affect the question which I have to decide, *i.e.*, whether the articles complained are libellous and whether they refer to the Plaintiff. It could only be relevant with reference to the *quantum* of damages to be awarded. Another document which was referred to and relied on by Defendant's Counsel was the letter of Defendants' attorneys dated 5th December 1905. It contained an offer by the Editor of the *Indian Daily News* that if these 6 Plaintiffs could satisfy him that, on fair explanation by the Police officials concerned and the enquiry by the Local Government, the Government was satisfied that the charges made were wholly untrue, he would most gladly place before his readers all facts vindicating the conduct of the Police officers concerned in the case and exonerating them from all responsibility and blame for the lamentable failure of justice. I intimated at the hearing and now repeat that the Plaintiffs (I speak of all six) were in no way bound to accept such conditional offer. It left them still subject to the arbitrament of the Editor of the *Indian Daily News*. It was in no sense an apology for or retractation of the statements contained in the articles, and it was impossible to say what might be the result to the Plaintiffs of accepting the offer. The circumstance that transpired that the Local Government had exonerated these Police officers has, I think, no bearing on this case. The Defendants have not sought to justify, and as I said before, the Police are not on their trial before me, though the line of the defence has tended rather in that direction. Nor am I concerned with the motives which have led the Local Government to undertake the responsibility for the costs in this case. When it appeared that the question of costs had been the subject of correspondence between the Local Government and these officers, I thought it advisable that the exact arrangement should be disclosed. It cannot, however, affect my decision in the slightest degree. The only persons responsible to the Court in the matter of costs are the parties to the suit. Coming then to the question of damages, it is not easy to say what amount should be awarded to the Plaintiff. On the one hand, the libel is serious one and should not be lightly passed over. On the other hand, the Plaintiff has not, on his own showing, suffered any material injury. It is not, of course, necessary to prove special damage, but in making an award, the circumstances of the Plaintiff and the effect of the libel upon him may, I think, be fairly taken into consideration. The amount to be awarded in this case is really immaterial. The Plaintiffs in this and the cognate suits have come forwarded, as Superintendent Aldridge said, not so much for the money, as to vindicate their characters. In this the

(11) 2 C. & P. 307 (1862)

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

Plaintiff succeeded and I think that the requirements of the case will be satisfied if I award him Rs. 250. For that amount there will be a decree. The Plaintiff must have his costs of suit calculated on Scale 2.

The Defendant Company appealed against the above judgment and the decree made thereon.

Mr. Morison (with him *Messrs. E. P. Ghosh* and *L. P. E. Pugh*) for the Appellants, submitted that the articles contained only fair and *bonâ fide* comments on matters of public interest. The Police had, on their own admission, a weak case which they pressed before the jury and there were certain facts brought out during the course of the trial which justified those comments. There was not one relevant fact in connection with the guilt of the accused that was not annihilated. The facts were so outrageous that, if this case had come before a jury, a plea of justification, if taken, might have succeeded. There was no person particularly mentioned in a libellous way. Those articles had to be considered as a whole in order to test whether they contained statements of facts or merely comments. The sense, spirit and object of the articles were to secure a public enquiry on the subject.

[HARINGTON, J.—Are you allowed to say, a man has committed criminal offence of conspiracy and comment on it ?]

My first contention is—this is a fair and *bonâ fide* comment on a matter of public interest. If I have foundation for my comments, there is no libel. I submit that it is not necessary for me to prove every statement in those articles, and it is because I am unable to do so that I did not take the plea of justification in my defence.

The Police must have known that the evidence was false and that is what they are accused of in the articles. Any fair man would have said just the same thing, under similar circumstances. [*Merivale* v. *Carson* (12), *Campbell* v. *Spottiswoode* (9), *Wason* v. *Walter* (13), referred to].

No attempt has been made to prove malice. [*Taylor* v. *Hawkins* (14)]. Furthermore, it was a matter of public importance and public benefit ought to be consulted. [*Henwood* v. *Harrison* (15)]. A public critic is entitled to comment fiercely on matters public.

[HARINGTON, J —Do you say you have more right than a private subject of the king ?]

If not in law but in fact I am. [Cited, *South Hatton Coal Co., Ld.*, v. *North Eastern News Association* (16), *McQuire* v. *Western Morning News Co., Ld.* (17)].

If there was any malice—it is unfair criticism. Was there any foundation ?—If not, it is unfair. In this case, no malice was alleged and proved and there was sufficient foundation to warrant the comments made.

[FLETCHER, J.—Have you found any case where a statement *per se* a libel, was justified as a comment ?]

A case may be *primâ facie* libellous and yet justified as a comment. In the absence of malice, the comment is justified, if there be some foundation for it and it comes within the protection of privilege. This is the principle I enunciated, as laid down in *Wason* v. *Walter* (13)

(9) 3 B. & S. 769 at p. 776-7 (1866).
(12) 20 Q. B. D. 275 at pp. 280-1 (1867).
(13) L. R. 4 Q. B. 73 at pp. 88, 94 (1868).
(14) 16 Q. B. 308 (1851).
(15) L. R. 7 C. P. 606 at p. 628 (1872).
(16) 1 Q. B. 133 (1894).
(17) 2 K. B. 100 (1903).

A. S. BARROW v. HEM CHANDRA LAHIRI.

and *Henwood* v. *Harrison* (15). [See also, *Woodgate* v. *Ridout* (1) and Odgers on Libel and Slander, 1905, 4th Edition, 208].

Mr. Pugh (following *Mr. Morison*, on the point of limitation and misjoinder) submitted that the action should be dismissed because (1) after the election of the present Plaintiff to continue with it alone and after the amendment was made of the cause-title and the amount of the claim, the suit assumed quite a new aspect from the one originally filed and it must be taken to have been filed on the day the amendment came to be made —one-sixth of a suit was not the same as the whole suit—when the suit was clearly barred by limitation, and because (2) the suit, as originally framed, was bad for misjoinder of parties and cause of action.

Regarding misjoinder, Mr. Pugh relied on *Smurthwaite* v. *Hannay* (18), *Sandes* v. *Wildsmith* (6), *P. & O. S. Navigation Co.*, v. *Tsune Kijima* (19) Civil Procedure Code (Act XIV of 1882), sec. 31.

Mr. Garth (with him, *Messrs B. Chakravarti*, *S. P. Sinha*, *B. C. Mitter* and *N. Sircar*) for the Respondent, contra.

On the subject of misjoinder, *Mr. Garth* cited, *Virajlal Bhaisankar* v. *Ramdat Hari Krishna* (20), *Lingamal* v. *Chinna Venkatammal* (21), *Ramanuja* v. *Devanayaka* (22).

Cur. adv. vult.

(1) 4 F. and F. 202 at p. 223 (1865).
(6) (1893) 1 Q. B. 771.
(15) L. R. 7 C. P. 606 at p. 628 (1872)
(18) A. C. 494 (1894).
(19) Ap. C. 661 (1895).
(20) I. L. R. 26 Bom. 259 (1901).
(21) I. L. R. 6 Mad. 239 (1882).
(22) I. L. R. 8 Mad. 361 (1885).

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is a suit for libel. The Plaintiff is an inspector in the Calcutta Police : the Defendants are respectively the Editor and Proprietor of a newspaper called the *Indian Daily News*.

The Plaintiff complains of two articles, which appeared in the issues of the said newspaper on the 17th and 19th July 1905, and of another article which appeared in such newspaper on the 19th July, being a reproduction of one which had previously appeared in a newspaper called *The Statesman*. These articles constitute the alleged libels.

The Plaintiff charges that the Defendants, by such publications, defamed him falsely and maliciously : in particular that the Defendants falsely and maliciously accused the Plaintiff and other Police officers of having conspired to charge an innocent man with murder though they knew him to be innocent, of having manufactured false evidence, of extorting confessions by torture, and of having accepted bribes to effect the above objects.

The Defendants deny that the articles referred to the Plaintiff, that they are not defamatory, and they do not bear the meaning attributed to them, and then they plead, in substance, that the publication was for the public benefit, and that the articles constituted fair and honest comment over matters of grave public interest, and that the object of the articles was to impress upon the Local Government the necessity of an impartial and searching enquiry into the matter. They deny malice and there is no plea of justification. They also set up the statute of limitation.

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

The case was tried at considerable length before Mr. Justice Chitty, who found for the Plaintiff, with Rs. 250 damages and costs. The Defendants have appealed

The circumstances under which the impugned articles came to be written are these:—

One Girish Goala stood indicted at the High Court Sessions for the murder of one Ganga, and abatement of such murder. The trial lasted for 4 days, when he was unanimously acquitted by a mixed jury, after a deliberation of only four minutes.

The trial excited great public interest, and the conduct of the police in the case elicited from practically the whole press of Calcutta and elsewhere, criticisms couched in language of considerable severity. *The Englishman*, *The Pioneer*, *The Statesman*, and *The Bengalee*, newspapers circulating in Calcutta, published articles in language of a decidedly strong description, relating to the disclosures on the trial. The proceedings in the trial have been placed before us, and it is clear from those proceedings that strong grounds existed for suspecting that the prosecution witnesses or, any way, some of them, had been tutored, and that the conduct of the police was open to very grave criticism.

Counsel for the defence did not hesitate to charge the police with a conspiracy against the accused to secure his conviction, in order to enable the person really guilty to escape. In his charge to the jury, the learned Judge told the jury it was for them to consider whether the whole story was concocted or not, in order to extricate the Kumar (a young man against whom it was imputed that he himself had committed the murder) and whether there was such a plot or not as has been suggested for the defence. The jury after only 4 minutes deliberation, brought in a verdict of not guilty. It was in these circumstances that the impugned articles came to be written. In my opinion, such circumstances would justify the use of language of considerable severity, if it was by way of comment, fair and *bonâ fide* comment, and with a reasonable regard to the requirements of truth and of justice.

And it is clear that the Government of Bengal were at once solicitous about the methods of the police in the case, for in their letter of the 20th July 1905, to the Commissioner of Police of Calcutta, that Government, within only three days after the publication of the first article complained of, referring to the case as reported in the daily press wrote:—

"It appears that the acquittal of the accused and the facts elicited at the trial tend to throw discredit and suspicion on the action and methods of the police in the matter." and asked for a full report and expression of the Commissioner's opinion on the case.

The law applicable to a case of this class is clear: the difficulty arises in the application of the law to individual cases. I will state concisely what I understand the law to be.

The Administration of Justice is a matter for fair and *bonâ fide* discussion, and to quote the language of the Lord Chief Justice Cockburn, when charging the jury in *Woodgate* v. *Redout* (1):—

"That the Administration of Justice

(1) 4 F. and F. 202 at p. 223 (1865).

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

should be made a subject for the exercise of public discussion is a matter of the most essential importance."

But writers in public papers must be careful as to the language they use. The same learned Judge in *R.* v. *Tanfield* (2), is reported to have charged the jury as follows :—

"Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of Courts of Justice, and fairly commenting on them, if there is any thing that calls for observation ; but they should be careful in discharging that function, that they do not wantonly assail the character of others, or impute *criminality* to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences."

In cases of this class, it is absolutely essential to differentiate between fair and *bonâ fide* comment and allegations of fact. This is clearly pointed out, if at the present day, authority were needed, by Lord Herschell in *Davies* v. *Shepstone* (3). That very distinguished Judge says, in delivering the advice of the Judicial Committee :—

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as, that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with serverity, the ackowledged or proved acts of a public man, and "quite another to assert that he has been guilty of particular acts of misconduct."

Before, then, we proceed to discuss the question of comment, fair or otherwise, we must ascertain whether the language complained of is an allegation of fact, or merely comment. If the former, we must be satisfied either of its truth, or that it is privileged.

We must, of course, look at each article as a whole, and in the articles now under discussion there is doubtless much that is comment ; but I do not think attaching to ordinary English words their ordinary English signification, there is any difficulty in distinguishing between that which is allegation of fact and that which is comment. Take the following passage : "Girish, however, *starved and tortured as he was*, proved stubborn." This is a statement that Girish was starved and tortured : it is not comment on the evidence given at the trial, or the expression of an inference fairly deducible from that evidence. Then :—"He refused to put his neck into the noose which the police and those behind them had so neatly tied for his accommodation." This is a statement of fact : and it is impossible not to understaud what is intended, and what is the imputation conveyed. But stronger allegations are to be found in the article of the 19th July :— "The true story of this clumsy police conspiracy," is an allegation of fact that there was a "clumsy police conspiracy." And again : The police over-reached them-

(2) 42 J. P. P. 424.
(3) 11 App. Cas. 187 at p. 190 (1886).

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

selves badly, but it is only due to the "fine defence of the prisoner's counsel *that this dastardly scheme to hang an innocent man did not succeed.*" This is tantamount to saying that there was a dastardly scheme to hang an innocent man: it is impossible to regard that as comment, and even if it had been, as fair comment. It is a charge of a heinous criminal offence: there is no plea of justification, and the Defendants have not pleaded that these allegations are true.

Then can it be said that the statements complained of are privileged?

In support of this claim of privilege, much reliance has been placed upon some observations of Chief Justice Cockburn, when charging the Jury in *Hunter* v. *Sharp* (4):—

"The occassion is a privileged one and if the privilege is exercised honestly, faithfully, and with reasonable regard to what truth and justice require, then, though he may exceed the limits of what he can legally prove to be the truth, he is protected from liability. It is not, therefore, necessary that the justification should appear to you to be made out, if you think, that the Defendant, or the writer, was in the reasonable and honest exercise of his vocation as a public writer, even although he was not fully warranted in drawing the inferences he did as to the conduct of the Plaintiff, and though it may be that he was not entirely justified by the absolute truth."

I have very carefully considered whether these observations can properly apply to a case like the present. There are no doubt a few cases in the books in which that which has been called "Licentious Comment" has been allowed. They are, however, of a very different character from the present, and no authority has been cited, nor do I think any authority can be cited, to show, that, when a grave criminal offence is alleged as a fact, anything short of proof of its truth can avail the Defendants in a libel action. In the same case of *Hunter* v. *Sharp* (4), counsel for the Plaintiff claimed a verdict on the ground that the libel imputed to the Plaintiff that he was guilty of a criminal charge, when Cockburn, C. J., is reported to have said:—"If that were so, *of course* the Plaintiff would be entitled to a verdict as there was no evidence in support of it" (p. 992). And the learned Judge amplified this view in his Charge to the Jury at p. 995.

I can find nothing in any reported case which even qualifies this view: nor was there any privilege on the occasion to justify this allegation as a fact of a most grave criminal offence.

I have cited somewhat freely from the charges of Chief Justice Cockburn, because there are few Judges who have had such a wide and varied experience in cases of this class, and because I can find no judicial utterances more favourable to the Defendants.

Another point is as to whether or not the articles apply to the Plaintiff. The law on this point is laid down in *Le fanu* v. *Malcomson* (5), and as regards the evidence, I do not think there can be any reasonable doubt that the articles were intended to apply to him.

There is only one other point: it is contended for the Appellant that the suit

(4) 4 F. and F. 983 at p. 1006 (1866).

(4) 4 F. and F. 983 at p. 1006 (1866).
(5) I H. L C. 637 (1848).

A. S. BARROW v. HEM CHANDRA LAHIRI.

is barred by limitation. But the suit, with five other officers of the Calcutta Police as co-Plaintiffs, was instituted on the 26th January 1906, well within time. The names of those other five officers were struck out on the 22nd April 1907, on the ground of misjoinder of parties and of causes of action, but the present Plaintiff continued sole Plaintiff: that is sole Plaintiff in a suit commenced within time. I do not think the suit is barred. *Sandes* v. *Wildsmith* (6), is in point.

We have been invited to say whether or not the Police were guilty of the conspiracy charged : there is no plea of justification and we cannot go into this. We are not trying the murder case over again : we are not trying the Police : we cannot, nor do we, express any opinion upon their conduct, in relation to the murder case. We can only try the issue of libel or no libel.

I am unable to appreciate why, when there was no plea of justification, either party was allowed, in the Court of first instance, to go into the evidence they did, which had the effect of substantially lengthening and increasing the costs of the proceedings. With the exception of the very small portion, connecting the libel with the present Plaintiff, that evidence has not been read to us.

A good deal has been said about the Government of Bengal guaranteeing the Plaintiffs' costs. We cannot go into this question, though, I feel constrained to say that, if the Government possesses this power of unlimited indemnification, it is one which ought to be exercised with the greatest care and discrimination, for otherwise, it might develop into a weapon of oppression.

And, I cannot part with the case without expressing my strong disapproval of the attack made by Superintendent Aldridge in his explanation, on the Counsel for the defence in the murder trial.

The appeal fails and must be dismissed with costs.

HARINGTON, J.—In this case the Defendants appeal from judgment in favour of the Plaintiff in an action for libel published in the Defendants' newspaper.

No question arises as to publication : the Defendants do not justify : but plead that the articles complained of are fair comments on a matter of public interest and that they do not refer to the Plaintiff.

The matter of public interest to which the articles related was what is known as the Sova Bazar murder case—a case in which one Joggeswar Ahir *alias* Girish was indicted at Sessions for the murder of one Ganga, and was acquitted by the jury.

Ganga was last seen alive on May 24th 1905. On May 28th, a dead body in an advanced stage of decomposition was discovered in a bath-room in a garden attached to the house of the Sova Bazar Raj family, where Ganga had at one time been employed. Death had been caused by injuries inflicted with a cutting instrument.

On the morning of May 30th, a tank near the bath-room was, under the superintendence of the Police, dragged by some fishermen in the presence of Girish and others and some clothing and a knife were discovered. After the discovery of these articles, Girish made a statement, in consequence of which, he was

(6) (1893) 1 Q. B. 771.

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

sent to the Magistrate to whom he stated that Ganga had been murdered in the bath-room by Sovendra Bahadur—that he had seen the murder committed—and that Sovendra had threatened to kill him if he mentioned what he had seen. On this statement Sovendra was arrested.

After his arrest, it was observed that Girish had a cut on his hand which he first said was due to the breaking of a soda-water bottle. But he afterwards stated that he was holding Ganga when Sovendra stabbed him. In consequence, Girish was arrested and Sovendra released on bail.

Some property alleged to have belonged to Ganga was found at the house of Girish's mistress after his arrest. On 3rd June, he was again taken before the Magistrate where he made a statement to the effect that Sovendra murdered Ganga because of an intrigue which Ganga was carrying on and that he had caught hold of Ganga to prevent Sovendra striking him, and so had received the wounds on his hand.

Girish was placed on his trial on 13th July, the case concluded on the 15th, when he was acquitted.

The articles complained of as libels appeared in the *Indian Daily News* of 17th July and 19th July 1905, the latter issue reprinting and adopting an article which had appeared in the *Statesman* of the 18th July on the same subject.

The articles contained very vehement attack on the police engaged in the case, on the ground that they had entered into a conspiracy with other persons to get an innocent man convicted and executed for the purpose of screening the real murderer from justice.

The question is, was the Judge in the Court of the first instance right in holding that the articles published by the Defendant were not protected under the right which all the King's subjects enjoy of making fair comments on matters of public interest?

The articles in question are three in number: they cover nearly 250 lines of printed matter.

The first contains a statement that the Judge in his summing up indicated that he did not believe that the whole fabric of the prosecutions evidence was a diabolical plot to hang an innocent man, but that the jury held other views and by their verdict said that it did not strain their credulity to believe that this case was a particularly diabolical conspiracy.

The writer goes on to state that after Kumar Shovendra Krishna Deb was arrested, articles alleged to be the property of the murdered man were found in the possession or custody of Girish, and then quotes the speech of the learned Counsel for the defence, who suggested that the police, in conjunction with the dependents of the Kumar's family, got some sort of evidence against the accused.

Then follows an allegation that Girish was starved and tortured to make him confess and that there had been monetary transactions between the police and other persons with regard to the case.

The second article, after calling attention to the reprint from the *Statesman*, contains the following passage: "The true story of this clumsy police conspiracy is that the police thought that the unfortunate Joggeswar Ahir would be undefended and that this mass of trumpery evidence might throw dust in the eyes of

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

the Judge and Jury, when backed by the hard swearing of the detective officers and policemen. The police over-reached themselves badly, but it is only due to the fine defence of the prisoner's counsel that this dastardly scheme to hang an innocent man did not succeed." The writer then attacks a witness in whose presence some of the incriminating articles are said to have been found and suggests that though the man was the son of a prostitute living in a brothel, the police put him forward as a respectable zemindar.

The third article which originally appeared in the *Statesman* deals with the case more fully. The writer discusses the evidence and the character of the witnesses, draws the inference that Girish had been tortured by the police—and alleges that the trial has revealed the outlines of a scandalous conspiracy on the part of the police.

The article concludes with a demand that the guilty person or persons should be brought to justice and that a fearless and unsparing investigation should be made into every aspect, every stage, every fact of the case connected with the conduct of the police.

The latter article, though the longest, requires less notice than the other two. It is more judicial in its tone and if it be held that the two former articles fall within the limits of the license accorded to those who comment on the matters of public interest, it cannot be said that the latter article is not entitled to the same protection.

There can be no question that the trial was a matter of considerable public interest and that the Defendants were not only entitled to publish in their newspaper a fair and accurate report of the case but were also entitled to discuss fully and openly the proceedings and to publish such criticism and comment as the case merited, provided only, they kept within the limits of fair comment.

The question whether the writing complained of is a libel or a fair comment on a matter of public interest is a question of fact which, in England, is determined by a jury subject to the direction of the Judge as to what in law constitutes a libel.

In this country, the Judge dealing with both the law and the facts would first have to determine whether the matters complained of were defamatory of the Plaintiff or not; secondly, if defamatory of the Plaintiff, whether they were comments or assertions of fact. If he came to the conclusion that, though defamatory of the Plaintiff, they were comments on a matter of public interest, he would then be called upon to determine whether they were fair comments, made *bonâ fide* and without malice.

A Judge in this country exercising the functions of a jury would be bound to direct his mind to those considerations to which, had he been summing up to a jury, he would have been bound to direct their minds. He would have been bound to tell the jury that, if the writing imputed that the Plaintiff had been guilty of misconduct or dishonesty or incompetence in respet of his employment as Police Inspector, such an imputation was defamatory. That if the writing contained an imputation that the Plaintiff had committed the criminal offence of conspiring with other persons to place

A. S. BARROW v. HEM CHANDRA LAHIRI.

before the Court false evidence in order to obtain the conviction of an innocent man, that such an imputation was defamatory.

Here, there can be no sort of question that, the imputations made are defamatory to the highest degree and constitute a very serious libel on the Plaintiff (assuming they apply to him) unless they can be excused on the ground that they are fair comment.

On this point, the Judge exercising the functions of a jury would be bound to read each of the articles complained of, and see whether they were only comments or whether there was to be found in them any allegation of fact defamatory of the Plaintiff as distinguished from defamatory comments on the Plaintiff's acts. There is, as is pointed out by Wilde, B. in *Popham* v. *Pickburn* (7), a strong distinction between alleging incorrectly that a man has committed a disgraceful act, and commenting on some act of his truly stated.

Now, omitting the assertions of fact which are to be found in the first and third articles, it is impossible to read the second article complained of without seeing that it is in no sense a comment on any of the evidence given but that it asserts as a fact that a very grave crime has been committed by the police. It states that there was a scheme on the part of the police to hang an innocent man; that the police entered into this scheme because they thought the innocent man Joggeswar Ahir—otherwise Girish—would be undefended, that believing that he would be undefended they thought they could mislead the Judge and Jury and so conspired to commit perjury and to produce false evidence to the end that they might procure the conviction and execution of an innocent man.

This is not a comment on any proved or admitted fact. It is a statement that the police have committed a crime of great heinousness, and of peculiar atrocity—a crime which, if proved against any members of the police force, would deservedly call down upon them the most severe punishment. It must be taken that this allegation that this conspiracy has been entered into is untrue, because the Defendants have not asserted in their pleading that it is true—the presumption of law, therefore, that the libel is false arises.

In my opinion, although a writer may be excused even if in the course of a fair and temperate comment he do go a little beyond what he can strictly prove, yet if he take upon himself to publish as a fact to the world at large that the prosecutors or witnesses in a criminal trial have conspired to procure, by false evidence, the wrongful conviction of a man they know to be innocent, he will be answerable in damages for libel, unless he places on the record a plea of justification, and gives evidence to establish that the defamatory statement is true in substance and in fact.

In the present case, the Defendants have not taken that course but the line of cross-examination persued with the Plaintiff's witnesses appears to be aimed at shewing that there was in fact a conspiracy as alleged by the Defendant. The tactics of insinuating the truth of the libel without putting a plea of justification on the record, which would have

(7) 31 L. J. Ex. at p. 136 138 (1862)

A. S. BARROW v. HEM CHANDRA LAHIRI.

enabled the Plaintiff to combat the truth of the libel, have always been considered under English law as a serious aggravation of the damages.

The learned Judge, in dealing with the case, has found as a fact that articles in question go beyond the limits of fair comment. This is the conclusion he has come to on the facts in the exercise of his functions as a Judge of fact.

Has the Appellant shewn any ground for interfering with his finding? It may be said, it is going too far to say that, if an article is *per se libellous*, nothing but a finding in favour of the Defendant on a plea of justification will avail as an answer to the action. But if that passage in the judgment is read with what follows, it becomes clear that the learned Judge is dealing with the particular libels before him and not laying down a general proposition of universal application, for he goes on to point out that the articles state as a fact that the police have committed a criminal offence and having found that this is the effect of the articles, he holds that the allegation that the police have committed a criminal offence does not come under the head of fair comment.

In this I agree, and I think it would have been a proper direction to a jury to tell them that, if they were of opinion that the article asserted that the police had committed the offence of conspiracy, then they could not find that it was within the protection accorded to fair comment on matters of public interest.

The only other question which arises is "do the articles refer to the Plaintiff?"

The learned Judge has found that they do. They purport to be directed against the Calcutta Police in relation to the Sova Bazar murder case.

The Plaintiff was the Inspector in charge of the investigation: his name is mentioned in the article reprinted from the *Statesman*. It is idle to suggest that the articles directed against the police in reference to this murder do not apply to the only member of the police force mentioned in them by name—he being the Inspector in charge of the case. With regard to the questions of the guarantee for costs which the Plaintiff's employers have given, I agree with the observation of my lord on this point. As the matter is not one which affect the issue of the appeal before us, I abstain from saying anything further with reference to it. I entirely concur in the observation which my Lord has made with reference to the attack on Mr. Ghosh.

I am unable to see any reason for disturbing the judgment of the learned Judge of the Court of first instance and agree that the appeal should be dismissed with costs.

FLETCHER, J.—I have had the opportunity of reading the judgment which has been delivered by my Lord.

It would have been sufficient for me to have expressed my concurrence therewith, but as the case is one of some public interest, I will state briefly the reasons that have led me to come to the same conclusion as my Lord and my brother Harington. Now the present case is to my mind a very simple one. We are not here trying the Sova Bazar murder case, nor the police. The only questions we have to decide are the issues raised in the present suit. Now those issues

A. S. BARROW *v.* HEM CHANDRA LAHIRI.

are (1) Do the articles complained of refer to the Plaintiff? (2) Are such articles fair comment on a matter of public interest? and (3) Is the present suit barred by limitation? With regard to the first of these three issues, there can, to my mind, be no doubt but that the articles do and were intended to refer to the Plaintiff and the other members of the police investigating into the Sova Bazar murder case.

The second issue is the one that has been most strenuously agrued on this appeal. Now, that the matter is one of public interest is not denied.

The publication therefore in a newspaper of articles referring to the proceedings of the police in investigating into and in conducting the prosecution in the Sova Bazar murder case is protected, provided that such articles fall within the limit of fair comment. Nor is this privilege to be put down solely on the ground that the writer of the articles has indulged in what has been described as "licentious comments." But if the writer, instead of limiting himself to fair and reasonable comment, goes out of his way to make statements of fact affecting the character or reputation of the Plaintiff, he cannot rely on the plea that the articles are fair comment on a matter of public interest but must justify the articles by proving the truth of the statements complained of. No plea of justification has been placed on the record in the present case. Are then the articles complained of fair comments on a matter of public interest or do they contain statements of fact which are defamatory on the Plaintiff? I have come to the conclusion that such articles contain defamatory statements which cannot in any view be justified as comments.

Take the article appearing in the *Indian Daily News* of the 19th of July 1905. There the public are told that there was "a police conspiracy," "hard swearing" on the part of the police and "a dastardly scheme to hang an innocent man." All these statements are *per se* libellous and unless they can be justified as fair comment, the present suit is really an undefended one.

Each of the above-mentioned statements charges the Plaintiff and the other investigating police with the commission of serious criminal offences and I am not aware of any case in which imputing to the Plaintiff the commission of a criminal offence has been held to come within the range of fair comment.

Moreover, in my opinion the writer of this article intended the above-mentiond statements to be statements of fact and not comment for he informs the public that these libellous statements are "the true story."

The Defendants having failed on the plea of fair comment, the Plaintiff is entitled to succeed, unless this suit is barred by limitation.

On this issue, it is sufficient for me to state that I entirely agree with the judgment. I also wish to express my concurrence with the remarks which have been made by my Lord as to the Government indemnifying parties to suits against costs to be incurred by them and as to the attack on Mr. Ghosh, Counsel for the defence, in the criminal trial by Superintendent Aldridge in his letter of explanation to the Bengal Government.

I, therefore, agree that the judgment

A. S. BARROW v. HEM CHANDRA LAHIRI.

of Chitty, J. was correct and that this appeal fails and ought to be dismissed with costs.

Messrs. G. C. Chunder & Co., Appellant's Attorneys.

Messrs. Ghosh and Kar, Respondents' Attorneys.

P. R. C. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 408 OF 1906.

MITRA, J.
1908.
24, February.

AKHOY CHANDRA BHUTTACHARYA and another, Defendants Nos. 4 and 6, Appellants,
v.
HARI DAS GOSSWAMI, Plaintiff, and Hari Pado Ghuttack and others, Defendants, Respondents,

Hindu Law—Dayabhaga school—Succession—Uncle's estate—Joint nephew preferential heir to nephew separated by exclusion —Spiritual benefit, doctrine of, not the only principle of succession—Mitakshara, application of, in absence of texts of Dayabhaga—Quasi contract and affection, principle of.

Spiritual benefit is not always the guiding principle of inheritance under the Bengal School of Hindu law.

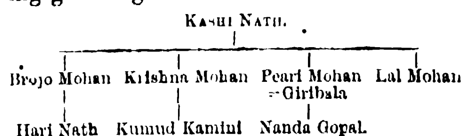
In cases not contemplated by Jimutvahana or his followers, the law should be developed on rational lines consistently with principles followed in similar cases and the decisions of the Courts should not be based on a blind adherence to the principle of spiritual benefit when such adherence would lead to a violation of other recognised principles consistent with natural justice.

In all cases of absence of texts or precedents under the Dayabhaga law recourse should be had to the theory of propinquity and natural love and affection as adopted by Vignaneswara and the commentators of the more ancient and orthodox schools of Hindu Law.

On the death of a Dayabhaga Hindu a nephew who was living in joint estate and mess with him excludes another nephew who was separate, when the separation was due to his father having been excluded from inheritance for causes not expressly mentioned in the text books. The position of the latter is similar to that of the separated coparcener who had not re-united, and consideration which applies in the one case should govern the other.

This was an appeal preferred on the 20th of March 1906, against the decree of A. E. Harwood, Esq., District Judge of Zillah Burdwan, dated the 6th of December 1905, affirming that of Babu Krishna Kumar Sen, Munsif of Kalna, dated the 23rd of December 1904.

The facts of the case will be best understood with reference to the following genealogical table :—



Kasinath excluded Brojo Mohan from inheritance and when he died his estate was inherited by the three remaining sons. Krishna Mohan died leaving his daughter Kumud Kamini as heiress. When Lal Mohan died he left surviving him as possible heirs his two nephews, Hari Nath and Nanda Gopal. The Defendants-Appellants claimed title to an

AKHOY CHANDRA BHUTTACHARYA *v.* HARI DAS GOSSWAMI.

8 as. share in the estate of Lal Mohan, through Hari Nath. The Plaintiff claimed under a sale deed executed by Giribala the mother and heiress of Nanda Gopal and he averred that Nanda Gopal was entitled to the estate of Lal Mohan to the exclusion of Hari Nath. Hari Nath, like his father Brojo Mohan, lived separately from the rest of the family who however were living in joint estate and mess at the time Lal Mohan died. Both the Courts below held Nanda Gopal to have been the sole heir of Lal Mohan and decreed the suit which was for recovery of possession upon a declaration of the Plaintiff's title. The Defendants Appellants preferred this second appeal.

Babus Ram Chandra Majumdar and *Hara Kumar Mitter* for the Appellants.

Babu Sarat Chandra Khan for the Respondents

The JUDGMENT OF THE COURT was as follows:—

The argument before me has turned on a question of Hindu law not touched by the text-writers or commentators of the Bengal School of law or any decision in British India. Such a case was not in the contemplation of the ancient Hindu lawyers.

Kasinath died leaving four sons, Brojo Mohàn, Krishna Mohan, Peary Mohan and Lal Mohan. But Brojo Mohan had been excluded from inheritance by his father. He did not inherit any share of Kashi Nath's property. His property was inherited by his three other sons, Krishna Mohan, Peary Mohan and Lal Mohan. If Brojo Mohan had got a share of his father's property either by partition during his life time or by inheritance after his death, there would have been no difficulty in the case. The case of partition during the life time of the father or after the father's death is contemplated by Hindu lawyers and rules of inheritance are laid down for cases of continued separation or of re-union. Exclusion for causes not expressly mentioned in the text-books was not contemplated.

Brojo Mohan died, it is said, 40 or 50 years ago. He was never in possession of any portion of the estate left by Kasinath, neither had his son Hari Nath from whom the Defendants claim by transfer ever possession. The exclusion, therefore, was complete, and if the law of limitation could be set up, the bar would be fully effective. Both the father and son were entirely separate from the rest of the family and had never at any time any thing to do with the family property. Re-union, as understood in Hindu law, could not take place between them and the rest of the family, because there never was a union followed by separation, see *Balabux* v. *Rukhma Bai* (1).

Krishna Mohan died leaving him surviving Kumud Kamini his daughter. Peary Mohan had a son Nanda Gopal. Nanda Gopal inherited his father's one third share of Kasinath's property, and when he died sonless, Achala his widow and on her death, Giribala his mother, the widow of Peary Mahan, inherited his share. Lal Mohan died leaving Nanda Gopal and Hari Nath his nephews, surviving him. He had no son or widow and it is alleged that his share passed to his brother's son Nanda Gopal alone.

(1) 7 C. W. N. 642: s. c. I. L. R. 30 Cal. 725; L. R. 30 I. A. 130 (1903)

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, APRIL 13, 1908. [No. 22

Contents.

NOTES

WE HAVE BEEN REQUESTED TO ANNOUNCE THAT ON the 10th March last the Madras High Court Vakils' Association was incorporated under the Literary, Scientific and Charitable Societies Act, XXI of 1860.

A COPY OF A PRINTED NOTICE ISSUED BY THE CIVIL Courts in the District of Tipperah has come to our hands which requires decree-holders desiring to put to sale any immoveable property to publish the sale notification in a certain local newspaper, and goes on to say that failing this the property sought to be sold would not be sold; the notice also requires the decree-holders to pay costs of the publication of the sale notification and makes the filing of the receipt of the payment of such costs to the newspaper office as a condition precedent for the holding of the sale. Sec. 289 of the Civil Procedure Code provides the mode of making proclamations of sale. Under this section a Civil Court may require the sale notification to be published in a local paper. But the proper course, we presume, is to make the order in each case as it comes up and not to issue a general printed circular like the one before us. We doubt also how far the provision in the notice that a receipt of payment of the advertizement charges from the newspaper office should be filed before the sale can be held is in accordance with the law.

THE DECEMBER NUMBER OF THE *Journal of the Society of Comparative Legislation*, received last month, shows how the self-governing Colonies of the British Empire are engaged in social and industrial legislation calculated to benefit the community. The following is a *resume* of the legislation for the benefit of the young.

The care of the young—*spes gentis*—is again a noticeable feature of the year's legislation. Queensland has been dealing with "neglected children," including under that description begging and destitute children, children whose relations are drunkards, or dead, or undiscoverable, or who associate with persons of bad character and children under ten who sell matches, newspapers, etc., in public places. Victoria has been establishing Children's Courts, so has New Zealand, so has Tasmania. In Germany the first Children's Court was to be opend at Frankfort on January 1, 1908. Victoria makes it unlawful to supply any smoking materials to juveniles under sixteen, and Ontario prohibits billiard roomkeepers admitting minors under eighteen. Trinidad and Tobago have made provision for the industrial and technical training of boys between fourteen and eighteen by binding them apprentice—a reversion to old methods worthy of note in these days when a plethora of unskilled labour is helping to fill our workhouses and goals.

THE KEEN CONCERN OF THE STATES FOR THE WELL-being of the people is also evinced by the trend of agricultural legislation in the different parts of the world. We invite attention to the following summary from the pages of the Journal.

Agriculture is another subject with which the Legislatures have been busy. Trinidad and Tobago are promoting the study of scientific agriculture in all its branches. Dairy-farming is the subject of legislative attention in the Province of Saskatchewan; stockbreeding and dairy-farming in Quebec; cotton-growing in the Leeward Islands; livestock and ploughing matches in Ontario; horse-breeding in Manitoba; forest preservation in Grenada. Bermuda has been providing for the inspection of its agricultural produce before shipment abroad; Fiji for the inspection of its fruit for export; Ontario, of its dairy produce; the United Kingdom for the analysis of food fertilisers. Manitoba legislates for the extermination of a long list of noxious weeds; Egypt against the cotton worm and its eggs; St. Vincent, St. Lucia, Grenada, and Montserrat to prevent the importation of plant diseases. New Zealand is looking after the diseases in bees. Victoria has been reclaiming its swamp lands. If this connection may be noted the Commonwealth of Australia's scheme for the scientific study of meteorology and the distribution of meteorological information. These are a few sheaves from a vast harvest field! samples only of some of the principal subjects which are engaging the Legislatures of the world.

IT IS ALSO VERY INTERESTING TO NOTE THE TENDENCY of marriage legislation in some of the Colonies. It is pleasing to note that such legislation as prohibition of marriage amongst near blood relations, the restraint on the power of parents to disinherit and the provision for the grant of maintenance to widows and children out of the estate, marks a distinct tendency of the modern civilization to recognise the wisdom and farsight of the ancient Hindu law-givers.

Michigan has been prohibiting marriage by epileptics imbeciles, or insane persons. Nebraska declares marriage between first cousins' of the whole blood void. Oregon makes wife-beating punishable with twenty lashes. Tasmania puts the spouses on the same footing in case of an intestacy. A new departure by Victoria in the matter of testamentary disposition is well worthy of note. It suffers not a man to disinherit its family. If he has by his will left his widow and young children without sufficient means of support, the Court may grant them maintenance out of the estate. New Zealand has a similar provision. Tasmania allows an infant husband of nineteen and an infant wife of eighteen to make a will.

IT IS ANNOUNCED IN THE COLUMNS OT THE *Empire* and the *Capital* that the Government of Bengal has suggested and the High Court has approved that the "Criminal Revisional Bench should visit the central stations to hear criminal cases" We do not know what truth there is in this statement, nor do we clearly understand what is meant by this scheme. If it means that the Criminal Revisional Bench is to hold its sittings quarterly at such distant stations as Cuttack, Patna, Dacca and Chittagong, we fail to comprehend how this will conduce either to public convenience or to speedier administration of justice It is evident that the Criminal Revisional Bench can but visit these centres once in the year, and if there be more circuit centres, at much longer intervals. It will be no advantage to Orissa, Behar, Eastern Bengal and Assam to have a couple of High Court Judges in their midst once a year to hear criminal appeals or revision cases. All the time that this Bench will be moving about there must be another Criminal Bench sitting at Calcutta. For, an aggrieved person at Cuttack or Patna cannot be expected to go to Dacca or Chittagong to move the Criminal Revisional Bench or *vice versa*. Even assuming that a Criminal Revisional Bench sits at the central stations above-mentioned for a couple of or even three months in the year, during the remaining nine months the people of those parts will have to come to Calcutta for moving the High Court.

THUS A SCHEME OF THIS KIND WITHOUT CONFERRING any substantial advantage to the people will only make them periodically pay a very heavy penalty for justice brought to their doors once in the year. An applicant or appellant before the High Court can now engage a counsel or vakil for a reasonable fee. But if he has to take counsel to Cuttack. Patna, Dacca or Chittagong to move or to argue before the Criminal Bench, the seeker of justice will have to pay many times the amount as counsel's daily fees and will have to multiply it by many times more for compensating him for the loss of time during the journey up and down and also for waiting for the cases to be taken up. The result will be to enrich the legal profession and to impoverish the seekers of criminal justice. Not only will this scheme involve larger expenditure of public money but will mean ruin to the people who may seek relief before a Court if Criminal Revision or Appeal sitting in the mofussil.

WE ASSIGN PUBLIC INTEREST A HIGHER PLACE THAN professional interest. We must, therefore, sadly confess that we see no merit in the scheme. If it were possible to introduce the English circuit system in this country, it might be profitable to discuss its redeeming features But we do not suppose it is possible for the High Court Judges to visit the 50 districts or more of the Bengal Presidency and to hold Sessions Courts at every district headquarter four times in the year. So it is fruitless for us to discuss any such scheme. We need only say in conclusion that whatever may be the merits of the English circuit system, it is wholly inapplicable to India. Further, there can be no excuse for introducing in India a system of criminal appellate circuit unknown to any other country and that in the face of the fact that there is a growing English opinion for doing away with the circuit system altogether. So it seems to us incredible that any such scheme should either be in contemplation or have been matured without the public knowing anything about it.

THE CASE OF *Ganesh* v. *Vishnu* REPORTED IN I. L R. 32 Bom. p. 37 deserves more than passing notice. The case turned on the construction of sec. 16 of the Indian Contract Act (IX of 1872). The Defendant, a Government servant, being heavily indebted and being afraid that *darkhasts* might be made against him to his superiors by some of his creditors, applied to the Plaintiff for a loan on a mortgage. The Plaintiff agreed to lend provided the Defendant executed a *khata* for the payment of Rs. 307-4 as. originally due by the latter's father but which in 1894 had been held to be time barred in a suit brought by the Plaintiff, and also for the payment of Rs. 25, the costs of the suit. The Defendant accordingly passed a *khata* for the amount. For this amount due under the *khata* the Defendant finally passed a promissory note for Rs 600 in 1901. The Plaintiff brought a suit against the Defendant on this promissory note. The principal defence was that the Defendant executed the *khata* for the

amount under undue influence within the meaning of sec. 16 of the Contract Act. It was urged that seeing the helpless condition of the Defendant, Plaintiff asked him to execute the *khata*, which the Defendant could not but execute at that time. The Plaintiff was under such circumstances "in a position to dominate the will" of the Defendant within the meaning of that term in cl (1) of sec. 16 of the Contract Act and therefore the Defendant's contract was not binding upon him.

His Lordship Chandavarkar, J. in a considered judgment held that the Defendant's contract was not made under undue influence. As to the construction of cl. (1) of sec. 16 of the Contract Act his Lordship observed. "Under that clause a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. That is when the two persons enter into a contract, first there must be subsisting between them some relation of the kind described . . ." In this case when the Defendant went to the Plaintiff for a loan there was then subsisting no relation between them so as to enable the Plaintiff to dominate the will of the Defendant. It was perfectly optional with the Defendant to comply with the Plaintiff's demand or not. If the Defendant did not like to execute the *khata* for the amount mentioned by the Plaintiff, there was nothing to compel him to do so Of course it is true that he was under a pressing necessity to borrow money from the Plaintiff and as without executing the *khata* he could not get the loan, he was compelled much against his wishes to execute the *khata* for the amount of barred debt. In a sense it might be said that the urgent need of the Defendant for the loan placed the Plaintiff in a position to dominate the will of the Defendant. But this position of domination did not arise from any relation subsisting between the parties at the time of the contract. If the Defendant were already heavily indebted to the Plaintiff and the latter by threat of suit or otherwise had induced the former to enter into a contract, the contract would have been vitiated by undue influence, because in such a case there would arise between the parties the relation which would give rise to the position of domination. But here the Plaintiff and the Defendant were at arm's length when the contract was executed and it cannot be said that the Defendant acted under undue influence in executing the contract.

Suppose a man being in urgent need of money goes to a money lender and asks for a loan. The money lender perceiving his difficulties damands a heavy rate of interest and he is obliged to agree to that rate of interest. Could this man afterwards say in answer to the claim of the creditor for the money and the interest, that he made this contract under undue influence and therefore it was not binding upon him? If that were the law, then shrewd borrowers would consent to any demand of the creditor at the time of the loan and afterwards successfully repudiate their obligations under the contracts on the ground of undue influence. His Lordship at p. 44 of the report points out what are the elements of undue influence within the meaning of sec. 16, cl (1) of the Contract Act. There are certain well known relations such as those of guardian and ward, solicitor and client, father and son, &c., which fall within cl. (1) of sec. 16 of the Contract Act. Besides these there may be relations between parties arising from special circumstances which may also fall within the sub-section. The test is as the learned Judge observes "confidence reposed by one party and betrayed by the other, which means there must be an element of fraud or coercion, under either of which the acts constituting undue influence must range themselves."

CURRENT INDIAN CASES.

Re Gulbai and Lilbai, I L. R. 32 Bom. 50 *Guardians and Wards Act, sec. 17.*

In appointing a guardian of a minor what things ought to be considered under sec. 17 of the Guardians and Wards Act explained.

Pandhari Nath *v.* Govind Shivram, I. L. R. 32 Bom. 59. *Hindu widow—Alienation.*

A Hindu widow under the Mitakshara Law is not competent to make a gift of moveables inherited by her from her husband.

Sundra Bai *v.* Shiv Narayana, I. L. R. 32 Bom. 81. *Marriage—Joint family.*

"There is a marked distinction between a family of brothers who are joint in estate and those who are not so joint. In the former, if one of the coparceners wishes to marry, and the family pay him for the expenses of the marriage, they cannot hold him liable to repay those expenses, nor can they hold his share in the joint estate liable therefor."

Bai Hirakore *v.* Thakardar, I. L. R. 32 Bom. 103 *Partition Act (IV of 1893), sec. 2.*

Sec. 2 of the Partition Act (IV of 1893) applies not only where a Court has to pass a decree in a suit for partition but also where a Court has passed a decree directing the partition to be effected in a particular mode.

G. S. D. *v.* The Government Pleader, High Court, Bombay. *Letters Patent, cl. 10.*

Where a vakil was suspended under cl. 10 of the Letters Patent, *held* that no appeal lay by right of grant and the High Court had no power to grant leave to appeal.

Reviews.

THE LAW AND CUSTOM OF THE CONSTITUTION. *By Sir William R. Anson, Bart, D. C. L., of the Inner Temple, Barrister-at-law, Warden of All Souls College, Oxford. In three volumes. Vol. II. The Crown. Part I. Third edition. Oxford. At the Clarendon Press. London, New York and Toronto: Henry Frowde. Also sold by Stevens & Sons, Limited, 119 and 120, Chancery Lane, London. 1907.*

Sir William Anson's valuable work on the Law and Custom of the Constitution has been out of print for some time. Failing to bring out a revised edition of the whole work, the learned author has taken the next best step of revising the first four chapters and bring them out separately in advance of the rest.

To students of English constitutional law, Sir William Anson's work has from the very outset proved indispensable. No existing treatise on the constitution of England is better adapted than Sir William's to assist students in the formation of accurate ideas regarding the various institutions which play their part in the governance of the empire, for Sir William's method is essentially *a posteriori.* He collects facts as they exist and have existed in the past and lets these tell their own tale. Less analytical than Dicey's, and even less theoretical and critical, this work does not also appeal to the imagination as do Bagehot's and Low's. It does in fact furnish students with that groundwork of knowledge of facts which ought to enable them to bring a critical spirit into the study of the other treatises.

We must not, however, be understood as saying that Sir William's method is therefore altogether dry as dust. The chapters of the part under review, dealing respectively with (I) Prerogative of the Crown, (II) The Councils of the Crown, (III) The Departments of Government and the Ministers of the Crown, (IV) The Title of the Crown and the Relation of Sovereign and subject, are all very interesting reading. The treatment is more or less historical and properly so, for as Sir William rightly says "it would be a mean thing, were it possible, to take stock of our inheritance without asking how we came by it. But it is not possible."

If only remains to add that Sir William takes full note of the changes that have within recent years been silently worked (by the operation chiefly of successive changes in the electorate) in the character of the constitution whilst the frame-work has practically remained the same. The power of the Cabinet has grown at the expense of the House of Commons. The ministers now look up less to their followers in the House for support than to the electorate, the power of keeping them in office now resting virtually with the electorate. Private members are no longer chosen for what they are worth as men but for the pledges they give to their constituencies to support one or the other group of leading men.

It is unnecessary to note the further changes in details which the author has carried out as the result of his researches since the last edition appeared. We have great pleasure in commending this edition to all students of political science. They will find the work immensely instructive.

THE ANNUAL DIGEST of all the reported decisions of the superior Courts, including a selection from the Scottish and Irish, with a collection of cases followed, distinguished, explained, commented on, overruled, or questioned. And references to the statutes passed during the year 1907. *By John Mews, Barrister-at-law, London, Sweet and Maxwell Ld, 3, Chancery Lane, Stevens and Sons, Ld. 119 & 120, Chancery Lane, Law Publishers 1908.*

The high standard of excellence of previous issues of the Digest has been maintained in this. All reported English cases and as many of the Scottish and Irish as are worth knowing are noted. Some Indian decisions of the Privy Council have also been digested. But we think some more might with advantage have been incorporated.

DIGEST OF INDIAN CASES for 1907, with an index of cases, overruled, followed, dissented from and referred to. *By S. Srinivasa Aiyar, B. A. B. L., Vakil, High Court, Madras. Madras: Printed at the Ananda Steam Press. 1908.*

We have great pleasure in recommending this excellent digest to our readers. The notes of decisions are concise—a great recommendation in a digest—well arranged and the cross references are sufficient but not profuse. The book barely covers 250 pages and is well got up.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN. LORD ROBERTSON. LORD ATKINSON. LORD COLLINS SIR ARTHUR WILSON. 1908, 18, March.	SACHINDRANATH ROY and others, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Privy Council—Special leave—Question of law—Period of limitation—Suit by Government upon title acquired at revenue sale—Adverse possession against defaulting proprietor.

Mr. DeGruyther, K. C., (instructed by *Messrs. Downer and Johnson*) appeared in support of the petition for special leave to appeal from the High Court of Judicature at Fort William in Bengal, and submitted that the value being over 10,000 rupees, the Petitioners were entitled as of right to appeal

provided the appeal raised a question of law. Counsel continued :—"The dispute was between the Government of India as represented by the Secretary of State, and the Appellants in regard to certain plots of land, and arose in regard to the boundaries of an estate called Mirzapur. It was not necessary to go into any question of the facts leading up to the present litigation. It would be sufficient to say that the title of the Government was acquired by the sale for arrears of Government Revenue in the year 1807. Having acquired title by purchase in the year 1807, Government sold the property again in the year 1870 to a man called Pareshnath. They again bought on a sale caused for non-payment of revenue in the year 1892. It was conceded that from the year 1873 to the time of the present action in the year 1902 the Appellants were actually in possession of the estate, but it was said that the suit brought by the Secretary of State for India in Council, irrespective of the period which would ordinarily be allowed to a private individual, might be brought within sixty years from the time when the cause of action accrued, and the Courts decided against the Petitioners on the merits, and also held that the action was not barred by limitation. The point which he submitted would be conclusive as against the title of the Secretary of State was this. It was conceded that from the year 1873 at latest the Petitioners were in possession till the year 1902. That was not adverse possession for sixty years but in the year 1870 the title to this estate vested in the purchaser from the Government, and it was not re-acquired by the Government till the year 1892. The Petitioners held for a period of more than twelve years as against the purchaser, that is, as against the vendor to the Government, and the Statute of Limitations in India, sec. 28, expressly provides that not only the remedy shall be barred but as a matter of fact the rights should be extinguished, that therefore prior to the year 1892, at which time the Government by re-purchase re-acquired the proprietary interests, their vendor had lost all proprietary title in this property because the Petitioners had held possession admittedly adverse to such vendor for a period exceeding twelve years."

SIR ARTHUR WILSON.—Was this point taken in the Court below?

Mr. Leslie DeGruyther.—No, but these facts were set out in the plaint. In the Court below they seem to have dealt only with the sixty years' limitation, and it was said : "we admit you have had possession for 30 years adversely but you have not proved the possession for sixty years adversely." The facts stated in the plaint and the title acquired by Government indicated on the face of the plaint that the Government had no title to this property, and he asked their Lordships to hold that that was a question of law, namely, whether a purchase by Government from a private vendor saves an action by such vendor from being barred by limitation, and gives the Government a further period of limitation of sixty years. In the plaint itself these facts were set out perfectly plainly.

LORD ATKINSON.—Who do you say were the vendors in 1872?

Mr. Leslie DeGruyther.—The Government. The Government sold to this man, Pareshnath. He brought an action against the Petitioner in 1873 and the Petitioners held possession adversely to Pareshnath for a period up to 1892. In 1892 the Government having purchased the land, the Petitioners have held adversely to them since then.

LORD MACNAGHTEN.—Whom did the Government buy from?

Mr. Leslie DeGruyther.—From Pareshnath for arrears of Government revenue.

SIR ARTHUR WILSON.—A revenue sale.

Mr. Leslie DeGruyther.—Yes.

LORD ATKINSON.—Whom do you represent?

Mr. Leslie DeGruyther.—I represent the person in possession. I submit that this alone is sufficient to entitle us to leave to appeal because there is no magic in a revenue sale, as your Lordships are aware. It is only the right title and interest of the vendor that passes, and in fact nothing more could pass. The question of merits all depended upon the consideration of various maps and survey proceedings and settlements made in 1837, and he mentioned them for the purpose of indicating that he might have to go into them at the hearing of the appeal, but he was not anxious to deal with the matter at any length if he could shew that the Petitioners ought to have leave to appeal as of right. He would ask their Lordships to give leave to appeal on the ground of limitation indicated above.

LORD MACNAGHTEN.—Have you got an opponent?

Mr. Leslie DeGruyther.—No, my Lord. We gave notice to the Solicitor to the Secretary of State for India and served him with a copy of the petition, but they do not appear. We served them with a copy of the petition and offered to give them inspection of all the documents which had been sent us from India.

LORD MACNAGHTEN.—Their Lordships will humbly advise His Majesty that special leave to appeal ought to be granted in this case.

J. W. A. *Leave granted.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION Before GEIDT and WOODROFFE, JJ. CRIMINAL REVISION No. 85 OF 1906. JUGAL NARAIN SINGH AND OTHERS Petitioners, v. THE EMPEROR, at the prosecution of G. R. Toomey, Opposite party, 11th March 1908.

Indian Penal Code, sec. 431—Whether placing a large quantity of bricks upon a public road is an offence.

The material facts as stated by the prosecution were these :—

One Mr. Toomey was driving one afternoon in his motor car with his wife. His Mistry was also in the car. On their way in the evening Mr. Toomey when passing over a bridge, noticed 3 or 4 men *salaming* him. He recognised one of them. After the car had gone about 150 feet from the bridge Mr. Toomey noticed some bricks lying on the road ahead—on the traces where the wheels of the car were to go. On seeing the bricks ahead Mr. Toomey cried out, "Bricks on the road" and he noticed that 6 or 7 men were standing near the place where the bricks lay As there were an unusual number of bricks on the road Mr. Toomey stopped, when the 6 or 7 men came forward and one of them hit a blow with a small *lathi* on Mrs. Toomey. Mr. Toomey cried out for help when some people responded from behind saying "coming, coming." Mr. Toomey then drove off as fast as he could but while he was driving off the 6 or 7 men began throwing brick bats at the car. The accused denied the occurrence.

They were, however, found guilty by the Deputy Magistrate of Mozafferpur under secs. 431 and 147, I. P. C. and sentenced to various terms of imprisonment. On appeal one of the accused was acquitted, but with respect to the others, the conviction and sentences were upheld. This rule was issued to set aside the conviction and the sentences.

Their Lordships observed.

GEIDT, J.—"I am doubtful whether the conviction under sec. 431, I. P. C. can stand. Before a conviction can be had under that section, it must be shown that the offender committed mischief. It is not sufficient to show that he has rendered a public road less safe for travelling . . . . . I think it can hardly be said that by placing bricks on the road any change was effected in the road itself. The road remained unaffected, although an obstruction has been placed in it. The act of which the accused have been found guilty might perhaps fall under sec. 283, I. P. C. . . . . I think however that the Petitioners have been properly convicted of the offence under sec. 147, I. P. C.

WOODROFFE, J.— . . . I, however, am of opinion that the mere placing of the bricks on the road would not come within sec. 431, I. P. C. but it might fall either under sec. 283 or mischief to the motor car, under sec. 435, I. P. C. But the accused have not been charged with either of these offences.

Conviction and sentences under sec. 431, I. P. C. reversed.

Mr. Norton with *Babu Dasarathy Sanyal* for the Accused.

Mr. Orr, Deputy Legal remembrancer for the Crown.

B. C.

CIVIL APPELLATE JURISDICTION. Before MITRA, and CASPERSZ, JJ. APPEAL FROM ORIGINAL DECREE No 179 OF 1905. MUSST SAHADRA KOER, v. PRAYAG RAM. 26th March 1908.

Probate, proceedings to revoke—Co-widow—Legal representative.

The Appellant Musst. Jibba Koer, one of the widows of the deceased testator, lodged an application for revocation of the probate granted to the Respondent. The application was refused by the lower Court, and she appealed to the High Court. She, however, died on the 15th March 1907, and, on the 30th May 1907, the co widow Sahadra Koer applied to be substituted as the legal representative of the deceased Appellant.

Held—That she was not the legal representative of the co-widow and the appeal abated.

Babus Jnanendra Nath Bose and *Dhirendra Lal Kastgir* for the Appellant

Babus Mohendra Nath Roy and *Raghunath Singh* for the Respondent.

A. T. M. *Appeal abated.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI, and SHARFUDDIN, JJ. APPEAL FROM ORIGINAL DECREE No. 476 OF 1906. MAHARAJ BAHADUR SINGH AND ORS., Appellants v. SURENDRA NARAYAN SINGH AND ORS., Respondents. Heard, 25th March 1908. Judgment, 8th April 1908.

Putni—Dar-putnidar—*Bengal Tenancy Act (VIII of 1885), secs. 65, 148 (h), 165—Lien—First charge —Parting of interest in the zemindary after accrual of rent.*

The appeal arose out of a suit brought by the Plaintiff, Mr A. H. Forbes, who was a *dar-putnidar*, to have it declared that a certain *putni* taluk formerly held by one Chutterpat Singh and of which the Plaintiff had been put in possession under the provisions of sec. 13, cl (4), Reg. VIII of 1819 (*Putni* Regulation) is not liable to be sold in execution of a decree dated the 10th July 1896, obtained by the former zemindar, Rai Dhanpat Singh, against the *putnidar* Chutterpat Singh, for arrears of rent of the *putni*. The Defendants Nos. 1, 2, 3 and 4 were the trustees of the estate of Rai Dhanput Singh. They were described as the Defendants first party. The Defendant second party was Chutterput

Singh, the former *putnidar*, and the Defendant 3rd party was a purchaser of the *putni* of Chatterput Singh in execution of a money decree obtained against him.

The facts of the case were as follows: The former zemindar Rai Dhanpat Singh obtained the decree for rent, which the Defendant 1st party now sought to execute, on the 10th July 1896 The decree was obtained against Chutterpat Singh, the *putnidar*, for arrears of rent of the *putni*. But on the 27th June 1893, Rai Dhanpat Singh had sold his rights and interest in the zemindari to Mussammat Bhagwanbatti Chowdhurani, so that when he obtained the decree of the 10th July 1896, he was not the zemindar. On the 19th July 1896, Rai Dhanpat Singh executed a deed of trust in favour of the Defendants 1st party. Amongst other properties he assigned to them the decree of the 10th July 1896. In 1897, the trustees applied for execution of the decree of the 10th July 1896 against Chutterput Singh which was refused. The case went in appeal to the High Court, which over ruled the objection of Chatterput to the execution of the decree in a judgment reported at I. L R 26 Cal 750.

The zemindar Bhagwanbatti then instituted proceedings under Reg. VIII of 1819 for the arrears of the *putni* rent which had then accrued due. The *putni* was advertized for sale. On the 14th May 1900, the Plaintiff deposited the *putni* rent under sec. 13 of the regulation. He was accordingly put in possession of the *putni*. After this, the Defendant 3rd party on the 1st September 1902 purchased the *putni* at a sale held in execution of a money decree.

The Defendants 1st party then endeavoured to execute the decree of the 10th July 1896 They advertized the *putni* for sale under sec. 165 of the Bengal Tenancy Act. The Plaintiff preferred a claim on the 10th November 1904, which was disallowed, because the claim sections of the Civil Procedure Code have no application to execution proceedings under the Bengal Tenancy Act He made an unsuccessful application to the High Court and was accordingly driven to the present suit.

The lower Court decreed the suit on the grounds (1) that the decree of the 10th July 1896 was not a decree which could be executed under the provisions of the Bengal Tenancy Act and (2) that the Plaintiff by depositing the *putni* rent had a first charge on the *putni*, and that the Defendant first party could not sell the *putni* free from his first charge.

The Defendants appealed to the High Court.

Held—That it was a decree for arrears of rent of the *putni*, which was a permanent tenure. Therefore, under the provisions of sec. 65 of the Bengal Tenancy Act, the holder of this decree has "a first charge" on the *putni* for the amount of this decree.

The word "assignee" as used in sec. 148 (*h*) of the Bengal Tenancy Act does not include trustees who execute decrees under an assignment, which is not for their own benefit but for the benefit of the heir of the assignor.

The English law of landlord and tenant cannot override the provisions of sec. 65 of the Bengal Tenancy Act.

The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue.

There is nothing in the law which disentitled a landlord to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari.

Nogendra Nath Bose v. *Bhuban Mohun Chakrabarti* 6 C W. N. 91 distinguished.

Hem Chunder Bhunjo v. *Monmohini Dassi*, 3 C. W. N. 604 and *Srimant Rai* v. *Mahadev Mahapa*, I. L. R 31 Cal. 550 dissented from.

Khettra Pal Singh v. *Kritharthomoyi Dasi*, 10 C W. N. 547: s c I L R. 33 Cal. 566 referred to.

The Plaintiff, as *dar putnidar* in possession has only "a lien" not a first charge, on the *putni*. The Defendants have a first charge on the *putni* Their decree is entitled to priority over the Plaintiff's lien. When they sell it, under sec. 165 of the Bengal Tenancy Act they sell it free of all incumbrances. The Plaintiff's lien which is not a registered and notified incumbrance, as defined in sec. 161 of the Act is distroyed, even if he has one.

Mr. Hill and *Babus Promotho Nath Sen* and *Ram Chunder Mojumder* for the Appellants.

Dr. Rash Behary Ghosh Babu Golap Chunder Sarker, *Moulvi Mahommed Mustafa Khan* and *Babu Dwarka Nath Mitra* for the Respondents.

A T. M. *Appeal allowed.*

Legislation.

A Bill to repeal the Central Provinces Laws Act, 1879, so far as it applies to the District of Sambalpur was published for information together with the statement of objects and reasons in the *Calcutta Gazette* dated January 29, 1908 Part IV The Bill was introduced in the Council on the 25th January 1908.

A Draft of proposed corrections in the Bengal Tenancy Act Rules (*Calcutta Gazette* 6th November 1907) was published for general information under sec. 190 (1) of the Bengal Tenancy Act in the *Calcutta Gazette* 5th February 1908 Part I p. 273—See also *Calcutta Gazette* 12th February, 1908 Part I p. 350

A Bill further to amend the Puri Lodging-house Act, 1871 was introduced in the Bengal Council on the 8th February 1908—See *Calcutta Gazette*, 12th February, 1908, Part IV p. 3.

Notifications.

No 1142 L R.—The 22nd February 1908.—In exercise of the power conferred upon him by sub-sec. (3) of sec. 1 of the Bengal Tenancy Act, 1885 (VIII of 1885), as amended by

Hazaribagh, Ranchi Palamau, Singhbhum.

Bengal Act I of 1907, and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor is pleased to extend the portions of the said Act, as amended by Bengal Acts III of 1898 and 1 of 1907, which are hereinafter set forth below, to the districts of Cuttack, Puri and Balasore in the division of Orissa.

2. This notification supersedes so much of any previous notification as extended sections or chapters of the Bengal Tenancy Act, 1865, to the aforesaid districts.

Portions of the Bengal Tenancy Act, 1885, which are hereby extended to the districts of Cuttack, Puri and Balasore in the division of Orissa.

Chapter of the Bengal Tenancy Act, 1885	Portion extended.
I	Sec. 3.
II	Secs 4 and 5.
III	Sec. 7.
V	The whole.
VI	Ditto.
VII	Ditto.
VIII	Secs. 52 to 75 (both inclusive).
IX	Sec. 80 and secs 93 to 100 (both inclusive)
X	The whole.
XI	Secs. 116 to 120 (both inclusive).
XIII	Secs. 147A and 147B.
XIIIA	Sec. 158A.
XIV	The whole.
XVII	Sec. 189, clauses (1), (2) and (3), and sections 190 to 192 (both inclusive).

No. 1879 L. R.—The 5th March 1908—In exercise of the powers conferred by secs. 5 and 5A of the Scheduled Districts Act, 1874 (XIV of 1874), and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor is pleased to extend to the Chota Nagpur Division except the District of Manbhum, the portions of the Bengal Tenancy Act, 1885 (as amended by Bengal Act III of 1898 and Bengal Act I of 1907), which are specified in column I of the table given below, subject to the restrictions and modifications specified in column 2 of that table.

Hazaribagh
Ranchi
Palam u.
Singhbhum

This supersedes notification No. 721 L. R., dated the 9th February 1903, published at p. 172, Part I, of the *Calcutta Gazette* of the 11th idem.

Portions of the Bengal Tenancy Act, 1885 (as amended by the Bengal Tenancy (Amendment) Act, 1898 and the Bengal Tenancy (Amendment) Act, 1907.	Restrictions and modifications
1	2
Chap. I, sec. 3, sub-sec. *(1)*	*For* Collector read Dy. Comissioner
„ „ „ *(2)*	......
„ „ „ *(15)*	......
„ „ „ *(17)*	......
„ X, „ 101, „ *(1)*	*Omit* in any case with the previous sanction of the Governor-General in Council, and may, if it thinks fit, without such sanction in any of the cases next hereinafter mentioned.
„ [illegible]101, „ *(3) and (4).*	......
Chap. X, sec. 102	*In cl. (b) after the word* tenure-holder *insert the words* Mundari khunt-kattidar, *and omit the words* settled raiyat.
102A	
103A	*In sub-sec. (3) omit* and (if a settlement of land revenue is being or is about to be made), the settlement rent roll has been incorporated with the record under sec. 104F, sub-sec. *(3)*.
„ „ 103B	*In sub-sec. (1) for* Collector *read* Deputy Commissioner.
„ „ 104G, sub-sec. *(2)*	*For* Part *read* Chapter.
	Omit the words but not so as to affect any order passed by a Civil Court under sec. 104H.
„ „ 108A	*In the proviso before the words* an appeal *insert the words* a suit or *and for* sec. 109A *read* secs. 160 and 161, Chota Nagpur Landlord and Tenant Procedure Act, 1879, and secs. 9A (8) and 9A (10), Chota Nagpur Commutation Act, 1897.
„ „ 109B, sub-secs. *(1)* and *(3)*.	*In sub-sec (1) omit* this Act *and insert* the Chota Nagpur Landlord and Tenant Procedure Act, 1879?
„ „ 111	*Omit* subject to the provisions of sec. 104H, *and* any application made under sec. 158, or.
„ „ 111A	*Omit* or, save as provided in sec. 104H, for the alteration of any entry in such a record of a rent settled under secs. 104A to 104F.
	In the proviso omit framed in pursuance of an order made under sec 101, sub-sec. *(2)*, cl *(d)*.
„ „ 114	*Omit* in any case except where a settlement of land revenue is being or is about to be made.
Chap XIII, sec. 148, opening words and cl. *(b)*, and cls. *(b)* *(1)* and *(b)* *(2)*.	*In cl. (b) for* sec. 50 of the Code of Civil Procedure, *read* secs. 46 and 47 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879, *and in the proviso to cl. b (1) for* Collector *read* Deputy Commissioner.
Chap. XVII, sec. 189, opening words, and sub-secs. *(1)* and *(2)*.	*In sub-sec. (2) after the words* under this Act *insert the words* or under the Chota Nagpur Landlord and Tenant Procedure Act, 1879, *and for* this or any other Act, *read* these or any other Act.
Chap. XVII, sec. 190	*In sub-sec. (2) omit* or High Court, *and omit* and, in the case of rules made by any other authority, in the prescribed manner.
195	*Omit cls. (b), (c), (d) and (e).*

AKHOY CHANDRA BHUTTACHARYA v. HARI DAS GOSSWAMI.

Lal Mohan, it appears, died within 12 years of the institution of the present suit. There is no express finding one way or other in the judgment of the lower Appellate Court, and I must assume for the purpose of the appeal, that there is no bar of limitation to the claim of the Plaintiffs or acquisition of title by adverse possession by any party.

Of the two nephews of Lal Mohan, Hari and Nanda Gopal, Hari was like his father separate and not joint with Lal Mohan but Nanda Gopal was a member of a joint family with Lal Mohan. Did Nanda Gopal inherit Lal Mohan's share excluding Hari? This is the only question in the case.

The texts of Jimutavahana and his followers, the authorities of the Dayabhaga School of law, are clear on one point. Chap. XI, sec. 5, para. 39 of the Dayabhaga as well as sec. 6, speak of inheritance by brothers' sons. If Brojo Mohan or his son Hari had been joint or re-united with Lal Mohan, the texts would make Nanda Gopal and Hari co-heirs. If, on the other hand, Brojo Mohan and Hari had been separated co-parceners without a subsequent re-union, the succession would, undoubtedly, devolve on Nanda Gopal to the exclusion of Hari. Re-union is a technical expression and has been defined by the text-writers. The Dayabhaga as well as the Dayakrama Sangraha define it and the definition is based on the texts of the sages. Re-union, the Sanskrit word being *sansristha*, implies a state of union or jointness, a partition and a subsequent state of jointness amongst co-parceners by mutual consent and through affection. Hari could not, therefore, be a re-united co-parcener nor was he a separate kinsman after partition, though he was, in fact, separate without a division. The contention before me—a contention which, it appears, was faintly pressed in the lower Court—is that the sages and the text-writers not having dealt with a case like the present one, the theory of spiritual benefit should be applied in the Dayabhaga school for determining heirship; that is to say, inasmuch as Hari and Nanda could offer the same number of oblation-cakes to Lal Mohan and his paternal ancestors, and so far as spiritual benefit was concerned, Hari and Nanda Gopal stood on the same level, they should divide the inheritance. On the other hand, it has been contended by the learned vakil for the Respondent that the Sanskrit word *sansristha* does not only include the state of re-union but also jointness, and therefore, Nanda Gopal having been joint with Lal Mohan would alone obtain the inheritance, excluding Hari who was separate.

I cannot accept either of these grounds of contention. I cannot give a meaning to the word *sansristha* which has not been given to it by the authorities and call a co-parcener *sansristha* when he was always joint and there never was a partition. He was joint but not re-united. Neither am I prepared to hold that the ancient sages and commentators intended that mere spiritual efficacy would control succession in such a case. If I were to hold that both the cousins would inherit the share of Lal Mohan, I would, in my opinion, go against the spirit of the texts of the sages and commentators.

Notwithstanding the predominance given to the theory of spiritual benefit

by the writers on the Bengal school of law, they have not adhered to it in the case of re-united co-parceners; they have excluded separated co-parceners and given preference to re-united co-parceners instead of applying the theory of spiritual benefit. It is clear they have ignored the theory of spiritual benefit whenever there is a contest between separated and re-united co-parceners, in the same way as they have ignored it in several other cases. Principles other than spiritual benefit have often heen applied, as will be apparent from even a cursory reading of the great work of Jimutavahana. I am quite sure that if they could contemplate a case like the present, they would have laid down that preference should be given to the joint as against the separate kinsman.

In Chap. IV, sec. 2, Jimutavahan gives here and there his reason for succession to be spiritual efficacy, but the wife or the daughter or the mother cannot confer spiritual benefit and in cases of *stridhana* a maiden daughter supersedes sons and in succession to father's property, she supersedes her married sisters. Propinquity has been accepted in the Bengal school as a principle for succession, *Toolsee Das Seal* v. *Lukhimony* (2), though spiritual benefit is also taken into consideration. In the case of succession to the property of a man who dies leaving both a joint nephew and a nephew who or whose father was never joint, other principles and not spiritual efficacy should be, in my opinion, taken into consideration as Jimutvahana has done so in similar and numerous other cases. In cases not contemplated by him or his followers in the Bengal school of law, the law should be developed on rational lines consistently with the principles followed in similar cases and the decisions of our Courts should not be based on a blind adherence to a principle which would lead us to the violation of other recognised principles consistent with natural justice.

Spiritual benefit, notwithstanding some authorities to the contrary, is not always the guiding principle of inheritance under the Bengal school of law. The theory of spiritual benefit cannot apply to a good many cases of inheritance under the Dayabhaga school of law. Spiritual efficacy as a principle guiding rules of succession must fail in the cases of all female relations. The widow, the daughter, the mother, the paternal grand mother are said to inherit under express texts. It was necessary in their cases to have recourse to a different principle, and that principle must have been affinity and affection which had led the more ancient sages to say that they come in the line of heirs. Yajnavalkya's text as well as the texts of many other sages could not be either avoided or reconciled with the theory of spiritual efficacy in all cases. In most cases, propinquity, spiritual efficacy and natural love and affection run in the same lines and no difficulty arises, but whenever they run in different lines, Jimutvahana was compelled to ignore spiritual efficacy and had recourse to other principles or express texts.

The reason for inheritance by a re-united co-parcener is not spiritual benefit but a *quasi* contractual relation and affection for each other. Spiritual benefit has no place. Affection is an important

(2) 4 C. W. N. 743 (1900).

element (Vrihaspati XXV, 72—77). The agreement "the wealth which is thine, is mine, that which is mine is thine." is also another elment. (Dayakrama Sangraha, Chap. V, sec. 1, paras. 2 and 3). The criterion is not expressly spiritual benefit.

We must next see what in such a case as the present, the older authorities have laid down and whether they have been expressly dissented from by Jimutvahana. An express dissent by the authorities of the Bengal school of law will preclude our adopting the rules laid down by the older and the more orthodox authorities. The sages whose texts have been interpreted in the Mitakshara, were undoubtedly of opinion that a co-parcener who is joint is entitled to preference under the law of survivorship. If, as has been found in this case, Lal Mohan was joint with Nanda Gopal, he would succeed according to the Mitakshara, which, in my opinion, should be the guiding principle in the absence of any express texts or commentaries of the Dayabhaga school of law. I would, in all cases of absence of texts or precedents under the Dayabhaga law, have recourse to the theory of propinquity and natural love and affection as adopted by Vignaneswara and the commentators of the more ancient and orthodox schools of Hindu law. They are highly respected by lawyers of the Bengal school and I would make the law of Bengal correspond with the law as administered in the rest of India.

On the ground also of implied agreement and convenience Nanda Gopal should exclude Hari. A and B uncle and nephew remain joint and acquire property jointly assisting each other. The one loves the other and each relies on the help of the other. They are in the nature of joint owners, joint tenants. The admission of a third person like Hari to succeed to the share of one of these on his death is a clear infringement of the natural order of things and the principles that regulate descent of property in all civilized systems of jurisprudence.

I am, therefore, of opinion that in this case the decision of the lower Appellate Court is correct and that Hari was not entitled to a one-sixth share of the inheritance left by Kasi Nath as a co-heir with Nanda Gopal. The appeal, therefore, fails and is dismissed with costs.

N. G. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM OUDH].

LORD ASHBOURNE.
LORD MACNAGHTEN.
LORD ATKINSON.
SIR ARTHUR WILSON.
1907.
11, June

THAKUR JOWAHIR SINGH, Appellant, Plaintiff,
v.
THAKUR BALDEO BAKSH SINGH and ors., Respondents, Defendants.

*Mortgage—Prior mortgage of whole property—Shares subsequently mortgaged to several persons—Rights of mortgagees, how to be adjusted—Right to redeem—Successive redemption suits by different mortgagees—*Res judicata—*Civil Procedure Code (Act XIV of 1882), sec. 13, Expl. II.*

A property belonging to A and B was mortgaged to X in 1879. In 1888 A mortgaged his share only to Y and in 1897 B similarly mortgaged his share to Z. Y had redeemed X in 1891. Z first sought to redeem Y in respect of the share mortgaged to himself, but on Y's

THAKUR JOWAHIR SINGH *v.* THAKUR BALDEO BAKSH SINGH.

objection that the whole property should be redeemed, Z's suit was dismissed and he subsequently instituted a suit to redeem the whole property and succeeded. In a suit by Y to redeem Z in respect of the share mortgaged to Y,

Held—*That as Z did not accept Y's offer to redeem the whole property, Y was entitled to redeem the share mortgaged to him.*

This was an appeal from a decree of the Judicial Commissioner of Oudh, dated the 4th August 1904, which reversed a decree of the Court of the District Judge of Sitapur, the said latter decree having reversed a decree of the Court of the Subordinate Judge of Sitapur, dated the 29th January 1902.

The principal question raised on the present appeal was whether the Appellant, Thakur Jowahir Singh, was entitled to recover possession from the first Respondent, Thakur Baldeo Baksh Singh, of a 4-anna share in the villages of Kahrawan and Mahrawan. The circumstances under which the litigation arose are as follows :—

In the year 1879 the ownership of the said villages was vested in the persons named below in the shares specified against their names :—

Kesri Singh	...	4 annas.
Balbhaddar Singh	...	8 annas.
Pahlad Singh	...	4 annas.

On the 5th September 1879, the said three persons mortgaged the whole of the said two villages to one Surat Singh for a sum of Rs. 16,000. The mortgagee was to have possession and take the profits in lieu of interest. The mortgage was for a term which expired on the 22nd June 1891.

Kesri Singh on the 10th December 1888, executed a second mortgage of his 4-anna share in the said villages in favor of Thakur Jowahir Singh. The mortgage money was Rs. 8,700 from which amount Rs. 7,400 was retained by the mortgagee to redeem Surat Singh's mortgage. The mortgage provided that on obtaining possession from Surat Singh, the mortgagee should remain in possession of the said 4-anna share for a period of 30 years appropriating the profits to the discharge of one-half of the interest stipulated to be paid.

The subsequent suit for redemption of Surat Singh's mortgage ended in a compromise dated the 25th July 1891. Pahlad Singh paid Surat Singh Rs. 4,000 and took possession of his own 4-anna share. Thakur Jowahir Singh paid Surat Singh Rs. 12,000 and took possession of the remaining 12-anna share belonging to Kesri Singh and Balbhaddar Singh.

On the 20th February 1897, Balbhaddar Singh executed a mortgage of his 8-anna share in the said villages in favour of Thakur Baldeo Baksh Singh, who, on the 15th June 1897, instituted a suit in the Court of the Subordinate Judge of Sitapur to recover possession from Thakur Jowahir Singh of the said 8-anna share by redemption of the mortgage, dated the 5th September 1879.

To the said suit Thakur Jowahir Singh pleaded *inter alia* that "the Plaintiff was not competent to redeem the share of one mortgagor only. He ought to bring a suit for redemption of the whole mortgaged property against the answering Defendant and Surat Singh, who is in possession of Pahlad Singh's share by virtue of the joint mortgage."

THAKUR JOWAHIR SINGH *v.* THAKUR BALDEO BAKSH SINGH.

On the 22nd June 1898, the said Subordinate Judge dismissed the suit, and on the 17th March 1899, the Judicial Commissioner of Oudh dismissed an appeal to his Court by Thakur Baldeo Baksh Singh on the ground that "a mortgagee by allowing his mortgagor to pay a portion of the mortgage debt and releasing a proportionate part of the mortgaged property did not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piecemeal."

Thakur Baldeo Baksh Singh then, on the 1st July 1899, instituted a second suit against Thakur Jowahir Singh in the Court of the Subordinate Judge of Sitapur, to recover possession of a 12-anna share in the said villages by redemption of the said mortgage, dated the 5th September, 1879. A decree was made in his favour on the 30th September, 1899. On appeal to the Court of the Judicial Commissioner, the said decree was on the 18th January, 1901, affirmed the Court holding that Thakur Jowahir Singh was by his pleadings in the previous suit for redemption estopped from contesting the Plaintiff's right to redeem the whole 12 anna share.

The present suit was instituted on the 3rd September, 1901, in the Court of the Subordinate Judge of Sitapur by Thakur Jowahir Singh to recover possession from Thakur Baldeo Baksh Singh of Kesri Singh's 4-anna share in the said villages mortgaged to him on the 10th December, 1888. The other Defendants to the suit, now Respondents, were Pahlad Singh, Balbhaddar Singh and the heirs of Kesri Singh who had died.

Thakur Baldeo Baksh Singh by his written statement pleaded that he was entitled to retain possession in virtue of the said decree passed in his favor by the Court of the Judicial Commissioner of Oudh, on the 18th January, 1901.

On the pleadings the said Subordinate Judge fixed 8 issues of which the following are material:—

1. Whether the mortgage of Kesri Singh's 4-anna share in favor of Plaintiff still subsists, and Plaintiff as mortgagee is entitled to recover possession thereof?

3. Whether the mortgage above referred to ceased and determined, and the Plaintiff is not entitled to sue for redemption for the reason stated in para. 18 of the written statement.

4. Is Plaintiff's claim barred by sec. 13, Civil Procedure Code?

5. Is Plaintiff estopped from affirming that Plaintiff is entitled to hold 8-anna share only?

6. Whether the mortgage of 4-anna share by Kesri Singh to Surat Singh, dated 5th September, 1879, has ceased and determined?

The Subordinate Judge decided that the effect of the previous litigation was to convey to Thakur Baldeo Baksh Singh not only the rights of Surat Singh under the mortgage of the 5th September, 1879, but also the rights of Thakur Jowahir Singh under the mortgage of the 10th January, 1888. He also held that all the matters raised by the Appellant in the present suit had been finally decided in the previous suits, and that the Appellant was estopped from raising them again. In accordance with the said findings a decree was made dismissing the suit with costs.

THAKUR JOWAHIR SINGH *v.* THAKUR BALDEO BAKSH SINGH.

Against the said decree Thakur Jowahir Singh appealed to the Court of the District Judge of Sitapur, and on the 1st June, 1903, judgment was delivered in the said appeal. The said Court decided that the only effect of the previous litigation was to permit Thakur Baldeo Baksh Singh to redeem the mortgage to Surat Singh, and left untouched the rights of Thakur Jowahir Singh under Kesri Singh's mortgage to him dated the 10th December, 1888; that in consequence Thakur Jowahir Singh was entitled to redeem Kesri Singh's 4 anna share; but that as Thakur Baldeo Baksh Singh insisted on the redemption of the whole 12-anna share, Thakur Jowahir Singh could only redeem Kesri Singh's share if he chose to redeem the whole 12-anna share. A decree was accordingly made in favor of Thakur Jowahir Singh for redemption of the 12-anna share, on payment of the sum of Rs. 12,000.

Against the said decree of the Court of the said District Judge, Thakur Baldeo Baksh Singh appealed to the Court of the Judicial Commissioners of Oudh, and on the 4th August, 1904, the said Court delivered Judgment and decided that Jowahir Singh was estopped by the previous litigation from now claiming to redeem Kesri Singh's share of 4 annas. In the result a decree was made reversing the said decree of the Court of the District Judge, and restoring the said Decree of the Court of the Subordinate Judge in this appeal.

Mr. Leslie DeGruyther for the Appellant argued in support of the judgment of the District Judge. The rights of Jowahir Singh under his mortgage of 1888 were in no way effected by the prior litigations. All that was held was that no action for redemption would lie piece-meal, all rights under the 1888 mortgage were left untouched by either of the litigations. The decision of the Sub-Judge that Jowahir's mortgage of 1888 was also redeemed was obviously a mistake. The second mortgagee is not prevented on any view of the law from redeeming the first mortgagee. There is no estoppel by conduct. Appellant has a right to redeem Kesri Singh's mortgage.

Mr. G. R. A. Ross for the Respondent, Baldeo Baksh, submitted that a careful understanding of the Judicial Commissioner's judgment would show that it was quite sound It was important to note the ground on which Jowahir had resisted that previous suit. He as Defendant pleaded that Baldeo could not redeem a part only of the property covered by the mortgage of 1879. In the second suit Jowahir pleaded that Baldeo could redeem only 8-annas of his mortgagor, Balbhaddar. He pointed to the reason for which the Judicial Commissioner in that suit decided against Jowahir, the forcing by him of Baldeo to redeem 12 annas share and then turning round and resisting redemption of that share. The suit was barred as *res judicata*; sec. 13, C. P. C., Expl. 2 was relied on.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—Their Lordships will humbly advise His Majesty that the decree appealed from should be reversed with costs. The respondent Baldeo Bakhsh Singh not having accepted the offer that the twelve-anna share should

THAKUR JOWAHIR SINGH *v.* THAKUR BALDEO BAKSH SINGH.

be redeemed, their Lordships will humbly advise His Majesty that an order should be made declaring that the Appellant is entitled by virtue of the mortgage deed, dated the 10th of December 1888 to redeem the four annas share comprised in the mortgage deed, dated the 5th of September 1879, with consequential directions.

The Respondent Baldeo Bakhsh Singh will pay the costs of the appeal.

C. W. A. *Appeal decreed.*

[ORDINARY ORIGINAL CIVIL JURISDICTION].

SUIT NO. 780 OF 1907.

FLETCHER, J.
1908.
Heard, 6 to 30, January.
Judgment, 4, March.

ANATH NATH DEB,
v.
J. C. GALSTAUN.

Easement—Ancient lights—Substantial interference—Nuisance—Reflected light—Mandatory injunction, refusal of—Delay—Damages.

The right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction but to constitute an actionable obstruction, the same must amount to a nuisance.

The question, that has to be decided, is not how much light is left inspite of the obstruction but whether there has been such a diminution of light as to constitute an actionable nuisance.

COLLS *v.* THE HOME AND COLONIAL STORES (1) *followed.*

WARREN *v.* BROWN (2) *referred to.*

Where it was urged that, although the natural light coming into the dominant tenant had been diminished, the reflected light had increased with the result that the rooms were better lighted than before, but it was admitted that if the building was raised, the light coming into the building would be seriously affected,

Held—*That the right of the dominant owner (to light) should not be made dependent on his refraining from exercising his undoubted right of raising the height of his building; there was thus a substantial interference with his rights.*

The suit was instituted on the 27th September 1907. On the same date, an application being made for an interlocutory injunction restraining the Defendant from proceeding with the building operations, a rule *nisi* (and an *ad interim* injunction) was issued on the Defendant to show cause why the injunction should not be granted as prayed for. On the 4th October 1907, the Defendant showed cause, when after hearing the parties, the Court adjourned the motion till the hearing of the suit but the *ad interim* injunction was withdrawn at the risk of the Defendant.

The other facts of the case fully appear from the judgment of the Court and are as follows:—

"This is a suit brought by the Plaintiff to restrain the Defendant from interfering with his ancient lights.

"The Plaintiff is the owner of premises known as No. 1 New China Bazar Street in the town of Calcutta, the main building whereof consists of a two-storied house. The openings on the north main wall of the Plaintiff's building form the subject of this suit. The north main

(1) (1904) A. C. 179.
(2) (1900) 2 Q. B. 722.

ANATH NATH DEB *v.* J. C. GALSTAUN.

wall of the Plaintiff's building does not run in a straight line but at each end of the building a portion thereof projects towards the north. On the ground floor of the Plaintiff's building, these openings consist of the seven windows facing due north and a door facing west and a window with another opening below it facing east. On the first floor, there are eight large windows and two small windows opening to the north, one small window facing east and four other openings in the room known as the pantry, three of which open to the north and the other to the north-west. The Plaintiff alleges, and the Defendant admitted at the trial before me, that all these openings are ancient openings.

"On the north of the Plaintiff's premises are the premises No. 2 New China Bazar Street which now belong to the Defendant. The former building on No. 2 New China Bazar Street consisted of a three-storied building of about 52 feet high with open verandahs on the south and west of the building, the verandah on the south of such old main building was seven feet six inches wide and ran up to a point of about four to five feet above the level of the 3rd floor of the building, with a sloping roof, commencing about three or four feet from the top of the main building. On the west side of the Defendant's old main building, there was a range of godowns extending for a depth of forty-five feet from New China Bazar Street towards the Defendant's old main building. This range of godowns was about 14 feet 6 inches high and the southern wall thereof formed, in part, the boundary wall between the Plaintiff's and Defendant's premises. Opposite the Plaintiff's main building, there ran a boundary wall, 6 feet 9 inches high, between Plaintiff's and Defendant's premises, as a continuation of the southern wall of the range of godowns. The Plaintiff's main building was at a distance from the boundary wall varying from 4 feet 6 inches to 7 feet 3 inches and the Defendant's old main building was at a distance of 19 feet from such boundary wall. The Defendant acquired the premises No. 2 New China Bazar Street in December 1906 with a view to erecting thereon a large new building.

"Early in 1907, the Defendant caused the old building to be pulled down and instructed Messrs. Martin & Co. to prepare plans for the erection of a new building on the premises. The plans were duly prepared and new building was, at the date of the hearing, in the course of erection having then reached a height of about 70 feet or thereabouts.

"The new building being erected is a four-storied building intended to be of the height of 77 feet, but a small portion thereof adjoining New China Bazar Street is not intended, at present, to be raised to the full height of 77 feet as the sanction of the Corporation has been withheld as to such portion being raised to this height. The new building being erected on the Defendant's premises is at a distance varying from 7 feet 9 inches to 8 feet 7 inches from the boundary wall between the Plaintiff's and the Defendant's.

"The Plaintiff alleges that the Defendant's new building has affected his ancient lights so as to constitute a nuisance."

ANATH NATH DEB v. J. C. GALSTAUN.

Mr. Knight (with him *Messrs. H. D. Bose* and *C C. Ghose*) for the Plaintiff, submitted that he had proved, by evidence, that the rooms on the north side of the building had been rendered such that it had been found inpracticable to carry on ordinary office-work in some of the rooms, which had to be converted into a store-rooms and the light and air in other rooms had been so affected as to amount to a sensible diminution thereof within the meaning of the decision in *Colls* v. *The Home and Calonial Stores* (1). He showed that the diminution had been such as is indicated in, amongst others, the following cases :— *Back* v. *Stacay* (3), *Martin* v. *Headon* (4), *Dent* v. *Auction Mart* (5), *Mackay* v. *Scottish Widows* (6), *Baxter* v. *Bower* (7), *Ecelesiastical Commissioners* v. *Kino* (8), *Kine* v. *Jolly* (9), *Higgins* v. *Betts* (10).

Submitted also that there had been no acquiescence on the part of the Plaintiff.

[*Vide*, the cases collected at p. 106 of Carson's Real Property Statutes].

He claimed that mandatory injunction was the proper remedy in a case like this.

Greenwood v. *Hornsey* (11), *Aynsley* v. *Glover* (12), *Cowper* v. *Laidler* (13).

Mr. J. E. Bagram (with him *Messrs. Garth, Zorab* and *B. C. Mitter*) for the Defendant, submitted that the only question for decision in this case was whether the erection of the Defendant's new building could be considered a nuisance and, if so, what was the remedy. He submitted that the evidence adduced by him showed that there was sufficient light and air in the rooms, in fact more than that enjoyed by many respectable offices in Calcutta. Besides, he submitted that, there was acquiescence on the part of the Plaintiff which ought to disentitle him to get any equitable relief. In the course of his argument, he cited :— *Kino* v. *Rudkin* (14), *The Attorney-General* v. *Nichols* (15), *Johnson* v. *Wyatt* (16), *Isenberg* v. *East India House Estate Co.* (17), *Yates* v. *Jack* (18), *Straight* v. *Burn* (19), *Gale* v. *Abbott* (20), *Rushmer* v. *Palsue* (21), *City of London Brewery Co.* v. *Tennant* (22), *Boyson* v. *Deane* (23).

Mr. Knight in reply.

Cur. adv. vult.

The JUDGMENT OF THE COURT, after stating the facts already quoted, was as follows :—

FLETCHER, J.— . . . . It being admitted that the Plaintiff's openings are ancient openings, the only two questions argued on the hearing of this suit were :—

(1) ((1901) A. C. 179.
(3) 2 C. & P 465: s. c. 31 R. R. 679 (1826).
(4) L. R. 2 Eq. 425 (1865).
(5) L. R. 2 Eq. 238 (1866).
(6) I. R. 11 Eq. 541.
(7) 44 L. J. Ch. 625 (1875).
(8) 14 Ch. D. 213 (1880).
(9) (1907) A. C. 1.
(10) (1905) 2 Ch. 210.
(11) 33 Ch. D. 471 (1886).
(12) L. R. 10 Ch. 283 (1875).
(13) (1903) 2 Ch. 337.
(14) 6 Ch. D. 160 (1877).
(15) 16 Ves. Jun. 343 (1809).
(16) 2 D. J. and S. 18 at p. 25 (1863)
(17) 3 D. J. and S. 263 (1863).
(18) 1 Ch. App. 295 (1866).
(19) 5 Ch. App. 163 (1869).
(20) 10 W. R. 748 (1862).
(21) (1906) 1 Ch. 234.
(22) 9 Ch. App. 212 (1873).
(23) I. L. R. 22 Mad. 251 (1898).

ANATH NATH DEB v. J. C. GALSTAUN.

(*i*) Does the new building so affect the light and air coming to the Plaintiff's premises so as to create a nuisance within the meaning of *Colls* v. *The Home and Colonial Stores* (1)?

(*ii*) If it has, is the Plaintiff entitled to a mandatory injuuction ordering the Defendant to pull down his building?

Dealing then with the first of these questions, it is admitted by the experts called by the Defendant that the whole of the direct light which formerly came to the Plaintiff's building has been taken away by the Defendant's new building. It is said, however, that having regard to the nature of the new building being erected by the Defendant, the amount of the reflected light has been so increased that, not only has the light coming to the Plaintiff's not been diminished, but, in fact, it has been increased. It is also stated by one of such experts, Mr. H. T. Bromley, who was formerly the City Architect, that, if the reflected light was diminished by the building No. 1 New China Bazar Street being raised or otherwise, the light coming to the Plaintiff's building would be seriously affected. Now, what is the nature of an easement of light and air?—"It is an easement belonging to the class known as negative easements. It is nothing more or less than to prevent the owner or occupier of an adjoining tenement from building or placing on his own land anything which has the effect of illegally obstructing or obscuring the light of the dominant tenement."—*Per* Lord Macnaghten in [1904] A. C. p. 185. That is, the right of the owner of the dominant tenement is a right to the reception of light and air in a lateral direction. It is not, however, every obstruction to the light and air coming to the Plaintiff's premises which will be an infringement of the Piantiff's right; the obstruction must amount to a nuisance.

"I am of opinion," says Lord Davey at p. 204 of [1904] A. C., "that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind."

If then I should accept the Defendant's evidence that, although the Plaintiff's premises have been deprived of all direct light, yet the light coming to them has not been diminished by reason of the increase of the reflected light, would the Defendant be entitled to succeed in this suit? In my opinion he would not. Doubtless light coming from other quarters has to be taken into account, but as Lord Lindley remarks in his speech in the House of Lords in *Colls* v. *The Home and Colonial Stores* (1) "light to which a right has not been acquired by grant or prescription and of which the Plaintiff may be deprived at any time ought not to be taken into account."

In order that the Plaintiff's premises should continue to enjoy this amount of reflected light it is necessary that the position of affairs should remain as at present. If the Plaintiff was to raise the height of his own building, which he has a perfect right to do, he would shut off the reflected light which at present comes

(1) (1904) A. C 179.

(1) (1904) A. C. at p. 211.

ANATH NATH DEB *v.* J. C. GALSTAUN.

to his premises. And to hold that the Plaintiff is under an obligation not to raise the height of his own building would mean that he enjoyed his easement not by reason of any act not to be done by the owner of the servient tenement but by reason of his forbearing to do some perfectly lawful act. I should therefore hold that even if the Defendant had established that the amount of reflected light which comes to the Plaintiff's premises is sufficient for the ordinary user thereof, yet as the Defendant's building takes away the whole of the light coming to the windows in the north wall and the Plaintiff can only enjoy such direct light by his or his neighbours forbearing to interfere with the light coming to the Defendant's premises so that it may be reflected into the Plaintiff's windows, the Plaintiff would be entitled to succeed in the present suit. But on the evidence which has been given before me, I am, however, of opinion that, even taking into account this reflected light, there has been such a substantial diminution of the light coming to the Plaintiff's premises as to amount to a nuisance.

Now the Plaintiff has called in support of his case Mr. Haarbleicher, partner in Messrs. Allen Brothers, who are the lessees and tenants of the Plaintiff's premises, and several gentlemen who are in the employ of Messrs. Allen Brothers, and Mr. Fitze, who is a sub-tenant of Messrs. Allen Brothers, to speak as to the state of affairs during the time the Defendant's old building was standing and as to the state of affairs now that the Defendant's new building is being erected.

Now, if I accept their evidence, as I do, there cannot be any doubt that there has been a substantial interference with the comfortable enjoyment of the Plaintiff's premises so as to create a nuisance. They say that the light has been so diminished that they have to use artificial light much earlier in the day time; some of them say that their health and eye sight has been affected by having to pour over their work and by the closeness in the atmosphere in the rooms. Mr. Fitze also says he cannot read a newspaper in his room at 3 o'clock in the afternoon. As against this, the Defendant has called several gentlemen employed in commercial houses in Calcutta Now these gentlemen called by the Defendant were not asked to go and see the Plaintiff's premises before the hearing of the suit, but went at the request of the Defendant to the Plaintiff's premises during the hearing of the suit, so that they might be called to contradict the evidence given by the Plaintiff's witnesses after the same had been given. Now the evidence given by these witnesses for the Defendant comes to this, (1) that there are many worse lighted offices in the business quarter in Calcutta than the Plaintiff's premises and (2) that the light coming to the Plaintiff's premises is sufficient for business purposes, *i.e.*, it is possible to carry on business in the Plaintiff's premises.

I am unable to see how this evidence given on behalf of the Defendant is relevant with regard to the question in issue; and the remarks of Lord Macnaghten in his speech in *Colls* v. *The Home and Colonial Stores* (1) appear to me conclusive on this point. Dealing with *Warren* v. *Brown* (2) his Lordship says "In

(1) (1904) A. C. at p. 194.
(2) (1900) 2 Q. B 722.

the Court of first instance, the learned Judge who tried the case found a special verdict which is not very easy to understand. The room in which the light has been materially diminished in its present state, is, he says, better lighted than the ground-floor front rooms in many of the principal streets. I do not see what bearing that fact had on the question at issue." .

Then it is said by the Defendant that one of the rooms on the ground floor is used as a store room and at any rate with regard to this room the Plaintiff is not entitled to any relief. In my opinion the Plaintiff does not lose his right to light and air by reason of the fact that this room is at present used as lumber room and on this part of the argument it is sufficient for me to quote from Lord Lindley's speech in *Colls* v. *The Home and Colonial Stores* (1). "If he (*i.e.*, the Plaintiff) chooses in future to use a well-lighted room or building for a lumber room for which little light is required, he does not lose his right to use the same room or building for some other purpose for which more light is required."

Then, it is said with regard to certain of the rooms in the Plaintiff's premises he could by making internal alterations improve the light coming thereto. This argument appears to me to be irrelevant. "The mode in which he (the Plaintiff) finds it convenient to arrange the internal structure of his tenement does not affect the question" (per Lord Davey in *Colls* v. *The Home and Colonial Stores* (1).

To sum up, the evidence given on behalf of the Defendant as to whether or not the Defendant's building constitutes a nuisance comes to this that the Plaintiff has as much light left as many other offices in Calcutta. But this is not the question to be decided. "The question to be decided is not how much light is left but whether the Plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has, it is no defence to say that he has as much light left as most other people." (per Lord Lindley, *Colls* v. *The Home and Colonial Stores* (1). I therefore hold that the erection by the Defendant of his new building constitutes an actionable nuisance by diminishing the light and air coming to the Plaintiff's premises.

There remains the second question, as to whether the Plaintiff is entitled to a mandatory injunction or to damages, to be dealt with. Now, it appears from the evidence that the Plaintiff's engineer and manager and Mr. Cobbold of Messrs. Allen Brothers were at an interview at the offices of Messrs Martin & Co., towards the end of May 1907, shown the plans of the new building proposed to be erected by the Defendant and that although they objected and threatened proceedings, nothing was done until the 27th September when the Plaintiff commenced this suit. In the meantime, the Defendant had contracted with Messrs Martin & Co., for the erection of his building and much material had been ordered out from Europe. On the 27th September 1907, the Defendant's building had reached a height of about 30 feet.

On 27th September, an application was made before the Vacation Judge for an interlocutory injunction. The application

(1) (1904) A. C. at p. 211.

(1) (1904) A. C. at p. 200.

ANATH NATH DEB v. J. C. GALSTAUN.

was not dealt with, but the Defendant was permitted to go on building at his own risk. In the meantime, the Defendant has practically completed his building at a very large cost. The Plaintiff's building is a small old fashioned house which in the ordinary course will in the course of a few years be pulled down and rebuilt.

In these circumstances, I have to decide whether the Plaintiff is entitled to a mandatory injunction. Now I think there was considerable delay between the end of May and the end of September in the Plaintiff's coming to this Court. On the other hand, I am satisfied that from what was said by Mr. Thornton at the interview at the end of May that the Plaintiff might get some compensation for the new building that he (Mr. Thornton) knew that the new building would invade the Plaintiff's rights.

I think, on the whole, that if the building had been stopped on the 27th September 1907, I should have granted a mandatory injunction ordering the Defendant to pull down so much of his building as affected the Plaintiff's ancient lights.

But in the meantime owing to the permission given to the Defendant to build at his own risk, a large and expensive building has been almost completed by the Defendant and I am satisfied that the Defendant could not comply with a mandatory injunction except by pulling down his building or by pulling down such part thereof as would render the remainder largely useless. Taking into consideration the delay on the part of the Plaintiff and the other circumstances, I have come to the conclusion, although not without some hesitation, that I ought not to grant a mandatory injunction but should make a decree for damages. Accordingly, I make a declaration that the Defendant's building has created a nuisance by obstructing the light and air coming to the ancient openings in the north wall of the Defendant's premises, and direct the Official Referee to enquire and report what sum ought to be paid by way of damages by the Defendant to the Plaintiff for the injury caused to his premises by such nuisance. The Defendant must pay to the Plaintiff his costs of this suit, such costs to be calculated on scale No. 2.

Mr. Charu Chunder Bose, Attorney for the Plaintiff.

Messrs. Morgan & Co., Attorneys for the Defendant.

P. R. C. *Decree for damages.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 900 OF 1906.

STEPHEN, J.
DOSS, J.
1908.
Heard,
28, January.
Judgment,
17, February.

H. MATHEWSON, Plaintiff, Appellant,
v.
JADU MAHTO and others, Defendants, Respondents.

Landlord and tenant—Disclaimer—Forfeiture.

There was no disclaimer by B of the relationship of landlord and tenant with A such as would cause a forfeiture of tenancy when B did not deny that he held the land as a tenant although he denied A's title to the interest of the landlord, A's case being that he acquired the landlord's interest at certain rent sales.

H. MATHEWSON *v.* JADU MAHTO.

JONES *v.* MILLS (3), WILLIAMS *v.* COOPER (4), GRAY *v.* STANION (5) *referred to.*

This was an appeal preferred on the 28th of May 1906, against the decision of Babu Mohim Chandra Sarkar, Subordinate Judge of Manbhoom, dated the 2nd March 1906, reversing the decision of Babu Sashi Bhusan Sen, Munsif of Puruliah, dated the 26th of August 1905.

The facts of the case material to this report will appear from the judgment.

Babus Jogesh Chandra Roy and *Ratan Chand Boral* for the Appellant.

Babu Nalini Ranjan Chatterjee for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff in the case sues four Defendants for *khas* possession of certain lands in which he claims a *mokurari* right on the ground of a denial of his right as a landlord by the Defendants Nos. 1 to 3 who were his tenants, and the Defendant No. 4 is added as he has been put forward as landlord.

The Plaintiff's case is that by the end of 1898 he had acquired the *mokurari* right in the land in question by reason of two sales on rent decrees in one of which he was the transferree of the purchaser. Acting on the title he had so acquired he brought a suit in 1899 against the present Defendants Nos. 1 to 3 to have it declared that he was entitled to the land free of an encumbrance claimed by the Defendants. Defendant No. 1, Jadu Mahto, pleaded among other things that he was not aware of the Plaintiff's predecessors-in-title having any interest in the land, that the decree, auction-sale and kobala on which the Plaintiff based his claim were collusive and fraudulent, that he had a jungle-buri right in the land. The second Defendant, Akhoy Mahto seems to have pleaded to much the same effect. An issue was framed as to whether the sale, decree and kobala were collusive and fraudulent and was decided in the Plaintiff's favour, but the suit was decreed for the Defendants on the determination of the point relating to the jungle-buri right. Meanwhile the Plaintiff had brought a rent suit No. 1627 of 1903 against Jadu Mahto alone, he being the registered tenant. To the claim in this suit the Defendant pleaded that he did not know whether the Plaintiff was entitled to rent, that he had already paid the rent claimed to Lalit Ghose, the present Defendant No. 4, and nothing more was due, and that he had never paid a higher rate of rent than he had stated. He afterwards gave evidence in the case, and the Judge's note of what he said is as follows : "I have no relation of landlord and tenant with Mr. Mathewson, the Plaintiff in this suit. I owe no money to him. I am tenant of Lalit Ghose to whom I pay rent." This evidence was given on the 5th February 1904, and thereupon the Plaintiff dropped the rent suit, and brought the present suit on 4th July 1904.

The first question that we have to decide in this case is whether such a denial of the Plaintiff's title has taken place as to cause a forfeiture of the land held by the Defendants or any of them. It has been held by this Court in *Debi-*

(3) 10 C. B. N. S. 788 at p. 796 (1861).
(4) 1 M. and G. 135 (1840)
(5) (1836) 1 M. & G. 695.

H. MATHEWSON v. JADU MAHTO.

ruddi v. *Abdar Rahim* (1) following the two cases there mentioned, that a denial of the Plaintiff's title by the Defendants is itself a cause of forfeiture, and the point has not been questioned. What we have to decide, therefore, is whether any of the Defendants has in fact denied the Plaintiff's title. The law on the subject of what constitutes denial, as has been mentioned in the case of *Mallika Dassi* v. *Makhan Lal Chowdhury* (2), is clearly laid down by Erle, C. J., in *Jones* v. *Mills* (3), where quoting Tindal, C. J., in *Williams* v. *Cooper* (4) he says "A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself. Here the tenant did not set up the title of another, neither did he affect to claim title in himself, but he required further information before he would pay rent to anybody. He acknowledged himself to be tenant and was ready to pay rent to the right person. What passed did not, in any judgment, amount to disclaimer." Byles, J. also in the same case points out that a refusal by a tenant to pay rent till he knew who was the right owner was no disclaimer. In *Gray* v. *Stanton* (5), Parke B. laid down that "a disavowal by the tenant of the holding under the particular landlord by words only is sufficient" to estop the tenant from claiming a right to notice, but that to make a disclaimer sufficient for this purpose "it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation which by necessary implication is a repudiation of it." Taking the law so laid down it is plain that nothing that occurred in the first suit, that relating to the encumbrance, worked a forfeiture. The relation of tenant and landlord between the Defendants and some one was not denied by the Defendant, though it was by the Plaintiff. What was denied by the Defendant was the Plaintiff's title to the interest of the landlord, and this seems to bring the case under the ruling of Tindal, C. J. above quoted, even though the auction sale and kobala on which the Plaintiff's title was based were impugned as collusive and fraudulent. It was admitted by implication, or what Byles, J., calls a negative pregnant with an affirmative, that under certain circumstances which might be proved in the case the Defendant would actually be the Plaintiff's landlord. The first words first quoted from the judgment in *Gray* v. *Stanion* (5), may seem to require a stricter construction, referring as they do to a disavowal of holding under a particular landlord, but they must be read with the judgment in the latter case, and the point of the sentence is that the disavowal may be by words only. The statements made in the rent suit are more decisive if they can be accepted. In the written statement of the sole Defendant, the present Defendant No. 1, there is nothing that does not come under the ruling of Erle, J., as the statement that

(1) I. L. R. 17 Cal. 196 (1888).
(2) 9 C. W. N. 928 : 2 C. L. J. 389 (1905).
(3) 10 C. B. N. S. 788 at p. 796 (1861)
(4) 1 M. and G. 135 (1840).
(5) 1 M. & W. 695 (1836).

(5) 1 M. & W. 695 (1836).

H. MATHEWSON *v.* JADU MAHTO.

he had paid rent to a former owner and that nothing more was due might by itself be quite consistent with the Plaintiff's title. The terms of the Judge's note of the Defendant's deposition go further, as they undoubtedly represent the Defendant as setting up a title in Lalit Ghose. But we find it impossible to act on this statement as it comes before us. The note is not a document made in accordance with sec. 182 of the Civil Procedure Code, nor does it appear that the provisions of sec. 183 have been complied with in respect to it. We cannot say that such a note as the present could not be taken into account under some circumstances, but considering the strictness of proof that is required to prove a case such as that now put forward we certainly cannot trust to this note alone for the purpose.

The result is that the Plaintiff has not proved any denial of his title sufficient to cause a forfeiture, and we need not therefore consider the further points that have been raised by the Defendant as to the liability of No. 2 and 3 for the acts of No. 7, and as to the nature of the holding of the Defendants.

The appeal is therefore dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 644 OF 1906.

STEPHEN, J. Doss, J. 1908. Heard, 31, January. Judgment, 5, March.	KUMAR KALANAND SINGH and others, Defendants, Appellants, *v.* SYED SARAFAT HOSSEIN, Plaintiff, Respondent.

Revenue Sale Law (Act XI of 1859), sec. 54—Purchaser of share—Right to recover from person who has acquired title by adverse possession previous to default.

Whether adverse possession is completed before or after the date of default, a purchaser at a revenue sale of a share of an estate in respect of which a separate account has been opened in the Collectorate becomes entitled to possession of the share.

If the adverse possession was completed before default, the default must be treated as the default of the person who has acquired title by adverse possession and the sale must be held to pass his interest.

This was an appeal preferred on the 30th of April 1906, against the decree of Babu Aswini Kumar Guha, Subordinate Judge of Zillah Bhagulpur, dated the 6th of January 1906, confirming that of Babu Jnan Chandra Banerjee, Munsif of Bhagulpur, dated the 10th of August 1905.

The facts of the case material to this report will appear from the judgment.

Babus Umakali Mukerjee and *Atul Chandra Dutt* for *Babu Sailendra Nath Palit* for the Appellants.

No one for the Respondent.

KUMAR KALANAND SINGH v. SYED SARAFAT HOSSEIN.

The JUDGMENT OF THE COURT was as follows:—

The suit, out of which this appeal arises, was brought by the Plaintiff-Respondent to recover possession of 9 gundas odd share of Mouzah Fatehpur, as a purchaser at a sale for arrear of revenue. Mouzah Fatehpur, with two other mouzahs, constituted an entire estate, in which Defendants Nos. 1, 2 and 3 owned a 7 annas 15 gundas odd share, Defendant No. 4 a similar share and Mussts. Laduan and Kaduan the remaining 9 gundas odd share. Separate accounts had been opened in the Collectorate under sec. 10 of Act XI of 1859 in respect of each of those shares. The 9 gundas odd share of Mussts. Laduan and Kaduan having fallen into arrear was sold by the Collector under sec. 13 of Act XI of 1859 in November 1900, and was purchased by the Plaintiff. Plaintiff then applied to the Collector for partition of the share purchased by him. Defendants Nos. 1, 2 and 3 objected to the partition on the ground that Plaintiff was not in possession of his share in Mouzah Fatehpur. Plaintiff thereupon withdrew his application for partition, and then brought the present suit to recover possession of his share in that Mouzah.

The main defence of the Defendant was that Mussts. Laduan and Kaduan had no right to the share, and that even if they had any right they had lost it by reason of adverse possession by the Defendants for more than 12 years; and that Defendants Nos. 1, 2, 3 and 5 had by such adverse possession acquired a right to one half, and Defendant No. 4 had similarly acquired a right to the other half of the 9 gundas odd share, and that they were in possession of their respective moieties.

Both the Courts below have held that as soon as the Defendants acquired a title to the share by adverse possession, their liability to pay Government revenue in respect thereof accrued, and as they defaulted in paying the revenue which fell due after they had acquired such title, their share passed to the purchaser at the sale. On this ground the Courts below have decreed the Plaintiffs' suit.

The Defendants Nos. 2 and 3 have appealed, and it is now contended on their behalf on the authority of the case of *Karmi Khan* v. *Brojo Nath Das* (1), and the cases cited therein, that the right acquired by adverse possession against the former proprietor is an encumbrance, and that under sec. 54 of Act XI of 1859, which defines the rights of a purchaser of a share at a revenue sale, the Plaintiff purchased the share subject to such encumbrance, and that therefore Plaintiff is not entitled to recover possession of the share.

It has also been urged that it would be incongruous to hold that adverse possession for 12 years, if it is not completed before the date of default in the payment of revenue, continues to be an encumbrance and the purchaser takes the share subject thereto, but that if such possession is completed before the date of default, it ceases to be an encumbrance and the purchaser takes the share freed from it.

We do not think that these contentions are sound. It is perfectly clear that although at the expiration of the statu-

(1) I. L. R. 22 Cal. 244 (1894).

KUMAR KALANAND SINGH *v.* SYED SARAFAT HOSSEIN.

tory period the trespasser acquires a right to the share as against the former owner, he does not acquire such right freed from the liability to pay revenue. Were it otherwise, the result would indeed be that all revenue paying estates or shares of estates in the possession of trespassers would, after the lapse of 12 years, become revenue-free. If after the trespasser has acquired a right to the share by adverse possession any instalment of revenue payable in respect thereof falls due, and he does not pay the same, such default must be treated as his default, and if, in consequence thereof, sale takes place, it must be held to pass his interest.

It is difficult to distinguish in principle the present case from those where the former owner transfers his share, before the date of default, under a private conveyance, or where the share is transferred by a judicial sale, and the share is subsequently sold by the Collector on account of default in the payment of revenue. It has been held that in the last mentioned cases, the right of the transferee or the purchaser at the sale, as the case may be, passes to the purchaser under the sale held by the Collector. See *Annoda Pershad Ghose* v. *Rajendra Kumar Ghose* (2), *Bhowani Koer* v. *Mathura Prosad* (3), *Gungadeen Misser* v. *Kheeroo Mundle* (4).

If adverse possession for the statutory period is not completed before the date of default, the purchaser by virtue of his certificate of sale steps into the shoes of the former owner, and becomes entitled to recover possession of the share in the same manner in which the former owner would have done, had no sale taken place, because by the very hypothesis, his right to the share would be still subsisting.

It follows therefore that whether the adverse possession is completed before or whether it is completed after the date of default, the purchaser at the revenue sale in either case becomes entitled to the possession of the share. Hence the anomaly, which has been suggested, does not exist.

For the foregoing reasons we agree with the Courts below and dismiss this appeal. As no one appears for the Respondent we dismiss it without costs.

N. G. *Appeal dismissed.*

(2) 6 C. W. N. 375: s. c. I. L. R. 29 Cal. 223 (1901).
(3) 7 C. L. J 1 (1907).
(4) 14 B. L. R. 170 (1874).

[ORDINARY ORIGINAL CRIMINAL JURISDICTION.]

CR. SESSIONS FOR 1906.

MACLEAN, C. J.
GHOSE, J.
HARINGTON, J.
BODILLY, J.
CASPERSZ, J.
1906.
27, August.

THE EMPEROR,
v.
KHUDIRAM DASS,
Accused.

Penal Code (Act XLV of 1860), sec. 326—Grievous hurt—Essence of offence—Jury—Verdict of "guilty but not voluntarily," meaning of—Sec. 338, conviction under—Causing grievous hurt by rash and negligent act—Criminal Procedure Code (Act V of 1898), secs. 237, 238.

To constitute an offence under sec. 326 of the Penal Code, the act must have been done "voluntarily"—that is of the very essence of the offence.

THE EMPEROR v. KHUDIRAM DASS.

When an accused person was charged with committing offences under secs. 304 and 326 of the Penal Code, and tried before a jury, and the latter found him not guilty under sec. 304, but returned a verdict of "guilty but not voluntarily" under sec. 326, and the Judge without asking the jury to explain the verdict discharged them and then convicted and sentenced the accused under sec. 338 of the Penal Code.

Held—*That the verdict on the charge under sec. 326 was in effect a verdict of "not guilty" and the accused was entitled to an acquittal.*

The case was referred to a Full Bench on a certificate granted by Mr. S. P. Sinha, the Officiating Advocate-General, for the further consideration of some points of law raised in course of the trial.

The accused was tried on the 13th, 14th and 15th of August 1906 at the August Criminal Sessions of the High Court before Mr. Justice Casperz and a jury. He was convicted under sec. 338 of the Indian Penal Code and sentenced to one year's rigorous imprisonment.

The facts are as follows :—

The accused Khudiram Dass was indicted at the said Criminal Sessions of August 1906, *firstly*, with having on or about the 6th of July 1906 in Calcutta committed culpable homicide not amounting to murder by causing the death of one Sashi Bewa by burning her with fire and thereby committed an offence punishable under sec. 304 of the Penal Code, *secondly* that he at or about the time and in the place aforesaid caused grievous hurt to the said Sashi Bewa by means of fire and thereby committed an offence punishable under sec. 326 of the Penal Code.

The said Khudiram Das pleaded not guilty to the two charges in the said indictment and was tried before the Hon'ble Mr. Justice Casperz and a common jury on the 13th, 14th and 15th of August 1906.

On the 15th August 1906 after counsel for the Crown and for the prisoner had both addressed the jury the learned Judge charged the jury and in the course of his charge read out and explained the provisions of sec. 336 of the Indian Penal Code and also carefully explained to them the meaning of the word "voluntarily" as defined by sec. 39 of that Code.

No charge under sec. 336 of the Indian Penal Code was, however, added by the said learned Judge to the charges upon which the said Khudiram Dass had been indicted, nor was the said Khudiram Dass ever called upon to plead to a charge under that section.

On the 14th August 1906 the said jury retired to consider their verdict and on their return, being called on by the Clerk of the Crown for their verdict the Foreman of the jury replied that it was a unanimous verdict and on being further questioned the Foreman stated that their verdict was "guilty of causing grievous bodily hurt without intention of taking life."

Thereupon under the directions of the learned Judge the said Clerk of the Crown read out to the jury the two charges under secs. 304 and 326 of the Indian Penal Code to which the prisoner had pleaded not guilty and asked the jury what their verdict was upon these charges.

THE EMPEROR *v.* KHUDIRAM DASS.

The Foreman after a brief consultation with his co-jurors stated that the unanimous verdict of the jury was "not guilty" on the charge under sec. 304 of the Indian Penal Code and their unanimous verdict was "guilty but not voluntarily" on the charge under sec. 326 of that Code.

Thereupon the said learned Judge discharged the said jury.

Thereafter some discussion took place as to what the verdict of the jury amounted to on the charge under sec. 326 of the Indian Penal Code and the learned Judge fixed the following day, the 15th August, to hear counsel for the prisoner and the Crown on this point.

On the 15th August 1906 both the counsel for the prisoner and the Standing Counsel for the Crown were heard and the counsel for the prisoner requested the learned Judge to refer the question for the decision of a Full Bench. But the learned Judge refused this application and delivered his decision in the following words:—"I have to pass judgment according to the unanimous verdict of the jury. On the first charge the verdict is "Not Guilty." I do not think that the verdict on the second charge amounts to an acquittal. I think the verdict will justify conviction under sec. 338." In the result he passed sentence of one year's rigorous imprisonment on the prisoner.

The learned Judge on again being asked by the counsel for the prisoner to reserve the point for the decision of a Full Bench refused to do so but directed that a note of such request be taken by the Clerk of the Crown.

The grounds on which the certificate of the Advocate-General was sought for and obtained were the following:—

(*a*) That the learned Judge was in error in discharging the jury inasmuch as if there was any doubt in his mind as to what their verdict amounted to under the second charge he should have further explained to them the provisions of sec. 326 of the Indian Penal Code and directed them to further consider their verdict on that charge.

(*b*) That the learned Judge was in error in convicting the prisoner under sec. 338 of the Indian Penal Code inasmuch as the prisoner was not charged under that section nor did he plead to a charge under that section nor did the jury find him guilty of an offence under that section nor could the jury have returned a verdict under that section inasmuch as an offence under that section cannot be construed as an offence kindred to one under sec. 326 of the Indian Penal Code the section under which the prisoner was charged.

(*c*) That the learned Judge was in error in convicting and sentencing the prisoner whereas he should have accepted the verdict of the jury as one of acquittal under sec. 326 of the Indian Penal Code and should have discharged the prisoner.

Mr. K. N. Chaudhuri for the Accused.

Mr. K. S. Bonerjee (Standing Counsel) for the Crown.

The JUDGMENT OF THE FULL BENCH was as follows:—

MACLEAN, C. J.—This case comes before us under the certificate of the Officiating Advocate-General. The Prisoner Khudiram was indicted at the last August

THE EMPEROR v. KHUDIRAM DASS.

Criminal Sessions for an offence punishable under sec. 304 of the Indian Penal Code. He was also indicted for another offence punishable under sec. 326 of the Indian Penal Code. The case was tried in the usual manner, and the Judge summed up the case to the jury; and, the jury found a verdict of "not guilty" as regards the charge under sec. 304; and, a unanimous verdict of "guilty but not voluntarily" on the charge under sec. 326. The learned Judge did not ask the jury to explain this verdict under sec. 326, but discharged them: and after some discussion and consideration of the matter treated the prisoner as having been convicted of a charge under sec. 338 of the Indian Penal Code and sentenced him to one year's rigorous imprisonment. The officiating Advocate-General then gave his certificate under sec. 26 of the Letters Patent 1865

It is now urged for the prisoner that the unanimous verdict of "guilty but not voluntarily" was in effect a verdict of "not guilty." This is the first question we have to decide.

To constitute an offence under sec. 326, the act must have been done "voluntarily"—that is of the very essence of the offence. It is unnecessary to-day to go into the question of what voluntarily means: we understand its meaning was very fully explained to the jury.

In my opinion, a verdict such as this "guilty but not voluntarily" having regard to the language of sec. 326 of the Indian Penal Code is in substance and effect a verdict of "not guilty."

But it is said that the Judge was justified in sentencing the prisoner as he did for an offence under sec. 338. It is noteworthy that the prisoner was not charged with any offence either under sec. 336 or under sec. 338: and the jury did not find him guilty of any offence under either of these sections.

It is further suggested that the Crown may call in aid the provisions of secs. 237 and 238 of the Criminal Procedure Code. Those sections have no application to the present case: those sections can only apply when there has been a conviction: but here there was no conviction by the jury of any offence under sec. 338 or any other section: and, consequently, there being no conviction, there could be no sentence. The verdict under sec. 326 being tantamount to a verdict of not guilty and there being no other charge and no conviction for any offence under any section of the Penal Code—the prisoner ought to have been discharged and must now be discharged. The conviction must be quashed.

GHOSE, J.—I agree in the judgment of the learned Chief Justice.

HARINGTON, J.—I agree. "Causing grievous hurt" is an offence under sec. 326, if it is done voluntarily. Here the jury found that it had not been done voluntarily and thus acquitted the prisoner, on the charge under sec. 326. "Causing grievous hurt" is also an offence under sec. 338, if it is caused "by doing any act so rashly or negligently as to endanger human life or the personal safety of others." The jury have not found that the prisoner "did any act so rashly or negligently as to endanger human life or the personal safety of others;" and till they found those facts against the prisoner he could not be convicted under sec. 338.

THE EMPEROR v. KHUDIRAM DASS

For these reasons I agree in the judgment that has been delivered.

BODILLY, J.—I agree with the learned Chief Justice.

CASPERSZ, J.—I cannot silently acquiesce in the judgment which has just been delivered, although I agree that the accused Khudiram Dass is entitled to be acquitted.

The issue before the jury, as put by the learned Counsel for the accused, and as explained and elaborated to the jury by myself, the presiding Judge, was whether the accused was guilty in respect of voluntary acts or in respect of merely rash or negligent acts. It may be gathered from the minutes of the proceedings in the Sessions Court, and it is a fact, that, on the 14th August, the only doubt was whether the verdict of the jury amounted to "guilty" under sec. 336, I. P. C., or "guilty" under sec. 338, and it was not until the following day, the 15th August, that the argument was first advanced by the learned Counsel that the verdict was tantamount to an acquittal. I was then of opinion that sec. 338, I. P. C, was present in the minds of the jury, and that their verdict might reasonably be construed as to be one of "guilty" under that section. But the difficulty I now feel, after hearing the arguments on both sides and after having had the advantage of consulting my learned colleagues of this Full Bench is that there was no clear expression by the jury of their opinion. If I had questioned the jury as to what they meant by saying "not voluntarily," then the matter would not have been left in doubt; and if the jury had found the prisoner guilty under sec. 338, I. P. C then the provisions of secs. 237 and 238 of the Criminal Procedure Code would have been applicable. But in the present uncertainty I think we are not entitled to read into the verdict a meaning of which, possibly, it might not be susceptible. For these reasons, therefore, I agree in the judgment of my Lord the Chief Justice.

Conviction set aside.

[CRIMINAL REFERENCE].

No. 17 AND 18 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
Heard,
19, February,
Judgment,
26, February.

THE EMPEROR at the prosecution of the Sathi Factory,
v.
SHEIKH ARIFF and ors., Accused.

*Indian Penal Code (Act XLV of 1860), secs, 379 and 430—Theft of water running through an artificial channel—Mischief by causing a diminution of the supply of water for agricultural purposes—*Bonâ fide *claim of right, facts negativing.*

Water running freely from a river through a channel made and maintained by a person cannot be the subject of theft.

FERENS v. O'BRIEN (1) *distinguished.*

Where the accused took water that was running freely from a river through a pyne made and maintained by another for irrigation purposes and it was found that the accused were not acting under a bonâ fide *claim of right and their act caused a diminution of the supply of water for agricultural purposes,*

Held—*That the accused committed an offence under sec. 430, I. P. C. even though*

(1) 11 Q. B. 21 (1883).

THE EMPEROR v. SHEIKH ARIFF.

There was no evidence to prove that the accused knew at the time they took the water that any lands were being actually irrigated with the water of the pyne.

Held further (WOODROFFE, J. dubitante) —*That under the circumstances of the case and having regard to the history of the pyne, the accused were not under a* bonâ fide *belief that they were entitled to take the water.*

This was a reference under sec. 438, Cr. P. C, by the Officiating Sessions Judge of Mozaffurpore (S. C. Mullick, Esq) on the 20th of January 1908, recommending that the order of the Subdivisional Magistrate (E. L. Tanner, Esq.) of Bettiah, dated the 20th of December 1907 convicting the accused persons in both cases under secs. 379 and 430, I. P. C. and sentencing them each to pay a fine of Rs 25, be set aside

The facts material to the report will appear from the judgment.

Babu Atulya Churn Bose and *M. Songhat Ali* for the Accused.

Mr. Garth and *Babu Dwarka Nath Mitter* for the prosecution.

The JUDGMENT OF THE COURT was as follows :—

GEIDT, J.—The accused in the two cases are tenants in village Belun, which is let in *thika* to the Sathi factory. There is a *pyne* or water channel running through the village by which water is conveyed for the irrigation of the *zerait* lands of the factory. The accused are found to have cut the embankment of this *pyne* with the object of irrigating their own fields, and have been convicted of theft of the water under sec. 379 I. P. C., and also of mischief by doing an act which caused, or which they knew to be likely to cause a diminution of the supply of water for agricultural purposes, the latter being an offence punishable under sec. 430. Each of the accused has been sentenced to pay a fine of Rs. 25. The Sessions Judge is of opinion that in the circumstances of the case, and on the findings of the Magistrate, the convictions cannot be sustained under either of these two sections, and he has accordingly referred the cases to this Court with the recommendation that the convictions and sentences be set aside.

I agree that the conviction under sec. 379, I. P. C. cannot be sustained. The water runs freely through the channel from the river and flows into some *khal* or *jhil* unless it is diverted for irrigation. This fact distinguishes the present case from that quoted by Mr. Garth, *viz.*, *Ferens* v. *O'Brien* (1), where the water was confined in pipes which were closed by taps. There the water was reduced into the possession of the water company which supplied it. In the present case the water running freely along the channel is not reduced to possession till it is actually brought on to the land irrigated. The factory, therefore, cannot be said to have been in possession of the water taken by the accused, and the offence of theft was not committed by taking it.

The ground, on which the Sessions Judge holds that the conviction under sec. 430 is bad, is that the Magistrate has found that there is no evidence to show that the accused knew that the *zerait* lands of the factory or the lands of any one else further down the *pyne* were being

(1) 11 Q. B. 21 (1883).

THE EMPEROR *v.* SHEIKH ARIFF.

irrigated. The Sessions Judge points out that for all the accused knew the water in the *pyne* might be running to waste, and it cannot therefore be held that the accused were likely to cause wrongful loss to other people who were irrigating their lands lower down the *pyne*. In his view, therefore, one of the elements of mischief was wanting. It is clear, however, that the act of the accused caused a diminution of the supply of water for agricultural purposes. (In one of the cases the Magistrate says that most of the water was being taken out of the *pyne*). The supply of water available for irrigation being thus lessened, its value or utility was diminished whether it was actually being used or not. If the accused were not entitled to take the water, they would by their act be causing wrongful loss to those to whom the *pyne* belonged, and to those who were entitled to take the water, and if they knew that they were not entitled to take the water, they must have had the intent to cause or knowledge that they were likely to cause wrongful loss, and their act would be punishable under sec. 430, Penal Code.

It was therefore for the prosecution to prove (1) that the accused were not entitled to take the water and (2) that they knew that they were not entitled to take the water. The Magistrate has found both these points against the accused. He has held that the factory constructed the *pyne*, and that the Manager has always kept under his control the distribution of water therefrom. He has also held that the accused were not acting under a *bonâ fide* claim of right. On these findings, which are findings of fact, the accused were guilty of the offence provided for in sec. 430.

This Court does not ordinarily interfere on revision with findings of fact, and it never interferes with such findings unless it is clearly satisfied that the findings are wrong or that there is no evidence to support them. To proceed otherwise would be to treat as appeals cases coming before us on revision.

As regards the construction of the *pyne* there is evidence that the *pyne* was constructed and is maintained by the factory, and the Magistrate points out in the case of Sheik Harif that the evidence of two out of the three witnesses for the defence is to the same effect. *Primâ facie* then the accused were not entitled to take the water. But it is said that having regard to the history of the *pyne*, the accused may have been under the *bonâ fide* belief that they were entitled to take the water. The *pyne* may have been constructed and may be maintained by the factory, and the primary use to which the *pyne* has been put may have been the irrigation of the factory *zerait*. Nevertheless the evidence shows (and it is not disputed) that the villagers, holding land along the *pyne*, including the inhabitants of the Belun village have in past years irrigated their lands from the factory, that this has been going on for the last twenty years and that the raiyats have latterly been paying to the factory irrigation charges at the rate of 1½ as. a bigha. But the evidence also shows, and this evidence has been believed by the Magistrate, that the villagers used the water not as of right but by permission. The raiyats in return for growing indigo for the factory were

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, APRIL 20, 1908. [No. 23

Contents.

NOTES

THE SELECT COMMITTEE OF THE EASTERN BENGAL and Assam Council, which were appointed to consider the Bill for amending the Bengal Tenancy, Act in so far as it applies to Eastern Bengal, have submitted their report. The report as well as the Bill as amended by the select Committee are published in the *Eastern Bengal and Assam Gazette* for Wednesday the 8th of April 1908 It will be remembered that the Eastern Bengal and Assam Government adopted the Amending Act I of 1907 of the Bengal Council almost without modification and introduced it in Council as its Amending Bill The object of the Bill was stated to be to "assimilate the law of landlord and tenant in the transferred districts to the law of Bengal in so far as the change introduced in Bengal by Bengal Act I of 1907 should be found suited to local conditions." However that may be, the result of introducing the Bill in this form has been that the Eastern Bengal and Assam Council has got an opportunity of reconsidering the provisions of the Bengal Tenancy Amendment Act I of 1907 and has been able to give more mature thought and consideration to some of the provisions of the Bengal Bill which the weight of official opinion in the Bengal Council carried into law in the face of much opposition. The result of this, we find, has on the whole been satisfactory.

WE NOTE WITH PLEASURE THAT THE PROVISION IN the Bengal Act making sec. 310A of the Civil Procedure Code inapplicable to rent sales has been abandoned by the sister council and that on the very ground that we, amongst others, urged against it, namely, that it would entail real hardship and injustice to unregistered tenants. Next in importance are the amendments of secs. 101B, 109C and 147A which gave certain powers to Revenue Officers and Courts for dealing with agreements and compromises between landlords and tenants.

WITH REGARD TO SEC. 109B, THE SELECT COMMITTEE observe:

However necessary the provisions of sec. 109B may be in Behar, we are satisfied that they are not appropriate to the conditions prevailing in many of the districts of Eastern Bengal with their turbulent and exciteable population, and we fear that, if it is so to be made incumbent upon the Revenue officer to enquire into the circumstances attending each and every agreement, settlement operations will stir up much strife and will revive many disputes happily settled.

We therefore propose to substitute for sec. 109B an amendment which, taken with the definition of rent and other provisions of the existing law, will make it clear that the Revenue officer has full power to inquire into and disregard inequitable agreements and compromises, and will yet leave it open to him to act upon agreements and compromises when they appear to be reasonable and when both parties are perfectly satisfied

With the proposed amendment in sec. 109B, sec. 109C becomes unnecessary, and we propose to omit it.

SIMILARLY WITH REGARD TO SEC. 147A, THE REMARKS of the Select Committee are also worth quoting.

Cl. 42 (sec. 147A).—Judicial officers and others are strongly opposed to the proposed sec 147A, on the ground that when the parties before the Court have come to a compromise, neither is likely to assist in any inquiry which the Court may endeavour to make, and that it will in practice be impossible to arrive at the truth.

As a decree cannot affect the rights of third parties, proposed sub-sec. (1) would seem to be unnecessary.

Moreover, the effect of the proposed section would seem to be that even in a suit for enhancement the landlord could not obtain by compromise an enhancement exceeding that obtainable by contract, though in itself fair and equitable, and such as the Court might decree on contest.

The Hon'ble Mr. Lyon is opposed to any modification of sec. 147A, which would permit the acceptance of compromises having the effect of enhancing rents beyond the limits permissible in the case of contracts, but the majority of us are of opinion that it is not in the interests of either landlord or tenant that when the parties have come to Court they should be required to contest every enhancement suit to the bitter end, and that in a suit properly framed for the purpose it should be open to the parties to enter into compromises providing for a reasonable and legal enhancement.

We therefore propose to substitute for sec 147A an amendment which while making it clear that the Courts are not blindly to accept compromises entered into between landlord and tenant will yet enable them in enhancement suits to act upon compromises by which the parties agree to equitable enhancements within legal limits.

WE ARE CLEARLY OF OPINION THAT SO FAR AS THESE provisions are concerned the circumstances of Behar are not such as to make exceptional provisions like those of secs. 109B, 109C and 147A specially necessary for that province. We consider the amendments made by the Select Committee in Eastern Bengal to be fair and judicious in themselves, and as such equally applicable to both provinces.

ANOTHER NOTICEABLE CHANGE IS THE OMISSION OF cl. 18 which provided that no subdivision of a

tenancy would be recognised unless the landlord expressly consented to it in writing or it was so consented to by an agent duly authorised in that behalf. This provision was no doubt intended to protect landlords from being defrauded by unscrupulous agents. We do not appreciate the reasons given in the majority report for omitting this provision from the Bill. But neither do we apprehend the consequences foreshadowed in the minority report of the dissenting members. The question is really one of the application of the law of agency to the relation of landlords, their agents and the tenants, and will be decided in each case as it arises upon facts, bearing on the extent of the agent's authority, as disclosed at the trial. We do not think landlords need special protection in this respect. The ordinary law affords sufficient protection to landlords and tenants alike.

THE PROVISION IN THE AMENDED CL. 22 REQUIRING that a Revenue Officer preparing a record of rights shall in each case frame a certificate also supplies an obvious omission. The remaining amendments consist of improvements in drafting and need not be noticed at length.

WITH REGARD TO THE AMENDMENTS INTRODUCED IN cls. 25A and 27, which provide that when the same plot of land is comprised in more than one area for which separate records have been framed limitation for the purpose of starting proceedings under secs. 105 or 106 of the Act should be computed as running from the date of the final publication of the last record, we must say that they are likely to prove useful. The Committee seem to think that the difficulties which have called for these amendments have not yet been judicially noticed. Such however is not the case. In the case of *Mohunt Padmalav* v. *Lukmi Rani*, 12 C. W. N. p. 8, the Court was called on to decide whether the limitation for an application under sec. 106, should be taken to start from date of the final publication of the earlier or the later record. In that case a certain mouza was found to have been erroneously omitted from one record and included in another. The Court held, not without hesitation, that limitation ran from the date of the final publication of the record in which the mouza was included.

WHILST WE MUST SAY WE GENERALLY APPROVE OF the modifications proposed by the Select Committee, we shall again urge as we have done before that the law of landlord and tenant in the two provinces should be the same or else there will be great confusion. We would therefore suggest that the Bengal Council should in its turn adopt the modifications finally made by the E. B. and Assam Council upon a manifestly maturer consideration of its own enactment. We would specially suggest that the provision making sec. 310A of the Civil Procedure Code inapplicable to rent sales should be forthwith repealed. Opportunity should also be taken by the Councils of both the Provinces to remove the doubt thrown by the decision of the High Court in *Asiruddi* v. *Mukhodamoyi* 12 C. W. N. 434 on the applicability of sec. 310A, C. P. C. to rent sales apart from the provisions of the Amending Act, and it should be expressly enacted that the provisions of sec. 310A, C. P. C. can be availed of by all persons other than the judgment-debtor whose rights would be affected by the sale.

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN. LORD ROBERTSON. LORD ATKINSON. LORD COLLINS. SIR ARTHUR WILSON. 1908. 18, March.	PARSOTAM RAO TANTIA and another, *v.* MUSAMMAT JANKI BAI and another.

Privy Council—Special leave—Mitakshara—Property received under father's Will if ancestral or separate—Question of fact—Pleading—Inconsistency.

Mr. Leslie DeGruyther, K.C., (instructed by *Messrs. Rankenford, Ford and Chester*) appeared in support of this petition for special leave to appeal from the High Court of Judicature for the North Western Provinces, Allahabad. The question was whether the father of a man named Narain Rao constituted with his sons a joint undivided Hindu family with the right of survivorship as an incident to that tenure, or whether one of the sons was separate in interest so that upon his death his interest passed not by survivorship to the remaining members of the family but to his widow. It appeared that the property was acquired by Narain Rao, the father of the Appellants and one of the Respondents, under a Will of his father executed in the year 1854. The question of law, which arose, *viz.*, what was the nature of the interest taken by Narain Rao under the Will from his father, has been differently answered by the different High Courts. The Appellants submitted that he took it as an ancestral estate which therefore came to his sons as joint estate, and over which Narain Rao had no power of devise. As a matter of fact Narain Rao did in the year 1864 make a Will. By this Will he partitioned out the whole of his property and said he was going to give to one son certain villages, and to a third son certain different villages, but he said in his Will he was not at all anxious his property should be partitioned, and that he should be very

glad if his sons did not act upon it; but remained members of the joint family. From the year 1880 when Narain Rao died up to the year 1901 all the parties remained as members of a joint undivided Hindu family. After there had been certain proceeding they desired to give evidence in the Court of first instance and the Respondents being anxious that the case should terminate quickly said they would not ask the Appellants to give evidence but would make certain admissions, and the admissions they made were the following: (1) that at and from the death of Narain Rao all the members of the family were joint in mess, residence, worship and business. (2) The management of the household and zemindary was joint. (3) The expenses of all the members of their mess, of ceremonials and other necessities were joint, *i.e.*, were paid out of a common fund and the income of all sorts of properties standing in the name of any member used to be kept in one place. (4) The surplus after all sorts of expenses was not divided among the members. (5) No accounting of the income and expenditure among the members. (6) After the death of Narain Rao many items of properties were purchased by this family. Some of the properties thus purchased were purchased in the name of one and not of all the members of the family. Still all the members enjoyed the income of all the items of properties in the same way. In other words the income of all the properties whether purchased in the name of one or of all the members used to be put into the common income of the entire estate. Those admissions having been made there was no oral evidence at all. Then it appears that an action was brought in the year 1901 by one of the sons of Narain Rao, Ram Chundra Rao and he asked for a partition of the estate so that he might be given not the share that was devised to him by the Will but one third of the whole estate. At that time the legal advisers of the Appellants took up the position that what Ram Chandra Rao took under the Will was less than one third of the whole estate, and therefore he could not have one third; and further that he could not have a share in the jewellery because in the year 1901 the Appellants alleged they had handed over certain jewellery to him. The Respondents' case on the other hand was that Ram Chandra was entitled to one third of the whole estate, and that as far as any moveable property was concerned there had been no partition of anything, but there was a contemplated partition. Ram Chandra Rao died before the settlement of the issues, and at a very early stage of the proceedings. His widow came in and claimed as his next heir the share which he possessed in the joint estate. The Petitioners then appear to have shifted their ground and said, this being an absolutely joint estate the father had no power of devise by law, and the suit could not proceed in the name of the widow, because she had no interest at all in the property. Both Courts in India had held that the brothers were separate in estate, and the chief ground for so holding was that the Will of Narain Rao was good in law. It was submitted that this view was opposed to that of the Calcutta and Madras Courts. Narain Rao having taken by devise from his father took an ancestral estate and had no power of devise at all. Whether that was so or not the fact was admitted that they lived joint in mess, that whatever shares were granted to them by the Will they threw them into one common stock, and there was no accounting between them, and the proper inference to be drawn was that the family at the time of Ram Chandra Rao's death was a joint and not a separate family.

SIR ARTHUR WILSON.—That must be a pure inference of fact.

Mr. DeGruyther submitted it was an inference of law having regard to the starting point, namely, whether they took the property as ancestral property or not under the Will. The question was: Were the Calcutta High Court and the Madras High Court right in saying that if one took by devise from one's father one took it as ancestral estate. If that was so then he had a joint ancestral undivided family. All the subsequent acts were consistent with that. The High Court really said that the fact that the father by his Will gave them specific interests operated as a separation and each one held a separate interest in the estate to the extent of the property devised to him. If their Lordships held, that the Calcutta and Madras Courts were right and the Bombay High Court wrong, it was ancestral estate and the Will was waste paper. The property went by survivorship on the death of the father and not by devise or inheritance and they continued to remain an undivided Hindu family until the death of Ram Chandra Rao. That he submitted was a question of law and the question of inference to be drawn from the facts really depended upon the conclusion their Lordships came to whether or not an estate taken by a father by devise was ancestral property or was self-acquired property. There was certainly a difference of opinion in the High Courts on a matter of very great general importance, and he therefore asked their Lordships to allow them to bring the matter before the Board for determination.

Mr. Ross in opposing the application submitted it was hardly a case in which the Board would grant special leave to appeal when it knew all the circumstances As a matter of fact application was made to the Court at Allahabad for leave to appeal and in refusing leave their Lordships said: "The main question in the case was one of fact, namely, whether or not the family of one Nana Narain Rao remained after his death joint in title and interest. Both the Court below and this Court held upon the evidence that the family did not remain so joint. . . . . . There is no evidence which would justify us in holding that the members of the family ever became re-united in interests. Seeing that the main question in the case was one of fact and the learned Advocate for the applicant has failed to

satisfy us that the proposed appeal involves any question of law, we dismiss this application with costs." It was now sought to be argued that there was a point of law, and it was that the testator Narain Rao having got the property from his father under the father's Will it remained in his hands as ancestral property, and therefore he could not make the Will which divided up the property. That plea was never taken in the written statement There was not any suggestion of the kind. On the contrary, the defence set up was that the Will was a good Will; that the testator had the power to make it; that it was his self-acquired property, and he had divided up the whole property under that Will. Then further on the question of what happened after the Will, it was argued in the High Court—not in the first Court—that those admissions made in the first Court, that were made to obviate the necessity of taking evidence, amounted to an admission that there was a reunion of the joint Hindu family. Both Courts came to the conclusion that they amounted to nothing of the kind. There could not be a re-union of a Hindu family where there had been no joint family. It is true there was no evidence in the case. The admissions made by one of the parties obviate the necessity of any evidence being put in by his opponent, but after all, those admissions took the place of evidence. The most that could be said was that supposing that that evidence did amount to a recognition that they lived jointly, and so on, they reverted to a state in which they were tenants in common and not joint tenants, and that has been held by the High Court.

Upon the question of the partition under a Will the judgment of this Board reported in 30 Indian Appeals, p 109, was referred to by the High Court. In that judgment Lord Davey says that if there has been a partition by agreement nothing that takes place after that can affect the question one atom. Under these circumstances he submitted that first of all the petition should be refused, and, secondly, that if it should be granted that should be done upon terms, because undoubtedly this plea now taken was not taken in the written statement and not argued till it came before the High Court.

LORD MACNAGHTEN.—What terms do you suggest?

Mr. Ross.—Your Lordships somtimes pass a special order that the costs shall be paid in any event by the Appellant—should your Lordships give the special permission—the costs of the application and the costs of the appeal.

Mr. Leslie DeGruyther in reply said:—With regard to the one point which seems to have been pressed, namely, that the point was never taken in the written statement, the reason why it was not taken in the written statement was that it was then immaterial.

SIR ARTHUR WILSON.—It was not your people's interest to take it.

Mr. Leslie DeGruyther.—Precisely. The man was alive at the time and it was totally immaterial.

SIR ARTHUR WILSON.—Your clients launched their case on the allegation that the Will was a good Will and did effect a devise of the property, and the members of the family having launched their case in that way you then come to us and ask us to give you leave to appeal on the ground that you ought to have launched your case in another way.

Mr. Leslie DeGruyther.—The whole question is really whether we made an admission in law. There has been no finding one way or the other, and the High Court was of opinion that we were not precluded from taking this point before them and they agreed with the Bombay High Court and not the Calcutta High Court, that the estate taken under such a Will was really self-acquired property and not ancestral estate at all. So that the point to be considered is the view of the High Court, whether it is right or wrong.

Then the other suggestion as to the re-union was put forward in this way. It was said there can be no reunion where there was no joint family, but the answer is that the whole of Narain Rao's estate was not disposed of by the Will, and that a certain portion of the estate which must of necessity have come into the hands of these brothers is joint undivided property by inheritance from their father. Then the question whether on the facts found, namely, that they remained joint in mess, and so on, is sufficient in law to constitute a re-union, I submit, must be a question of law and not of fact. There is no doubt we did in the first instance say the Will was good; but that, after all, did not prevent us from raising the question in the High Court.

LORD MACNAGHTEN.—When it was raised in the High Court was objection taken to its being raised?

Mr. Leslie DeGruyther.—We took the point in the High Court and the High Court said they were inclined to agree with the Bombay High Court.

Mr. Ross.—Having expressed strong doubt whether it was open to them to take it they said they would deal with it.

Mr. Leslie DeGruyther.—They did decide it in fact. The only question is whether the present Respondent is in any way prejudiced by that, or whether the pleader of the Petitioners having once said this Will was good, that prevented them from saying afterwards when better advised: no, this will is bad. I would ask your Lordships to allow us leave to appeal, and as to the question of costs in a matter of this description your Lordships would be perfectly able to dispose of the question of costs at the hearing without putting us on terms now.

LORD MACNAGHTEN.—I do not think it is a case for putting you on terms. The question is whether you should have leave at all.

After consultation

LORD MACNAGHTEN said: Their Lordships were unable to advise His Majesty to grant special leave in this case.

Mr. Ross asked for the costs of the Petition.

LORD MACNAGHTEN.—We think you must have the costs.

J. W. A. *Leave refused with costs.*

allowed to irrigate from the *pyne* not only the indigo but other crops as well. The irrigation charges, moreover, are paid not for the use of the water but for the work done by the factory at the request of the villagers themselves. That work is the clearance of the branch distributories leading from the *pyne* to the village lands. Formerly the poor villagers had to do this work and the rich villagers got the water first, and so, to give an equal chance to all, the factory clears these branch channels. Some of the villagers themselves may be employed in the actual work but they are paid by the factory, which recoups itself by levying the charges mentioned. This is an arrangement made by mutual agreement. The evidence also shows that the factory has had the entire possession and control of the village irrigation, deciding which village in turn shall be allowed to use the water, and this is confirmed by the fact that while *pynes* are usually a fruitful source of quarrels among the villagers using them, in the case of the present *pyne* these quarrels have been conspicuous by their absence through its entire history. It is true that in a few cases the *pyne* has been cut and the water used without permission first obtained, but the Manager, Coffin, deposes that all these cases were settled by him, that is the factory's right to the exclusive control of the *pyne* was asserted on one side and admitted on the other.

No doubt the present cases would not have arisen had not the raiyats ceased to grow indigo for the factory. The arrangement, whether express or implied, was that the raiyats if they should grow indigo, a crop which does not ordinarily pay them, would be allowed to irrigate both their indigo and their oats, but this concession was not as of right but on permission in each case obtained. When the raiyats ceased to grow indigo, the existence of the arrangement could not give rise in them to the belief that they were nevertheless entitled to take the water, and the manager on his side recognising that the arrangement was at an end ordered that the irrigation charge for the year 1315 the year in which the occurrence took place should not be levied. Whether this order was or was not known to the villagers makes no difference. The material circumstance is that hitherto the exclusive possession and control of the factory has been admitted by taking permission beforehand, or by settling the few cases where this was not done.

There is not only no reason for thinking that the accused had a *bonâ fide* belief that they were entitled to take the water, but their own conduct in running away when they were discovered cutting the *pyne*, and afterwards sending for permission, shows positively that they had no such *bonâ fide* belief.

In this view of the matter I am unable to hold on the findings that this was not a matter for the Criminal Court. I would accordingly refuse to interfere with the conviction under sec. 430 while setting aside the conviction under sec. 379. I would also allow the sentence of fine to stand

WOODROFFE, J.—As regards the conviction under sec. 379, I think it cannot stand as it is at least doubtful on the facts proved whether the water can be said to have been so reduced into possession as

THE EMPEROR *v.* SHEIKH ARIFF.

to be the subject of theft. I agree, therefore, that the conviction under sec. 379 must be reversed.

Then as regards sec. 430, I think it may not unreasonably be held on the facts found that the accused did an act which caused or which they knew to be likely to cause a diminution of the supply of water for agricultural purposes. I am, however, myself doubtful whether on the facts proved and the claim of right asserted, this is a matter which should be disposed of in the Criminal Court. Having regard, however, to the three circumstances that the question on this point is one of fact, that my learned brother agrees with the finding of the trying Magistrate on this point, that the conviction is one for mischief and that the sentence is one of fine only, I do not think it necessary to differ from the order he proposes to make as regards the charge under sec. 430, the conviction under which section must therefore stand.

B C

[INSOLVENCY JURISDICTION.]

FLETCHER, J. 1908. 17, January. — In the matter of BITHAL DASS KALLA, an Insolvent.

Indian Insolvency Act (XI and XII Vict., C. 21), sec. 9—Procedure—Adjudication of insolvency, application for—By petition or by a rule—Rule obtained per incuriam.

The usual procedure for obtaining an adjudication order is by petition to the Court duly verified under sec. 9 of the Indian Insolvency Act (XI and XII Vict., C. 21) and not by a rule.

Rule nisi.

On the 22nd August 1907 several creditors of one Ramrattan obtained an adjudicating order against him. Subsequently, from certain letters and telegrams and a contract belonging to Ramrattan that came into the possession of the Official Assignee, it appeared to the creditors that one Bithal Das Kalla was a partner of Ramrattan. Thereupon on the 9th December 1907 the creditors applied to the Court upon petition for and obtained a rule calling upon the said Bithal Das Kalla to show cause why he should not be adjudged to have committed an act of insolvency pursuant to the provisions of the Act.

Mr. N. Chatterjee appeared in support of the rule.

Mr. B. Chakravarti showed cause. He submitted that the rule was obtained *per incuriam* and ought to be discharged. The proper procedure is to apply for adjudication as laid down in sec. 9 of the Act upon a verified petition, whereon the order is made and served on the insolvent in due course.

The JUDGMENT OF THE COURT is as follows:—

FLETCHER, J.—This is a rule obtained by Baymull and Amlock Chand calling upon one Bithal Das to show cause why he should not be adjudged to have committed an act of insolvency pursuant to the provisions of the Act for the relief of Insolvent Debtors in India. Now, the usual way of obtaining an adjudication of a person, as is well-known, is by petition to the Court and the adjudication order made thereon is served on the insolvent. What should be done by the creditor is set out in sec. 9 of the Insolvency Act which says "whereupon and upon such petition being duly

IN THE MATTER OF BITHAL DASS KALLA.

verified, it shall be lawful for the Court to adjudge that such person has committed an act of insolvency." That the application be by a petition duly verified is a condition precedent to the Court granting the order. The application in the present case is not made on such a petition but on a rule. I think that this rule must have been obtained *per incuriam* and I discharge the rule with costs.

Messrs. Bonnerjee and Bonnerjee, Attorneys for the adjudicating creditors

Mr. Nalin Chandra Gupta, Attorney for the insolvent.

P. R. C. *Rule discharged.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 618 OF 1906.

RAMPINI, J. SHARFUDDIN, J. 1908. Heard, 19 and 20, February. Judgment, 20, February.	SREEMUTTY KURANI DASSI, Defendant No. 1, Appellant, *v.* SAJONI KANT SINGH, Plaintiff, Respondent.

Occupancy holding—Transferability, local usage of—Evidence to prove—Transferee allowed to hold and pay rent as marfatdar—*Mutation of name on payment of* solami.

Where it was proved by evidence that for 15 or 16 years before suit, occupancy holdings had been transferred in the Pergunnah as also in the village, and the landlords had allowed the transferees to hold possession and pay rent as marfatdars *and granted them receipts as such, but would not substitute their names in the* sheristha *unless some payment was made by way of* selami *or* nazar,

Held—*That the evidence was insufficient to establish a custom or local usage of transferability of occupancy holdings.*

This was an appeal preferred on the 25th of April 1906, against the decree of Babu Umesh Chandra Sen, Subordinate Judge of Zillah Birbhum, dated the 20th of January 1906, reversing that of Babu Jogendra Nath Basu, Munsif of Bolepur, dated the 31st of May 1905.

The appeal arose out of a suit brought by a landlord to eject the purchaser of an occupancy holding on the ground that the holding was not transferable by custom. The Defendants pleaded that the occupancy holding was transferable by custom without the consent of the landlord and further contended that the purchase had been made with the consent of the Plaintiff's father and that the Plaintiff himself with full knowledge of the facts had ordered his agent to grant a *roka* to the Defendant after having received rent from her, and therefore the Plaintiff was estopped from maintaining this suit.

The fourth and the fifth issues, which are material to this report, were as follows :—

4th issue.—Is occupancy right transferable by local custom or usage ?

5th issue.—Is the Plaintiff estopped from disputing the title of the Defendant No. 1 ?

Both issues were decided in favour of the Defendant by the Munsif. On appeal, however, by the landlord, the Munsif's judgment was reversed by the Subordinate Judge, the material portions of whose judgment are as follows :—

'The question for consideration in this appeal is whether the existence of the

alleged custom or local usage has been established by evidence.

. . . .

"The sum and substance of the evidence thus adduced on both the sides, are that occupancy holdings are transferred in the Pergana and also in the village in question from about fifteen or sixteen years ago, that the landlords allow the transferees to hold possession and pay rent as *marfatdars* but that they do not substitute their names, unless some money is paid them as *selami*.

. . . .

"The question therefore is, whether the facts as established by the evidence, *viz*, that tenants sell their holdings but that the landlords do not get the names of the purchasers substituted, unless some payment is made by way of *selami* or *nazar*, though they continue to receive rents even from the purchasers and grant them receipts as *marfatdars*, do fulfil the requirements for the establishment of the alleged custom or local usage, that is to say, the custom or usage by virtue of which a purchaser would be entitled to claim as of right the *status* of a tenant against the landlord.

"I think that the answer should be in the negative.

"It is proved by one of Defendant's witnesses, Hari Das Bosu, witness No. 5, who is a pleader of twenty-four years' standing in his re-examination, that recognition as tenant means mutation of names. This is quite true, as otherwise it would be of no good, either to the landlord to refuse *dakhil kharij* or to the tenant to try for it. So long as the former tenant's name is intentionally kept in the register, it implies that he is the tenant and no other. Therefore so long as the landlord does not substitute the purchaser's name, there is no implied completion of the contract between them as landlord and tenant. It has also been settled by case-law that receiving rent and granting receipts to a purchaser as *marfatdar*, do not amount to recognition and do not help the purchaser. *Rasamoy Purkait* v. *Srinath Moyra* (1). And similarly when a purchaser has to pay *nazar* to get his name registered, that also is no evidence of the custom by virtue of which a purchaser can claim as of right to be recognised as a tenant.—see *Maharaja Radha Kishore Manikya* v. *Sreemutty Ananda Pria* (2). The main argument of the Respondent's pleader is that it has been established by evidence, that the custom had existed before, but that since the last seven or eight years the landlords refuse to recognise the sales. Some witnesses have no doubt deposed to that effect, but it is a general statement only not supported by actual facts. Witness No. 5, as has already been observed above, has said that he had made some purchases twelve or thirteen years ago and that his name has not yet been registered in the *malik's sheristha*. Therefore this contention of the Respondent's pleader is not sound.

"He next argues that his client has no business to get her name substituted, but, as it has been proved that tenants, etc. sell their holdings without landlord's consent, she is protected from eviction. But if she has got no right against the landlord by such purchase, she is no

(1) 7 C. W. N. 132 (1902).

(2) 8 C. W. N. 235 at p. 237 (1903).

SREEMUTTY KURANI DASSI v. SAJONI KANT SINGH.

better than a trespasser and therefore liable to eviction. She may have a right against the seller, but not against the landlord, so long as he does not recognise her as a tenant.

"The next point of contention is—that as it has been proved that the purchasers get their names registered on payment of *selami*, the Defendant is entitled to have a declaration to that effect. I do not see how such a decree can be passed in this suit. A decree to that effect, without ascertainment of the amount, would be wholly inoperative and moreover that is not the Defendant's case as set forth in the written statement.

"For all these reasons, I am of opinion, that the alleged custom of transfer has not been proved and that the Plaintiff is entitled to a decree to evict the Defendant. The judgment of the Court below must be reversed."

The arguments so far as they are material to this report were as follows:—

Dr. Rash Behari Ghose (with him *Babu Nalini Ranjan Chatterji*) for the Appellant, submitted, with reference to the question of the transferability of the holding, that the Subordinate Judge had taken an erroneous view of the evidence necessary to establish the usage of transferability of an occupancy holding. What is necessary to establish such an usage is evidence of purchases or transfers by persons other than the landlord made with the knowledge but without the consent of the latter and to which no objection was made by him. *Dalgleish* v. *Gozaffar* (3), *Ramhuri* v. *Jubbar Ali* (4). The Subordinate Judge has misdirected himself in holding that "recognition as tenant means mutation of names." Mutation of names is not the only means of recognition of the purchaser by the landlord. In the recent Privy Council case *Naba Kumari Debi* v. *Behari Lal Sen* (5), it was held that there was a sufficient recognition of the transferee as tenant although the rent receipts did not describe the transferee as tenant but described the rent paid as rent of the holding and the person paying as occupier of the holding and as paying on her own account (p. 908). So long as the tenant does not pay the *selami*, the landlord may not effect a mutation of names, but this would not affect the usage of transferability.

The High Court can go into the question of the sufficiency or otherwise of the evidence necessary to establish a usage. *Kakarla Abbayya* v. *Raja Venkata Papayaa* (6).

Babu Ram Chandra Majumdar (with him *Babu D. N. Bagchi*) for the Respondent was not called on to reply on this point.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal in a suit brought by a landlord to eject the purchaser of an occupancy holding on the ground that such holdings are not transferable by custom. It seems that the defence was a twofold one. The Defendant first pleaded that the occupancy holding was transferable by custom, without the consent of the landlord. Then she raised a special plea, namely, that the purchase

(3) 8 C. W. N. 21 (1898).

(4) 6 C. W. N. 861 (1902).

(5) 11 C. W. N. 865: s. c. I. L. R. 34 Cal. 902 (1907).

(6) I. L. R. 29 Mad. 24 (1905).

SREEMUTTY KURANI DASSI *v.* SAJONI KANT SINGH.

had been made with the consent of the Plaintiff's father, and further, that the Plaintiff himself, having learnt all the facts, ordered his agent to grant a *roka* to the Defendant after having received rent from her. The Plaintiff's suit, therefore, it was pleaded, was barred by estoppel.

The Munsif framed issues with regard to both these defences. The 4th issue was:—"Is occupancy right transferable by local custom and usage?" and the 5th issue was "Is the Plaintiff estopped from disputing the title of the Defendant No. 1?" He decided both these issues in favour of the Defendant, and dismissed the suit. The landlord appealed to the Subordinate Judge, who entered only into the question of the transferability of the holding. He said:—"The question for consideration in this appeal is whether the existence of the alleged custom or local usage has been established by evidence;" and he decided against the Defendant and so he decreed the suit.

The Defendant No. 1 now appeals to us and urges, *first*, that the Subordinate Judge has overlooked the decision of the 5th issue, and that the Munsif had dismissed the suit on both grounds; and, *secondly*, that the subordinate Judge was wrong in holding that the transferability of occupancy rights has not been established and has taken a wrong view of the evidence necessary to prove such custom or usage.

We think that the first of these grounds must prevail. It is clear that the appeal should not have succeeded before the Subordinate Judge, unless he displaced the findings of the Munsif on both the 5th as well as the 4th issue. He has not done so; and the case must therefore go back to him to decide the 5th issue.

The learned pleader for the Appellant has argued at very great length as to the evidence necessary to establish the transferability of occupancy holdings; and he has contended, with great ingenuity, that the Subordinate Judge has taken a wrong view of the nature of the evidence necessary to establish this fact. We, however, see no reason to suppose that the Subordinate Judge is wrong on this point; and we can, therefore, only remand the case to the lower Appellate Court for a decision on the 5th issue which we accordingly do. The costs will abide the result.

Case remanded.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 270 OF 1906.

WOODROFFE, J. HOLMWOOD, J. 1907. 24, June.	SAURENDRA MOHAN TAGORE, Judgment-debtor, Appellant, *v.* HURRUK CHAND and others, Decree-holders, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 287, cl. (c)—Execution sale—Sale-proclamation—Statement of value—Enquiry as to approximate value when to be made.

It cannot be laid down generally that in no case should any enquiry be made as to the value of judgment-debtor's property to be sold before issuing the sale-proclamation.

KASHI PERSHAD SINGH *v.* JAMUNA PERSHAD SAHU (1) *commented on.*

(1) I. L. R. 31 Cal. 922 (1904).

SAURENDRA MOHAN TAGORE v. HURRUK CHAND.

Where the decree-holder stated the value of the property to be Rs. 15,000, but the judgment-debtor objected that the value was Rs. 1,50,000, and the Court adopted the former valuation without any inquiry,

Held—*That in the face of the discrepancy in the value as stated by the decree-holder on the one hand and the judgment-debtor on the other, an enquiry as to the approximate value of the property was obviously necessary and should be held.*

This was an appeal preferred on the 3rd of July 1906, against an order of Babu Durga Charan Sen, Subordinate Judge of Zillah Bankura, dated the 10th of April and 24th of May 1906.

The facts of the case will appear from the order of the Subordinate Judge which was as follows :—

"This is an application made by the judgment-debtor with regard to certain alleged defects found in the sale-proclamation ordered to be issued. It is urged that the description of the property as given in the sale-proclamation is not what it is in the decree; *secondly*, that certain mortgages as incumbrances have not been notified as required to be done by cl. (c) sec. 287, Civil Procedure Code; *thirdly*, that the valuation has been give only as Rs. 15,000 (fifteen thousand) while its value would be more than a lac.

"With regard to the first objection, the learned pleader for decree-holders contends that there has really been no deviation from the description as given in the decree, but that a few words only have been added with a view to give a clear idea to the intending purchaser. I do not think this can be allowed. The description as given in the plaint and for the matter of that in the decree should be strictly followed. If the decree-holder finds that the decree does not contain the exact description as in the plaint, his remedy lies in applying for amending the decree, but I do not think decree-holder can be allowed to deviate from the description of the property as found in the decree.

"With regard to the alleged incumbrances, the learned pleader for decree-holder contends that in the original case he made all parties to the case about whom he could know that they had any incumbrance; that as to the several incumbrances now asked to be notified it is not known if the liabilities are still in existence or, in other words, if these have not been already satisfied. It also urged that as in a mortgage decree a special procedure is to be followed under the Transfer of Property Act, sec. 287, Civil Procedure Code, does not apply and as such the decree-holder is not bound to mention in the sale-notification anything about these so-called mortgages as incumbrances. Now under Circular Order No. 13, of 27th April 1892, sec. 287, Civil Procedure Code, has been made applicable to applications for execution in cases of mortgage decree, and as such I cannot ignore the provisions of sec. 287, cl. (*c*), Civil Procedure Code. The judgment-debtor must adduce evidence within a week to shew that the alleged incumbrances are still due and have not been satisfied, after which necessary order will be passed on this point. As for the value, I do not think at this stage I can ask the decree-holder to put such value on the property as the judg-

SAURENDRA MOHAN TAGORE v. HURRUK CHAND.

ment-debtor may consider proper. 17th April be fixed."

Against this order the judgment-debtor appealed to the High Court.

Babus Lal Mohan Doss and *Nunda Lal Banerjee* for the Appellant.

Mr. K. N. Chaudhuri and *Babu Surendra Nath Ghoshal* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—Sec. 287, cl. (*c*) of the Civil Procedure Code requires that the sale-proclamation should state "every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property" to be sold. Whether this clause rquires that the value should be stated in all cases or not, the Court has, in the present instance, elected to state the value in the sale-proclamation and has thus considered that element to be a material one. If in the opinion of the Court it is material, the value must be stated with approximate accuracy. For that purpose, it may be and in some cases it will be necessary for the Court to make an enquiry in order to ascertain what the value of the property really is, and this will be necessary in such a case as the present one, where there is conflict between the value placed on the property by the judgment-creditor and that by the judgment-debtor. In the present instance there is a very great discrepancy. The value as stated by the judgment-creditor is Rs. 15,000 and that put upon the property by the judgment-debtor is Rs. 1,50,000. It appears to me obvious that in order to ascertain which of these statements is true, some enquiry must be made by the Court settling the sale-proclamation. In the present proceedings, no such enquiry has been made. The learned Judge dealing with the question of value says this: "As for the value, I do not think at this stage I can ask the decree-holder to put such value on the property as the judgment-debtor may consider proper." In other words, he accepts the value given by the decree-holder without enquiry, and refused an enquiry into the accuracy of the valuation given by the judgment-debtor. In this, I think, he was clearly wrong. Our attention has been drawn to the case of *Kashi Pershad Singh* v. *Jamuna Pershad Sahu* (1). If that case intended to lay down what is stated in the head-note, I am unable to agree with it. However that may be, this decision is not in my opinion binding upon us. The passages relied upon are *obiter dictum*. The learned Judges in that case in dealing with the question of value say : "It (the lower Court) has allowed only ten years' purchase, because the property is subject to the mortgage charge for the loan of Rs. 3,25,000 the principal of the debt, and for future interest on the Defendant. We consider that in the circumstances the Court could not have estimated the value at any higher rate." That as a finding of fact concluded the appeal, and the observations of the learned Judges referred to were unnecessary.

For these reasons I consider that the appeal should be decreed and the case remitted to the Subordinate Judge with directions to make such enquiry as he may consider necessary for the purpose

(1) I. L. R. 31 Cal. 922 (1904

SAURENDRA MOHAN TAGORE *v.* HURRUK CHAND.

of ascertaining the approximate value of the property which is to be sold and such value should be stated in the sale-proclamation.

The costs of this appeal will abide the result—hearing fee, five gold mohurs.

Let the record be sent down as early as possible.

HOLMWOOD, J.—I would decree this appeal and remand the case to the Subordinate Judge for enquiry into the approximate value of the property on the short ground that the discrepancy in the value as given by the decree-holder and that given by the judgment-debtor is so patent that it *primâ facie* necessitated and enquiry; when such a discrepancy appears on the face of the sale-proclamation, it is certainly the duty of the Court to ascertain approximately the correct value for the benefit of the intending purchasers. I do not understand that this Court in *Kashi Pershad Singh* v. *Jamuna Pershad Sahu* (1), intended to lay down that in no case should any enquiry be made before issuing the sale-proclamationn. In any case, as is pointed out by my learned brother, their observations on that point were not necessary for the decision of the case before them. It seems to me that the enquiry which has been ordered by the Subordinate Judge into the existing incumbrances necessarily involves an approximate finding as to the saleable value of the property; and I can, therefore, see no reason why the value should not be ascertained by the Subordinate Judge. I, therefore, agree in the order passed.

N. G. *Appeal allowed.*

(1) I. L. R. 31 Cal. 922 (1904).

[CIVIL APPELLATE JURISDICTION.]

APPLICATIONS FOR LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL.

NOS. 1 AND 2 OF 1908.

MACLEAN, C. J.
DOSS, J.
1905.
25, February.

ANANDA GOPAL GOSSAIN and ors., Defendants, Petitioners,
v.
NAFFOR CHANDRA PAL CHOWDHURY and ors., Plaintiffs, Opposite Party.

Civil Procedure Code (Act XIV of 1882), sec. 595—"Final decree"—Order of remand—Suit to annul incumbrances—Bengal Tenancy Act (VIII of 1885), sec. 167—Notice—Dismissal of suit on the ground of non-service of notice—Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a putni *at a sale for its own arrears was dismissed by the Subordinate Judge on the ground that the Plaintiff had failed to prove the service of notices under sec. 167, Bengal Tenancy Act, but the High Court on appeal held that the service of notices was proved and remanded the suit for the trial of the other issues in the case ;*

Held—*That though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case,* viz., *whether the notices were properly served or not. The order was therefore a "final decree" within the meaning of sec. 595 of the Civil Procedure Code.*

SAIYID MUZHAR HOSSAIN *v.* BODHA BIBI (1), ROHIMBHOY HALIBBHOY *v.* C. A. TURNER (2) *referred to.*

(1) I. L. R. 17 All. 113 (1694)
(2) I. L. R. 15 Bom. 155 (1890).

ANANDA GOPAL GOSSAIN *v.* NAFFOR CHANDRA PAL CHOWDHURY.

This was an application filed by the above named applicants on the 8th of January 1908, for a certificate for leave to appeal to His Majesty in Council, against the judgments and decrees of the Court, dated the 28th of August 1907, passed in Appeals from Original Decrees Nos 427 and 450 of 1905, by Rampini and Sharfuddin, JJ, reversing the decrees of Babu Bhagabati Charan Mitra, Subordinate Judge of Zillah Nadia, dated the 31st of July 1905.

The facts of the case are as follows:—

The Plaintiffs who were the purchasers of a *putni*, which was sold for its own arrears, alleged that they had applied for the issue of notices under the provisions of sec. 167 of the Bengal Tenancy Act for the annulment of certain incumbrances held by the Defendants; that the notices were duly issued by the Collector; that the incumbrances held by the Defendants therefore came to an end and that the Defendants were consequently no longer entitled to occupy the land. The Plaintiffs accordingly brought these suits for *khas* possession and mesne profits.

The Subordinate Judge dismissed the Plaintiffs' suits. He held that the suits were defective for non-joinder and misjoinder of parties; and also that the Plaintiffs failed to prove the service of the notices issued under sec. 167, Bengal Tenancy Act.

The Plaintiffs appealed to the High Court and on their behalf it was contended (1) that the notices were duly issued and served and (2) that the suits were not bad for non-joinder or misjoinder of parties.

On the first point, the High Court (Rampini and Sharfuddin, JJ.) observed that the Plaintiffs undoubtedly had applied to the Collector for the issue of notices under sec. 167. The Collector had also ordered the issue and service of these notices. It was his duty, not the Plaintiffs' to serve them. The Plaintiffs were no doubt bound to prove the actual service of notices, but their Lordships thought that the Subordinate Judge was wrong in disbelieving the evidence of service that had been given and in not giving due weight to the fact that the witnesses were speaking of events which took place in the ordinary routine of business four years previously, of which they could not, in the ordinary course of nature, have a vivid recollection. In their Lordships' opinion there was good evidence of service of notices.

On the question of misjoinder and non joinder of parties, their Lordships observed that no suit was liable to be dismissed for misjoinder of parties. In suit No. 239 Appellants' counsel having given up all the Defendants except Rajabala it was ordered that the suit be remanded for the decision of other issues.

In suit No. 240 the only defect alleged was that a lady named Nithoranoni had not been made a party. Their Lordships directed that she be made a party in the suit remanded for the trial of the remaining issues.

Against the decrees of the High Court, the present applications for leave to appeal to His Majesty in Council were preferred.

Babu Sarat Chandra Khan for the Petitioners.

ANANDA GOPAL GOSSAIN *v.* NAFFOR CHANDRA PAL CHOWDHURY.

Babu Amarendra Nath Bose for the Opposite Party.

The JUDGMENT OF THE COURT was delivered by

MACLEAN, C. J.—This is an application for a certificate that the case is a fit and proper one for appeal to His Majesty in Council.

The suit was one under sec. 167 of the Bengal Tenancy Act and the object of it was to annul certain encumbrances by giving notice under sec. 167 of the Act.

The cardinal point in the suit was whether the notice was properly served. The Subordinate Judge found that it was not, and dismissed the suit. This Court took an opposite view and held that notice had been properly served and remanded the case to be tried out on the other issues. An application is now made for leave to appeal to His Majesty in Council from the decision of this Court and the only question is whether the order passed by this Court is a final decree within the meaning of sec. 595 of the Code of Civil Procedure. On the face it purports to be only an order of remand, but the question whether the notice was properly served or not is, as I have said, the cardinal point in the case. If the view taken by the Subordinate Judge is correct then there is an end of the suit, and the decree, therefore, was final, and the Petitioner contends that this is a final decree, because, if notice was not properly served, the suit must fail, and the Defendant is released from further liability. He says he is entitled to have that question decided by the Judicial Committee. I think his contention must prevail.

The case appears to be governed in principle by the judgment of the Judicial Committee, in the case of *Saiyid Muzhar Hossain* v. *Bodha Bibi* (1) and of *Rohimbhoy Halibbhoy* v. *C. A. Turner* (2). No question arises as to value and the decree against which it is sought to appeal is one of reversal.

I think therefore that a certificate must be granted. This order will also govern the application for leave to appeal to His Majesty in Council No. 2 of 1908.

N. G. *Certificate granted.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 86 OF 1907.

STEPHEN, J.
HOLMWOOD, J.
1908.
17, February.

MAHADEV MOHANTA
Defendant, Appellant,
v.
BOLORAM GOGAIN, Plaintiff, Respondent.

Animal, wild—Elephant—Escape and recapture—Property of original owner when ceases.

An elephant after having been for a long time in a state of domestication strayed from its owner but was recaptured by another person and resumed its domestic habits on being recaptured;

Held—*That this was conclusive proof that the animal was not wild and that the owner's property in it never ceased.*

Whether in any case an elephant which escaped from a life of domestication was wild or not must be decided upon the circumstances of the case. One test is the animus revertendi, *and another, whether*

(1) I L. R. 17 All. 113 (1894).
(2) I. L. R. 15 Bom. 155 (1890).

MAHADEV MOHANTA v. BOLORAM GOGAIN.

on recapture the animal had or had not to be treated as a wild animal.

CHYTUN CHURN DAS v. THE COLLECTOR OF SYLHET (1), PEAL v. SCOTT CAMPBELL (2) *considered.*

Appeal preferred on the 5th of March 1907, against the decree of Mr. W. B. Brown, Judge of the Assam Valley Districts, dated the 20th of November 1906, modifying that of the Subordinate Judge of Sibsagar, dated the 9th of June 1906 and remanding the case to that Court to come to a conclusion as to damages.

The facts of the case are as follows :—

The Plaintiff sued the Defendant for recovery of possession of an elephant. His case was that the elephant was a tame one and had belonged to him for 20 years. As the custom is in Assam it was regularly turned into the jungle to graze with the legs hobbled. It disappeared from the jungle on 11th September 1903. Search was made for it, but it could not be found. In January 1904 it was caught in a stockade 10 or 12 miles away by Defendants who were lessees of an elephant catching mehal from the Government. Plaintiff now sued to recover the same from Defendants.

The identity of the animal having been proved by evidence the question arose whether Plaintiff's ownership of the animal continued after it had strayed from his keeping in September 1903. On this point, the Subordinate Judge found against the Defendant being of opinion that the case was governed by *Chytun Churn Das* v. *The Collector of Sylhet* (1).

On appeal the Judge of the Assam Valley Districts reversed the finding of the Subordinate Judge on this point. He observed :—"Although the doctrines of the jurists may be somewhat against my view, I think I must hold that an elephant which has been thoroughly tamed and domesticated for a long number of years, like the one in suit, becomes a tame animal and that the owner's property in it continues although it may be lost and recaptured, provided that its identity can be clearly established. If the opposite view were to prevail, the practical consequence would be disastrous. Elephants are constantly getting lost and are recaptured by their owners after a time. If an elephant becomes a wild animal as soon as it goes out of sight, as Justinian says, or as soon as the owner ceases instant pursuit, as Blackstone puts it, then he has no right to recapture it; for the Elephant Preservation Act VI of 1879 makes it an offence to capture a wild elephant without a license. When elephant catching operations are going on, it would be an easy matter for the mahalder's men to drive into their stockades tame animals which had been let loose in the jungle to graze. ... It would be highly inequitable to destroy the security of property in such valuable animals without cogent reasons, *i.e.*, strong authority." He accordingly found in favour of the Plaintiff. He was of opinion however that the Defendants were entitled to compensation for their trouble in catching the animal as provided in sec. 168, Contract Act and sent the case to the lower Court for assessing compensation to be paid to Defendants by the Plaintiff.

Against this order the Defendant No. 2 appealed.

(1) 21 W R. 75 (1873).

(2) 3 C. L. R. 516.

MAHADEV MOHANTA v. BOLORAM GOGAIN.

Babu *Monmohan Dutt* for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against the order of the District Judge of the Assam Valley Districts by which he remits the case to the lower Court for that Court to come to a conclusion as to damages.

The question at issue is whether the Plaintiff is entitled to an elephant who strayed from him in the month of September 1903 and who was captured by the servants of the Government Mehal in the ensuing January. It is sought to withstand his claim on the ground that the elephant at the time of his capture was a wild animal in whom the Plaintiff had lost all rights of property. There is no doubt that the law of this country as derived from the Justinian Institutes and as recognised in England is that, when a wild animal has escaped from captivity and pursuit of him has been given up, the property which a man formerly may have had in him ceases, and it becomes open to any one else to reduce the animal to his possession, when it will from the time become his property.

The question we have to decide is whether the elephant in this case was a wild animal. Now it is contended on behalf of the Defendant that all elephants are from the nature of the case wild animals, because we may take it as a general rule that all elephants are born in a state of wildness. Two authorities have been quoted to us to support this contention. One is the case of *Chytun Churn Das* v. *The Collector of Sylhet* (1), where a passage in Stephen's Commentary reproducing the law as laid down by Justinian is applied to the case of an elephant who had escaped from the control of his master. This part of the judgment is entirely *obiter*, as the case was decided against the Plaintiff on the question of identity, and the point of law raised was not entirely answered by the part of the judgment to which we have referred.

The question again came before this Court in the case of *Peal* v. *Scott Campbell* (2), where the elephant escaped from his former master and was captured by some one else. The case there was decreed in favour of the Defendant. The facts as related in the judgment of the Court are, that the animal in question escaped from the master's premises, or from the place where it had been left to graze in company with other elephants which were wild, and not merely did not return to its master but kept aloof from any habitation of man and resumed unmistakably the wild habits which had been familiar to it before its capture; and after recapture had to be treated precisely in the same manner as other wild elephants.

Applying the law as laid down in these authorities to the present case we are of opinion that the wildness of an elephant who has escaped from a life of domestication must in every case depend upon the circumstances. One test of wildness is supplied by Justinian being followed by subsequent authorities and this is called *animus revertendi*. If the

(1) 21 W. R. 75 (1873).
(2) 3 C. L. R 515.

MAHADEV MOHANTA *v.* BOLORAM GOGAIN.

animal has gone away and may be supposed to be likely to return to a state of captivity it is obviously not wild. But there may be other tests of its wildness and one is suggested by the case of *Peal* v. *Scott Campbell* (1), and is this; that supposing the animal is recaptured, has it or has it not to be treated like a wild animal? In this case the elephant had apparently been in a state of domestication for a long time, and it appears from the judgment that it resumed its domestic habits on being recaptured. This seems to us to be a conclusive proof that it was not wild and that the property in it had never ceased under the general law relating to wild animals.

There is one other matter which goes a long way in opposition to the conclusion we are asked to adopt that all elephants are wild, and that is the Act for the preservation of wild elephants No. VI of 1879. This applies to wild elephants and makes it an offence to capture any such elephant. It also repeals certain sections of the Indian Forests Act which applied only to elephants. This makes it obvious that the Act contemplates the existence of tame elephant, and whereas it makes an offence to capture wild elephants it contemplates and does not affect the recapture of tame elephant apparently by their original owners.

The result is that we hold that the elephant in this case was not a wild animal, that the property in him of the Plaintiff had not come to an end when he was captured by the officials of the Mehal, and that the learned Judge's order to have the case remitted to the lower Court for compensation under sec. 168 of the Indian Contract Act was a proper and suitable order.

(1) 21 W. R. 75 (1873).

The appeal therefore is dismissed. We make no order as to costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 229 OF 1906.

MACLEAN, C. J. Doss, J. 1908. Heard, 24, February. Judgment, 20, March.	RAJA PRAMADA NATH RAY and ors., Decree-holders, Appellants, SHEBAIT PURNO CHANDRA ROY, Judgment-debtor, Respondent.

Shebait, *trespass by—Mesne profits, liability of idol for*—Shebait's *position—Representation of idol.*

Where a decree for mesne profits, following a previous decree for recovery of possession of immoveable property, was passed against one P who was described therein as " Shebait *P*,"

Held—*That the decree should be taken as made against the idol the suit having been defended on behalf of the idol and for its benefit.*

The position of a shebait *as representing an idol discussed.*

This was an appeal against the order of Babu Dina Nath Sirkar, third Subordinate Judge of Hooghly, dated the 2nd of March 1906.

The facts of the case are as follows :—

On the 18th March 1882, the predecessor in title of the Appellants purchased at a sale held in execution of a mortgage-decree obtained against the Respondent an 8 as. share of Lot Kismat Mahomed Aminpur, save and except cer-

RAJA PRAMADA NATH RAY v. SHEBAIT PURNO CHANDRA ROY.

tain *debutter* lands, the area whereof was specified in the mortgage and sale certificate. The decree-holders obtained possession of the major portion of the property but were prevented by the judgment-debtor from obtaining possession of some lands which according to the decree-holders were included within their purchase. They therefore brought suit No. 13 of 1894 in the Court of the third Subordinate Judge of Hooghly, on 15th March 1894, against the Respondent, Purno Chandra Roy, describing him in their plaint as the "son of the late Hurish Chandra Roy, inhabitant of Sheorafuli, Pergunnah Boro, Chowki Serampur, District Hooghly." In the plaint it was alleged that the properties in suit were the mal lands of Lot Mahomed Aminpur, that they were the auction-purchased property of Raja Promotho Nath Ray, that the Defendant was "holding wrongful possession on the pretext of the same being *debutter*," that the said plea was wholly without foundation; and the Plaintiffs prayed that the Court might be pleased "to award possession to the Plaintiffs of the properties by ejecting the Defendant from possession thereof." The Plaintiffs also asked for mesne profits for three years before the institution of the suit and from after the institution of the suit up to the time of recovery of possession. In his written statement, the Defendant, who signed his name as "*shebait* Purno Chandra Roy," stated that the properties in Schedules (*ka*) and (*ga*) of the plaint formed part of "valid rent-free *debutter* land confirmed by the authorities" and "set apart for the performance of the sheba of the idols consecrated by his ancestors;" that "since a very long time, the expenses of the daily sheba and those of the occasional festivals of the idols were being defrayed from the income of the said lands, and the Defendant and his predecessors were in possession as *shebaits* of the valid rent-free *debutter* properties claimed, and the rents of the said properties were never realised along with those of mal lands." With regard to the lands in Sch. (*kha*) he admitted they were mal lands of Lot Mahomed Aminpur. The Subordinate Judge found that 60 bighas of land to the west of the Railway line were the *debutter* property of the idol Sarbomangala, that ten annas share of Bally Hat was the *debutter* property of the idol Ramsita of Bhadrakali. As regards the remaining lands which were alleged to be the *debutter* property of the idol Nistarini he held that all except 25 bighas of hat Sheorafuli were mal lands. He accordingly gave the Plaintiffs a decree for recovery of possession of the properties adjudged to be the mal lands of Lot Mahomed Aminpur and for "mesne profits of the lands decreed, the same to be determined in execution proceedings." On appeal to the High Court the decree of the Subordinate Judge was affirmed with slight modifications which are not now material. Subsequently, in execution case No. 86 of 1903, the decree-holders applied for the determination of the wasilut for "three years next before the date of the institution of the suit on 15th March 1894 up to the date of recovery of possession on 23rd December 1896" and the Court made a decree on the 1st of May 1905 directing that "the nett wasilut . . . be determined to be Rs. 27,710-6-6

including interest and the decree-holders do realise the said sum and the costs in the suit amounting to Rs. 4,757-1-0, making a total of Rs. 32,467-7-6 with interest thereon at the rate of 1 per cent. per annum from this date to the date of realisation thereof from the judgment-debtor." In the cause title as set out on the top of the decree, the judgment-debtor was described as "*Shebait* Purno Chandra Roy, son of the late Hurish Chandra Roy, inhabitant of Sheorafuli, &c., at present of Gobind Sen's Lane in Calcutta."

On the 31st May 1905 the decree-holders made the present application for execution of this decree for mesne profits by the sale of the properties which were declared in the suit to be the *debutter* property of the idol Nistarini. In the alternative the decree-holders prayed for the appointment of a receiver of the attached properties and the realisation of the decretal amount out of the rents and profits.

The application was opposed by Purno Chandra Roy *inter alia* on the ground that the decree was not a decree against the Goddess Nistarini and her properties were not liable to sale in execution of the decree.

The Subordinate Judge upheld the judgment-debtor's objection and dismissed the application. His order on the application was in the following terms :—

The judgment-debtor, Purna Chandra Roy, objects that as the Original Suit No. 13 of 1894 was brought against him in his personal capacity, the *debottar* of idol Nistarini cannot be attached and sold in the execution of the decree passed in the said suit. The learned Vakil for the decree-holder contends that in the decree the judgment-debtor being described as *shebait* Purna Chandra Roy, the objection cannot be entertained in the execution proceeding. Now it appears from the pleadings in the suit that it was brought against Purna Chandra Roy in his personal capacity, but that contending in his written defence that he held possession of the lands claimed as *shebait* of the several idols to whose benefit they had been endowed by his predecessors he verified and signed his written statement as *shebait* Purna Chandra Roy, and that accordingly in the decree he was described as "*shebait*." It further appears that in the written statement there was no mention at all of the idol Nistarini, but that on the other hand, it was said that the lands in claim had been dedicated to several idols In the judgment however it was observed that 25 bighas out of the disputed land, had formed the *debottar* of Nistarini and 60 bighas, the *debottar* of Sarbamangala Thakrani. All that may therefore be found is that the judgment-debtor Purna Chandra Roy claimed to be the *shebait* of idol Nistarini, as also of other idols. Likewise it may be presumed that the profits of the decreed lands went into his treasury as *shebait* of all those idols. The question therefore is, can Nistarini alone be liable for those profits which have been ascertained at Rs 35,000 odd. I am inclined to hold that she is not so liable. Under the circumstances stated above, the decree is to be construed as a decree passed against Purna Chandra Roy in his personal capacity, inspite of his being described in the decree as a *shebait*, and this apparently not on any motion made by the Plaintiff decree-holder, but on a misconception on the part of the decree mohurir.

The decree-holder's pleader has then cited the case of *Rani Shibeswari Debi* v. *Mathuranath Acharjya* (10), but the Defendant of that case was the *shebait* of a particular idol, and not of a number of idols as in the present case. It can therefore scarcely be predicated that all the profits for which the Plaintiff has obtained a decree were appropriated to the sheba of Nistarini I do not consider it necessary to enter here into the more complicated question as to whether the idol would be liable for all the wrongful appropriation committed by the

(10) 5 W. R. 202.

RAJA PRAMADA NATH RAY *v.* SHEBAIT PURNO CHANDRA ROY.

judgment-debtor in her name. Before selling away her *debottar* and thereby extinguishing her sheba and worship, it is certainly incumbent on the decree-holders to determine the extent of her liablities. But far from doing any thing of the kind the application for execution is wholly silent as to why her property is sought to be followed. No doubt, a *shebait* may be sued against on behalf of an idol, but then all the necessary materials should be placed before the Court. As observed above, that has not been done in the case; and even if it were, the Court in execution could not go behind the decree and follow the property of Nistarini when her name even was not mentioned in the plaint, written statement or decree. Accordingly the judgment-debtor's objection is allowed, the attachment removed and the execution Petition dismissed. Judgment-debtor will get costs with interest at 6 per cent. Pleader's fee Rs. 50.

The decree-holders appealed.

Dr. Rash Behari Ghosh (with him *Babus Tara Kishore Chowdhuri* and *Braja Lal Chuckerbutty*) for the Appellants contended that the decree was against the judgment debtor as representing the idol Nistarini. It was against "*shebait* Purno Chandra" and not against him personally. The plaint distinctly alleged that Purno Chandra held possession as *shebait.* Referred to para. 4 of the written statement of Purno Chandra and to the preliminary decree of the Sub-Judge and the High Court and the decree for mesne profits now sought to be executed.

Babu Baidyanath Dutt (with him *Babus Dwarka Nath Chuckerbutty* and *Nagendra Nath Ghose*) for the Respondent submitted that the Thakur was no party to the suit at all. In the plaint Purno Chandra himself is alleged to be the trespasser. He is stated to have set up *debutter* title as a mere pretence. What he, on the other hand, did in his written statement was to set up the *jus tertii* of the Thakur or rather several Thakurs. That would not make the third party whose title he set up, rightly or wrongly merely to screen his own possession, a party to the suit so as to bind such third party by the decision in the suit. It is the plaint from which the nature of the suit is to be gathered and not from the written statement. No application was made in the suit to amend the plaint so as to make the idol Nistarini a party. The Thakur Nistarini is mentioned for the first time in this present application for execution. The word *shebait* was used by Purno Chandra to signify that he was no longer Raja Purno Chandra but merely the *shebait* of Thakurs. It was simply descriptive. Then the decree does not mention Purno Chandra as *shebait* of Nistarini. He was *shebait* of several idols besides Nistarini. Refers to the written statement and the judgment of the High Court. Which of these Thakurs was the decree against?

Mr. S. P. Sinha, following on the same side, submitted that the contention that the suit was against the idol and the decree was obtained against the idol was absurd. When a decree is sought to be obtained against the estate of a deceased person and the suit is for that purpose instituted against his executor, the latter has to be described as executor to the estate of such and such person, deceased. A decree against "so and so, executor," *simpliciter*, is nonsensical. It cannot be argued that such a decree binds all and sundry estates of which he happens to be executor. Here, in the plaint the Defendant is not described as the *shebait* of Nistarini or indeed as *shebait* at all.

RAJA PRAMADA NATH RAY v. SHEBAIT PURNO CHANDRA ROY.

Supposing the suit was against the *shebait* as such, that fact only would not make the *debutter* estate liable. A *shebait* is a trustee. His position is that of the manager of an infant heir. *Prosanno Coomaree* v. *Golab Chand* (2). An obligation incurred by a trustee even in the management of the trust estate does not bind the trust estate directly but only through the trustee's right to be indemnified out of the trust estate. *T. E. Madden* v. *A. E. Bridge* (11). That was a case of contractual obligation. Here the trust estate is sought to be made liable for the trespass of the *shebait*—which is a tort. If a trustee commits a tort in the reasonable management of the trust estate, he would no doubt be entitled to be indemnified and the person who recovers damages against the trustee, may in such a case proceed against the trust estate, *Raybould* v. *Turner* (5). But is it at all conceivable that the *shebait* should have committed trespass in the reasonable and prudent management of the idol's estate? Then who knows what he did with the profits? At any rate, the question of his right to indemnity must be tried before the *debutter* property can be made liable. It was never tried in this case, never even raised for trial. In *Prosanno Coomaree* v. *Golab Chand* (2), it was laid down that *debutter* property can be made liable only after the necessary issues have been raised and determined. This question cannot be gone into in execution proceedings. This can be done only in a properly constituted suit against the *debutter* estate.

(2) L. R. 2 I. A. 145 (1875).
(5) (1900) 1 Ch. 199.
(11) 9 C. W. N. 9 (1904).

Dr. Rash Behari Ghosh in reply submitted that suits can be brought or defended on behalf of an idol only by the *shebait*. *Maharaja Jagadindra Nath Ray* v. *Hemanta Kumari* (1). No fresh suit is necessary for the determination of the question of indemnity and subrogation. Sec. 244, C. P. C., is wide enough. See *Prosonno Kumar Sanyal* v. *Kali Das* (12).

The position of the *shebait* may be compared with that of a Hindu widow. A decree against the widow may bind the estate.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—I have read the judgment about to be delivered by my learned colleague, and as he has gone very fully into the matter and as our conclusion is the same, I propose to express my views rather more shortly.

The question raised on the appeal is whether the *debutter* property of the idol Nistarini can be attached and sold in execution of the decree passed in the present suit. The decree was passed for mesne profits for upwards of rupees thirty-five thousand. The decree-holder contends that the judgment-debtor was sued as *shebait* of the idol, that he defended as *shebait* of the idol, and that the decree was passed against him as such *shebait*, and that the *debutter* property of the idol is consequently liable. In the decree the judgment-debtor is described as *shebait* Purno Chandra Roy, and the decree was that the mesne profits should be realised from the judgment-

(1) 8 C. W. N. 809: s. c. L. R. 31 I. A. 203 (1904).
(12) I. L. R. 19 Cal. 683.

debtor. The decree is dated the 10th of April 1905.

In his written statement in the suit, dated the 9th of July 1894, the Defendant is described as *shebait*; and, his case as shown in paragraph 4 is that the lands which the Plaintiffs were claiming were not his lands, but the *debutter* property of certain idols; and, he alleged that "he and his predecessors were in possession as *shebaits* of the valid rent-free *debutter* properties claimed." It will thus be seen that the Defendant was not setting up any right of his own, but was defending on behalf of the idols and alleging that the property was the *debutter* property of those lands. Idols can only be sued through the *shebait*. If the judgment-debtor paid the amount, he would, seeing that he had defended the suit on behalf of and for the benefit of the idol, be entitled to be indemnified out of the idols' estate for the amount he so paid, his case being that it was the idol who was entitled to the property and to the mesne profits. If that be so and it looks as if such were the case, then the decree holder claims to stand in the shoes of the *shebait* in respect of that right to indemnity as against the property of the idol. There can be no other representation of the idol in the present suit than through the present Defendant, the *shebait*, and in that view the idol must be taken to be before the Court. It is clear from the pleadings that the question was whether the lands in dispute belonged to the Plaintiff or were the *debutter* property of the idol. In these circumstances I think that the order now appealed against must be taken to be an order against the Defendant as *shebait*, and not in his personal capacity, and that the property of the idol is liable to make good the claim for mesne profits, and consequently the appeal must be allowed with costs.

DOSS, J.—The facts which raise the points in controversy are few and may be briefly stated. On the 18th March 1882 the predecessors in title of the decree-holders purchased at a sale held in execution of a mortgage decree against judgment-debtor Purno Chandra Roy an eight annas share of Lot Kismat Mahomed Aminpur save and except a considerable quantity of *debutter* lands the area whereof was specified in the mortgage and sale certificate but their exact situation was undefined. The decree-holders obtained possession of the major portion of the property but were prevented by the judgment debtor from obtaining possession of some lands which according to them were included in their purchase. They therefore brought an action against the judgment debtor Purna Chandra Roy to recover possession of those lands. Purna Chandra Roy put in his defence as *shebait* and asserted that the lands claimed were outside the decree holders' purchase, that they were the *debutter* property of idols for whose worship they had been dedicated by their ancestors and that the expenses of the idols were defrayed out of their income. The Court below was of opinion that the allegation of the judgment-debtor, Purno Chandra Roy, that sixty bighas were the *debutter* property of the idol Sarbamoungala and that a ten annas share of Bally Hat was the *debutter* property of the idol Ramsita of Vadrakali was correct and accordingly dismissed the claim of

RAJA PRAMADA NATH RAY *v.* SHEBAIT PURNO CHANDRA ROY.

the decree-holders in respect of those lands. As regards the remaining lands which the judgment-debtor alleged was the *debutter* property of the idol Nistarini the Court below decreed the Plaintiff's suit with the exception of 25 bighas of Hat Seorafulli called the lower hat which were found to be the *debuttar* of that idol and in respect thereof the decree-holders' claim was dismissed. On appeal, this Court affirmed the decree of the Court below with a slight modification to which it is unnecessary to advert. Then, on the 1st July 1903, the decree-holders brought an action against the judgment-debtor for mesne profits for the lands decreed to them in the previous action and on the 10th April 1905, obtained a decree for Rs. 32,467 for mesne profits, inclusive of interest and costs. In the decree Purno Chandra Roy is described as "*shebait* Purno Chandra Roy, Defendant, judgment-debtor" and it directs that the decree-holders do realise the said sum from the judgment-debtor. In execution of this decree the decree-holders sought to attach and sell the twenty five bighas, which, in the previous action, had been found to be the *debutter* of the idol Nistarini. The judgment-debtor objected that the decree for mesne-profits had been passed against him in his personal capacity and that consequently the *debutter* lands could not be attached in execution thereof. The Court below has given effect to this contention. The decree-holders have appealed and it has been contended on their behalf, first, that the decree for mesne profits is against Purno Chandra [in] his capacity of *shebait* and that [it] can be executed against *debutter* lands; *secondly*, that having regard to the circumstances under which that decree was passed the *debutter* lands of the idol Nistarini can be attached and sold in execution, and *thirdly*, that the evidence which the decree-holder offered to adduce in the Court below in order to prove that the mesne profits of the land decreed to them had been appropriated for the purposes of the idol Nistarini ought to have been taken.

As regards the first contention it is clear from the description of the judgment-debtor in the decree that it is made against him in his character of *shebait*. In the previous action for possession the judgment-debtor, who was then the Defendant, could not be styled as *shebait* in the plaint as the decree-holders could only claim to recover possession on the footing that the lands were *mal*, *i.e.*, non-*debutter* lands. It is only when the judgment-debtor in his written statement raised the defence that the lands were *debutter* and set up the title of certain idols in respect thereof and signed and verified his written statement as *shebait* that he assumed the character of *shebait* and indeed having regard to the fact that *debutter* lands alone had been excluded from the decree-holders' purchase this was the only possible defence which was open to him in the action.

In all the subsequent proceedings and above all, in the decree for mesne profits, the judgment-debtor, Purno Chandra Roy, has been described as *shebait*. It is clear, therefore, that the decree under execution must be held to have been passed against Purno Chandra Roy in his capacity of *shebait*. It is equally clear from the judgments of this Court

RAJA PRAMADA NATH RAY v. SHEBAIT PURNO CHANDRA ROY.

and the Court below in the previous action for possession that Purno Chandra Roy had been fighting in the interest and for the benefit of the idols. If he had succeeded in that action in respect of the entire lands claimed as being the *debutter* of the idol Nistarini as he had been successful in respect of the *debutter* of the idols Sarbamongola and Kamsita, the lands recovered by the decree-holders would have continued to form part and parcel of Nistarini's *debutter*.

It is because he failed, that the decree-holders obtained a decree for mesne profits.

The powers and duties of a *shebait* may now be taken as almost settled. Apart from his duties in connection with the worship and service of the idol, a *shebait* has the possession and management of its properties. In other words, his possession is that of a manager and he is not only empowered but bound to do whatever is necessary for the benefit or preservation of its properties. He is, among other things, empowered for the protection of the idol's estate to bring suits [see *Maharaja Jagodindra Nath Roy* v. *Hemanta Kumari* (1)], and to defend hostile litigious attacks, see *Prosunno Kumari Debya* v. *Golap Chand Babu* (2). Purno Chandra Roy was therefore not only justified in defending the suit for possession (wherein as I have already said, he was to a considerable extent successful) but would have been guilty of dereliction of duty if he had abstained from opposing the action. *Primâ facie* therefore, the decree for mesne profits which was the inevitable result of such opposition, ought to be realizable out of the estate of the idol. If the rents and profits collected during the period for which the decree-holders have been kept out of possession, have been applied wholly for the purposes of the idol, then there can scarcely be any doubt that the estate of the idol must compensate the loss sustained by the decree-holder. But supposing that they have been appropriated by the *shebait* Purno Chandra Roy to his own private purposes and not to those of the idol, it seems to me equally plain that the estate of the idol ought to bear the loss, though the *shebait* would in such a case be accountable to the former for such misappropriation.

The liability of a trespasser for mesne profits arises not because the latter has collected the rents and profits (for either through his negligence or for some other reasons he might not have collected any rents and profits), but because in consequence of the wrongful dispossession by him, the owner has been deprived of the rents and profits, which he otherwise would have collected. The foundation of the trespassers' liability is not the gain which he makes, but is the loss which the owner sustains.

The liability of the estate of an idol for wrongs committed by its *shebait* in the reasonable management of its properties, is analogous to the liability of a corporation for wrongs committed by its agents in the course of their employment, and for the apparent furtherance of its purposes. (See *The Mersey Docks Trustees* v. *Gibbs* (3), *Taff Vale*

(1) 8 C. W. N. 809: s. c. L. R. 31 I. A. 203 (1904).

(2) 2 L. R. 2 I. A. 145 (1875).

(3) L. R. 1 H. L. 93 (1865).

Ry. v. *Amalgamated Society of Ry. Servants* (4), and in both cases it is founded on the policy of the law and without regard to personal default, for both the idol and the corporation are incapable of personal wrong doing. Neither can be invested with rights or duties except through natural persons, who are their agents.

The liability of a trust estate for damages for wrongs committed by the trustee in the reasonable management of the trust estate is merely another, though perhaps not so obvious, an illustration of the same general principle. *Raybould* v. *Turner* (5). The fact that in such a case it is the trustee who is personally liable at law, and that the trust estate may only be reached in equity, through the medium of the doctrine of subrogation, is the necessary consequence of the legal estate being vested in the trustee, and it in no way affects the general principle upon which the liability depends.

It has been observed by the Court below that if execution against the idol's properties be allowed, it may, in cases where the *shebait* is not possessed of independent means, lead to the extinction of its estate. But it appears to me that the obvious answer to this argument is that if the idol may lose the whole or a portion of its properties, in case its *shebait*, through laches, suffers a trespass for more than 12 years, as undoubtedly it may, *Gnanasambanda Pandora* v. *Velu Pandaram* (6), *Shyama Charan Nandi* v. *Abhiram Gossami* (7), *Ram Kanai Ghose* v. *Hari Narain Deo* (8), *Nilmony* v. *Jagabundhu* (9), no grave anomaly is involved in holding that the idol ought to lose the whole or a portion of its properties if the *shebait* in the prudent management of its properties and in the furtherance of the interest of the idol unintentionally commits a trespass and thereby renders the idol's estate liable for damages.

As regards the second contention I have already pointed out that Purno Chandra Roy in the previous actions for possession set up in respect of some lands the right of the idol Sarbamongola; in respect of others the right of the idol Ramsita of Vadrakali, and in respect of the remaining lands the right of the idol Nistarini. His first two claims were successful and it was only in respect of the third which was based on the right of the idol Nistarini, that he failed with the exception, however, of 25 bighas which were found to be *debutter*. It is quite clear therefore that the decree for mesne profits was and could only be obtained for lands in respect of which he had unsuccessfully set up the right of the idol Nistarini.

In the view which I have taken of the first and second contentions it becomes unnecessary for me to say anything with regard to the third.

For the foregoing reasons I am of opinion that the appeal ought to be decreed with costs.

Appeal decreed.

(4) (1901) App. Cas. 426.
(5) (1900) 1 Ch. 199.
(6) L. R. 27 I. A. 69 (1899).
(7) I. L. R. 33 Cal. 511 (1906).
(8) 2 C. L. J. 546 (1905).
(9) I. L. R. 23 Cal. 580 (1896).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 233 OF 1905.

HARINGTON, J. HOLMWOOD, J. 1908. Heard, 3 and 4, February. Judgment, 4, February.

ISHAN CHANDRA DASS SARKAR, Defendant, Appellant, *v.* UPENDRA NATH GHOSH and others, Plaintiffs, Respondents.

Public navigable river, fishery in—Arm of the river ceasing to be an arm of a flowing river, effect of.

When on account of a change in the course of a public navigable river an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it; it becomes the property of the adjacent owner.

KRISHNENDRA *v.* MAHARANI SURNOMOYEE (1), JOGENDRA NARAIN *v.* CRAWFORD (2) J. J. GRAY *v.* ANUND MOHUN (3) *referred to.*

This was an appeal preferred on the 16th of June 1905, against the decree of Babu Pran Krishna Biswas, Subordinate Judge of Zillah Faridpore, dated the 23rd of March 1905.

The facts of the case appear from the judgment.

Babus Jogesh Chandra Roy and *Sarat Chandra Ghose* for the Appellant.

Babus Dwarka Nath Chuckerbutty, Tarak Chunder Chuckerbutty and *Ramoni Mohan Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the Defendant against the judgment of the Subordinate Judge in an action in which the Plaintiff claimed a declaration of his right in a *jalkar* and possession of the same together with mesne profits.

The *jalkar* in question is situated in an old river-bed and it is the Defendants' case that the old river-bed formed portion of a river in which he was granted an exclusive right of fishery and the Defendants say that they are still entitled to exercise that right in the old river bed in which the Plaintiff claims now to have a *jalkar*.

The facts are that the old river-bed in question is closed at both ends and now forms a piece of stagnant water, the Amin's map showing that a considerable extent of cultivated ground exists between the eastern end of this old river-bed and the river into which it used to run. The Judge has gone very carefully into the history of the river and he has shown—and there seems to be no reason for challenging his view of the facts on this head—that the old river-bed with which the river-bed now in dispute used to be connected, has in its turn ceased to be a river because one end of it is silted up, the bed has shifted further away and it is now only a back water from the main river.

Now, the Appellants say that notwithstanding the fact that it is found that the ends of this disputed river-bed are closed, they are entitled to go into it and take fish therein. It is conceded that they had a grant of fishery in the stream of the river Padma but they say they can enter this part because there is a small stream opening from the south into the disputed river-bed and they say that they can come up from a river called

(1) 21 W. R. 27 (1873).
(2) I. L. R. 32 Cal 1141 (1903).
(3) W. R, 1864, 108.

ISHAN CHANDRA DASS SARKAR v. UPENDRA NATH GHOSH.

Kumar in small boats up into this old river-bed and so get access there and take fish. That is the first ground on which they contest the judgment of the Subordinate Judge in favour of the Plaintiff.

Now, the Kumar river is not a river which was included in the Defendants' *jalkar*. On the contrary, the *jalkar*, which they had, was confined to the stream of the Padma, that is to say, they were granted their *jalkar*, in the Padmabati, the name of the goddess, which my learned brother, who is conversant with the language says, means the living stream of the Padma. The Kumar is mentioned in their grant because the landlord grantor recites that he had a *jalkar* in the Kumar but does not grant that *jalkar* to the Defendant, he only grants a *jalkar* in the rivers Padmabati, Bhubanessur and Ramkristapur. Now, a difficulty strikes us as being in the way of the argument which was addressed to us on behalf of the Defendant on this point because according to his statement the old river-bed is accessible only from the river Kumar which is not within his *jalkar*. If it be taken that he is right in saying that the persons who are the grantees of the *jalkar* have a right to follow the fish up all the streams connected with that *jalkar*, then the persons who would be entitled to come up to the old river bed and fish there would be the grantees of the *jalkar* in the river Kumar. However that may be, that is not a matter which is before us and so we express no opinion as to the right of the grantees of that *jalkar*, but the result of the argument which is addressed to us by the learned vakil for the Defendant would be that the Defendant, at any rate, would not be entitled by virtue of this small stream to come and fish in this old river-bed because that stream does not join the river which forms their *jalkar* but joins another river. But it is contended that under the law as laid down in *Krishnendra* v. *Maharani Surnomoyee* (1) he is entitled to pursue the fish up to the time when the channels are finally closed at both ends, that is, so long as the fish can pass to and fro, he is entitled to come up the water and fish there. He is entitled to come into his own fishery that is the law as laid down; but he is not entitled to come up streams joining other people's fisheries after the fish.

Then another ground on which he impugns the judgment of the learned Subordinate Judge is that he says that this stream is known as Mara Padma, *i.e*, the dead Padma and that his grant covered any stream which went by the name of the Padma.

The answer seems to us to be two-fold: *first*, that his grant is not of the dead Padma but of the Padma which is flowing; and *secondly*, that we have no evidence before us to show that there was a flowing stream called Padma over the river-bed in dispute since the date of the grant which was made under which the Defendant claims his *jalkar* right.

Next the Defendant contends that if at any time there was connection between the river-bed in dispute and the rivers in which his *jalkar* lay, then he is entitled to the fish to be found in the river-bed.

The Judge has found on the evidence that both ends of this river-bed are closed but he finds that during the rains when the country is under water,

(1) 21 W. R. 27 (1873).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, APRIL 27, 1908. [No. 24

Contents.

NOTES

The constitution of the Benches and the distribution of business amongst them from Friday the 24th April last has been as follows :—

PRESIDENCY GROUP, BURDWAN GROUP AND PRIVY COUNCIL DEPARTMENT.—The Chief Justice and Mr. Justice Das.

RAJSHAHYE GROUP.—Mr. Justice Caspersz and Mr. Justice Coxe.

PATNA GROUP.—Mr. Justice Mitra and Mr. Justice Bell.

CRIMINAL BUSINESS (except Contested Revision cases).—Mr. Justice Stephen and Mr. Justice Holmwood.

CRIMINAL BUSINESS (Contested Revision cases).—Mr. Justice Rampini and Mr. Justice Sharfuddin.

CASES BELOW Rs. 1,000.—Mr. Justice Brett.

ORIGINAL SIDE.—Mr. Justice Chitty, Mr. Justice Woodroffe and Mr. Justice Fletcher will sit singly.

A FULL BENCH OF THE ALLAHABAD HIGH COURT (*vide* I. L. R. 30 All. 66) have held that Mukhtears are not entitled to practise generally and as of right in Criminal Courts, but they can act only when they have received the permission of the Court to act in any particular proceeding. This decision is based upon the interpretation of sec. 4 (r) of the Criminal Procedure Code and sec. (9) of the Legal Practitioners' Act. In the definition of the word "pleader" in sec. 4 (r) is included "any mukhtear or other person appointed with the permission of the Court to act in such proceeding;" so apparently a mukhtear who is not appointed with the permission of the Court has no authority to act for an accused in a Criminal Court. In sec 340, Cr. P. C., we find that the accused is given the right to be defended by a "pleader," so unless the word pleader includes a mukhtear, a mukhtear has no right to defend an accused in a Criminal Court. Nevertheless it has been the practice for mukhtears to appear for accused persons in Criminal Courts without any formal permission of the Courts. The Full Bench held that this practice did not confer any right upon the mukhtears to appear in criminal proceedings without the permission of the Court.

THE OLD TYPE OF MUKHTEARS OR LAW AGENTS ARE now fast disappearing. In Bengal no one is now allowed to appear for the mukhtearship examination unless he has passed the matriculation examination of the Calcutta University Then the law examination that he has to pass gives him a more comprehensive knowledge of the law than is possessed by many a junior Magistrate. With the raising of the standard of qualification, the standard of professional morals amongst the mukhtears is bound to rise. They have been described by an eminent Judge of the Calcutta High Court as the poor man's counsel. It was on this ground that the proposal for the abolition of this class of legal practitioners was opposed and abandoned. The same objections would hold good with regard to any restriction against the mukhtears appearing as a matter of course before magistrates. We are therefore at one with Banerji, J., that if permission to act in a criminal case be asked for by a mukhtear, such permission should not be refused except for valid reasons.

WE INVITE ATTENTION TO THE DECISION OF THE PRIVY Council in *T. P. Petherpermal Chetty* v. *R. Muniandy Servai*, 12 C. W. N. 562 reported in this number. In this case an owner of mortgaged properties attempted to defraud the mortgagee by executing a *benami* sale of the properties, but the attempt failed. It was held by the Judicial Committee that the owner was not precluded from recovering the properties from his *benamdar*, by reason of his having been a party to a fraud which did not succeed. This has been the law in India and apparently also in England. See also *Jadu Nath Poddar* v. *Rup Lal Poddar* 10 C. W. N. 651, where the case law on the subject was exhaustively reviewed by Mookerjee, J. In neither did the case of a successful fraud of this kind come up for the consideration of the

Court. But, as noticed by Mookerjee, J., in the latter case, the decision of the Courts has been uniformly to the effect that in such a case the owner is precluded from recovering from the *benamdar*, and the decision of their Lordships of the Privy Council reported in this number endorses this view of the law. As, however, this question did not arise in this case it was hardly to be expected that their Lordships would examine the grounds of this decision.

BUT WE VENTURE TO THINK THAT THESE GROUNDS need reconsideration, if not by the Judicial Committee, by the High Court, and that in the interest of the defrauded creditors themselves. We stated our reasons very fully in an article on "*Benami* Transfer" (11 C. W. N. pp. cxlv-cxvi). We said:

> Under the present state of law, the defrauded creditor after the *benami* transfer has been once successfully set up against the claim of any creditor cannot proceed against these properties again although the right to proceed against the debtor's properties may not be barred by limitation. For the properties have been given to the *benamdar* and not to the real owner (the debtor). But if the properties are held to belong to the real owner even after the accomplishment of the fraud, the defrauded creditors can seize these properties And this they may be enabled to do even when the *benami* transfer becomes known to them after the expiry of the period of limitation for the enforcement of their claims if a liberal construction be placed upon the provisions of sec. 18 of the Limitation Act.

In fact the only person who is benefitted by the law as laid down above is the fraudulent *benamdar* whose fraud is of a deeper dye even than the owner's.

WHILE WE HAVE BEEN DISCUSSING THE DESIRABILITY of introducing the circuit system in some form or other in this country, it is interesting to note the changes that are being made in England with regard to the circuit system A Return has been issued by the Lord Chief Justice of England with an explanatory introduction showing the number of days that the Judges of the King's Bench Division have sat in London and spent in circuit. This Return has been published as a Parliamentary paper and the result of it has been the issue of a circular curtailing the circuit period and increasing the London sittings. Henceforth ten Judges are to sit constantly on the King's Bench in London. Some facts from this Return are very instructive with regard to the merits of the circuit system. For instance a certain Judge spent, excluding Sundays, 33 days on a certain circuit. Of these six days were occupied with the "pomp and ceremonies" of opening the assizes and on five days there was enforced leisure as there were "no sittings" from want of sufficient work. Naturally the English *Law Journal* suggests that "by the establishment in every county of a Court for criminal business analogous to the Central Criminal Courts, a large proportion of these ceremonious days would be left free for the real work of the Judges."

WE DO NOT KNOW WHETHER THE PROPOSED INTRODUCTION of the circuit system amongst us is intended for the ceremonious opening of Session Courts in certain important centres in the mofussil. We have under the existing Criminal Procedure a District and Sessions Judge in every important town in Bengal, whose duty it is to hold Sessions trial with the aid of the jury or assessors. We therefore see no advantage to any one outside the legal profession in Calcutta from a High Court Judge visiting a mofussil town for holding a Sessions trial. At present witnesses are examined and even the jury have to be addressed in the vernacular in the mofussil. Sessions trials before High Court Judges are bound to add to the complexity of the procedure and expense of the accused. Inspection of Mofussil Courts by High Court Judges is, however, both wholesome and useful. If an Additional Judge is required for this purpose we should certainly welcome his appointment. But in making these appointments care should be taken to select such men only as would command the respect of experienced District Officers and Civil Judges. If any inspecting or itinerant High Court Judge is found imperfectly acquainted with the criminal or civil procedure or with the ordinary matters of practice or law, the Subordinate Judiciary, the Mofussil Bar and the public will surely lose all respect for the High Court.

UNDER SEC. 335 OF THE CODE OF CRIMINAL Procedure, the Calcutta High Court may, with the consent of the Governor General in Council, hold its sittings anywhere within its Appellate Jurisdiction. On obtaining such consent, the Chief Justice may direct an officer to notify in the local official Gazette of any sittings intended to be held in exercise of the Original Criminal Jurisdiction of the High Court. Assuming that a High Court Judge is deputed to hold Sessions in certain mofussil centres under this section, the benefit of such trials, so far as the public are concerned, is likely to be of a questionable character. The Charter Act provides that there shall be no appeal from such trials held by High Court Judges. Had the trial been before a District and Sessions Judge, the accused person would have a right of appeal. Further if the District Judge and jury happened to differ, there would be a reference before a High Court Bench composed of two Judges. These are very valuable safe-guards that the law provides against a failure of justice in criminal trials of a grave character. We do not think that the public will be prepared to forego these valuable rights and privileges for the doubtful advantage of a more or less final trial before a single High Court Judge. So whatever may be the scheme for holding Circuit Courts, it should be placed before the public for ascertaining the opinion of those who are likely to be affected, for good or evil, by the change.

IF THE DISTRICT AND SESSIONS JUDGES ARE NOT at present considered efficient enough to hold Sessions trials, the obvious remedy lies in the extension of the jury system of trial. If the High Court Judges are to visit only important centres, as most of these are the head quarters of jury districts, their visit to such centres for holding Sessions Courts is hardly necessary. If the Sessions Judge and the jury differ, the law already provides for a reference to the High Court and for hearing such references High Court Judges need not be taken down to the place of trial. As for non-jury districts, there is in these days of education and enlightenment no dearth of men to serve as jurors and the High Court has only to move the executive Government for the extension of jury trials in such districts to prevent a failure of justice. Trial by jury is in this country free from the objections to which it is open in England since the High Court here has the last word in cases where the Sessions Judge and the jury disagree. Hence there is no necessity for sending out High Court Judges to hold sessions trials. We may further add that under the proposed scheme for the separation of the executive and the judiciary, it will be possible to train up and obtain a more experienced and efficient class of District and Sessions Judges than we possess at present. In conclusion we have to say that efficiency in our judicial officers of all ranks is all that is required for creating increased confidence in the administration of justice and no amount of pomp and show will make up for the deficiency in this respect.

THE FOLLOWING EXTRACT FROM THE *Law Times* is instructive as showing the trend of public opinion with regard to whipping.

We notice that during the assizes at Cardiff this week two sentences of flogging (in addition to imprisonment) were passed by Mr Justice A. T. Lawrence upon men found guilty of robbery with violence. The Judge is reported to have said that "he knew there was some humanitarian people who objected to the use of the lash" adding: "If those persons who have such highly sentimental views happen to be the persons attacked then I will listen to them." This is a curious piece of Bench logic. What has the situation of the objector (*i.e.*, whether he has or has not been attacked) to do with the justice of the case? Moreover, objections to the lash are not governed by "sentimental" or "humanitarian" views; they rest upon the proved inefficacy of a gross and disgusting form of punishment. It seems to us that Judges who persist in dealing out the "cat" are—if they would but realise it—in a rather awkward position. They have not acquainted themselves with the history of flogging, or, if they have done so, they decline to be guided by patent and established facts. It has been shown to weariness that robbery with violence was never suppressed by flogging.

Review.

THE PRINCIPLES OF COMPANY LAW. *By Alfred F. Topham, L. L. M. (Cantab) Bar-at-law. Publishers: Messrs. Butterworth & Co., London. Second Edition. 1908. Price* 7s. 6d.

This is a handy little book on Company Law, and is one of a series of useful legal hand books that Messrs. Butterworth & Co., are issuing. The author shows considerable grasp of the subject and puts within a small compass the leading principles that promoters, framers, directors, auditors and others concerned in companies, whose liabilities are limited by shares, should never lose sight of. For instance in the chapter relating to the memorandum of association, the proposition that "a company cannot do anything outside the powers given in the memorandum of association" is illustrated by reference to some leading cases. In the chapter on Directors, the author tells us at the outset that a company need not have any directors and goes on to explain why directors are appointed and how the directors occupy the position of "trustees for the company." The law regarding remuneration of directors, their powers and liabilities is also very concisely stated. In the chapter relating to accounts and auditors, notes of cases as to the duty of auditors are given. The Indian Companies Act is a voluminous work and Indian readers will find this handbook useful in acquiring a knowledge of company law.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1210 OF 1906. PRANKRISTO SAINI AND OTHERS, Appellants *v.* KUNJO BEHARY DAS AND OTHERS, Respondents 8th April 1908.

N. W. P. Assam and Civil Courts Act (XII of 1887), sec 22—Power of District Judge to transfer appeal after remand to Subordinate Judge.

Plaintiffs sued Defendants for arrears of rent. The defence was that the rent payable was much less. The first Court decreed the Plaintiffs' claim but on appeal the District Judge decreed the appeal and held the rent was as stated by the defence. The Plaintiffs appealed to the High Court and the judgment and decree of the District Judge was ultimately set aside; the case was remanded to the lower Court for re hearing of the appeal having regard to certain observations made in the judgment of the High Court After remand the District Judge transferred the appeal to the Subordinate Judge for trial who upheld the Defendants' contention. Plaintiff again appealed to the High Court on the ground that the District Judge was not competent to transfer the case which was remanded to him for trial and the Subordinate Judge had no jurisdiction to hear the appeal.

Held—That under sec. 22 of Act XII of 1887 the District Judge had full jurisdiction to transfer the appeal and the Subordinate Judge was competent to try the same. This objection was not raised before the lower Court and should not be entertained. 15 W. R. p. 574, I. L. R. 23 Mad. 814 distinguished. I. L. R. 21 All. 230 dissented from.

Babus Mohendra Nath Ray and *Upendra Narain Mukerjee* for the Appellants.

Babu Khetra Mohun Sen for the Respondents.

A. T. M. *Appeal dismissed with costs.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI, and SHARFUDDIN JJ. APPEAL FROM ORIGINAL DECREE No. 344 OF 1906. PRANKRISHNA SAMANTA, Appellant *v.* MANIK CHUNDER KHAN, Respondent. Heard, 26th March 1908. Judgment, 3rd April 1908

Bengal Tenancy Act (VIII of 1885) sec. 65—Tenure not permanent—Sales at different dates—Sale under rent-decree and previous sale, which to prevail.

The suit was one for possession. The Plaintiff alleged that he bought a certain tenure at sales held in execution of rent-decrees against the former tenant for arrears of rent due for the year 1301 (1894-5). The date of the Plaintiff's purchase was 16th May 1900. The Plaintiff alleged that he took possession in July 1900, but was dispossessed by the Defendant, who purchased the tenure in execution of a certificate issued by the Collector for the rent of 1303. The date of the Defendant's purchase was June 1897, that is, about 3 years before the Plaintiff's purchase.

The lower Court held that the tenure was not proved to be a permanent one, and that, therefore, the provisions of sec. 65 of Bengal Tenancy Act did not apply. Consequently, though the sales, in execution of which the Plaintiff purchased, were held in execution of rent-decrees, the Plaintiff had no first charge on the tenure and no priority over the Defendant. The latter's purchase being prior in time to that of the Plaintiff must prevail.

The Plaintiff appealed to the High Court.

Held—That the Court below was correct.

Dr. Rash Behary Ghose and *Babu Nanda Lal Banerji* for the Appellant.

Babus Nilmadhub Bose and *Debendra Nath Ghose*, for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CIVIL RULE No 675 OF 1908. MULUK PATNI, Plaintiff, Petitioner, *v.* BHARAT CHANDRA DASS, Defendant, Opposite Party. The 21st April 1908.

Specific Relief Act sec. 9—Civil Procedure Code sec. 318, no bar.

The Defendant, Opposite Party, obtained a decree on a mortgage against one Prokas Dev and in execution thereof purchased the mortgaged property and took out delivery of possession under sec. 318 C. P. C. on the 12th February 1907. The Plaintiff was no party to the said mortgage suit or execution proceeding and he brought a suit under sec. 9, Specific Relief Act alleging that he was the tenant under Prokas Dev from a long time and he was in possession of the disputed land till 7th May 1907 when the Defendant forcibly dispossessed him. The Munsif held that although the Plaintiff was dispossessed as alleged by him and he had brought the suit within six months of his alleged dispossession but as the Defendants had taken possession under sec. 318, C. P. C. the Plaintiff must be taken to have been evicted in due course of law and his only remedy was to bring a title suit against the Defendant and the suit under sec. 9 of the Specific Relief Act was not maintainable. Against this order the Plaintiff moved the High Court and obtained the above rule. It was contended on his behalf (1) that the alleged delivery of possession to the Defendant by the Civil Court was in February 1907 and the Plaintiff was no party to the suit or execution proceeding and the Plaintiff was dispossessed by the Defendant on the 7th May 1907 and it cannot be said that the dispossession of Plaintiff by Defendant on the 7th May was made in due course of law. (2) The Plaintiff was Defendant's judgment-debtor's tenant and he could not be dispossessed under sec. 318, C. P. C., as he was not a person coming within the description of those against whom possession may be delivered under sec. 318. There was no legal delivery of possession against him under 318 but the proper procedure would have been under sec. 319, C. P. C. It was argued on behalf of the opposite party that delivery of possession being under sec. 318, C. P. C. the decree-holder got actual possession of the land and was entitled to evict any person who may have any claim to the land and the said delivery of possession being given by Court he got it in due course of law Sec. 9 of the Specific Relief Act gives only a summary remedy to a person against forcible ouster but does not cover a case like the present one *viz*, when a person was put in possession in execution of a decree of Court. The possession of the Plaintiff, if any, after 12th February 1907 was that of a trespasser only.

Held—The Plaintiff does not come within the description of any of the persons against whom delivery of possession can be given under sec. 318, C. P. C., the proper mode of delivery of possession against him would have been under sec. 319, C. P. C. and therefore he could not be said to have been evicted in due course of law and the suit was maintainable under sec. 9, Specific Relief Act.

Babu Khetra Mohon Sen for the Petitioner.

Babu Surendra Nath Ghoshal for the Opposite Party.

A. T. M. *Rule made absolute.*

ISHAN CHANDRA DASS SARKAR v. UPENDRA NATH GHOSH.

the eastern end of this old river-bed is covered with water and there appears to be a communication with the old bed of the Bhubaneshwar but the Bhubaneswar has left its bed ; one end is silted up and it is nothing more than a back-water: and even if there is a communication of some sort during the rains with the bed of the Bhubaneshwar, that would not be sufficient to justify the claim of the Defendant. The test would appear to be whether at any time the stream flowed through this old river-bed so as to make it in fact an arm of the river in which the *jalkar* was granted. The question was considered in the case of *Jogendra Narain* v. *Crawford* (2). There it was laid down that where the Plaintiff had a *jalkar* in a big river and claimed a right of fishery in a piece of water which was originally a part of the river and was still connected with it, though the communication might dry up in the hot weather, he was entitled to fishery in the said water. Now, the Defendant says that he comes under the ruling that is laid down in that case but in that case the test applied was—was the old river bed in effect still an arm of the river in which the Plaintiff had a general right of fishery? And it was held that it was such an arm because in the greater part of the year the stream of the river flowed down through this old channel and the channel appeared to be recognised as the arm of the river and it was held that though in dry weather connection might cease, it did not make it less an arm of the river and so did not take it out of the river in which the *jalkar* was granted. That test being applied to this case, it seems to us clear that the bed now in dispute cannot be considered to be an arm of the river; because in the first place, there is a considerable tract of country intervening between the river-bed and the main river, and secondly, there is no evidence that at any time there was any stream that flowed through it which could be described as the stream of the river in which the *jalkar* was granted, nor was it ever considered in its present form as an arm of such a river.

In our opinion the Defendant has failed to show that there is anything wrong in the judgment of the learned Subordinate Judge who has given a judgment in favour of the Plaintiff. The learned Subordinate Judge having found that it is not an arm of the river in which the Defendant's *jalkar* is situated, followed the ruling laid down in *J. J. Grey* v. *Anund Mohun* (3). That case explicitly lays down that if a river changes its course, the old dry bed of the river becomes the property of the owner of the adjacent soil, such owner is entitled to all bheels or ponds, gulfs or dambos in which water remains but which do not communicate with the river except in the time of flood. The right, therefore, of the present Plaintiff to the fishery seems to us to have been satisfactorily established because he has shown that it is no longer an arm of the flowing river; that river having changed its course, the arm has ceased to be an arm of the river. Under the ruling we have cited, it becomes the property of the adjacent owners who are entitled to fishery. In this case the adjacent owners are the Plaintiffs. Therefore the judgment of the learned

(2) I. L. R. 32 Cal. 1141 (1905).

(3) W. R., 1864, p. 108.

ISHAN CHANDRA DASS SARKAR v. UPENDRA NATH GHOSH.

Subordinate Judge in favour of the Plaintiff stands and the appeal must be dismissed with costs.

The cross-objection on behalf of the Plaintiff is not pressed and is therefore dismissed.

The Plaintiff applies to us to correct a clerical error in the decree. The matter ought to have been mentioned to the Subordinate Judge. The correction, however, is a small one. The Subordinate Judge used the word 'green,' in his decree instead of the word 'blue." The word 'green' must be expunged and 'blue' put in the second line of the decree.

S. C. S. *Appeal dismissed.*

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

LORD MACNAGHTEN. LORD ATKINSON. SIR ANDREW SCOBLE. SIR ARTHUR WILSON. 1908. 18, March.	T. P. PETHERPERMAL CHETTY, Defendant, Appellant, R. MUNIANDY SERVAI and ors., Plaintiffs, Respondents.

Benami *transfer—Fraudulent object defeated—Right of owner to recover from* benamdar *—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 91, 144.*

Where a benami *deed of transfer of land was executed with the object of defrauding creditors, but the object failed,*

Held—*That the owner was entitled to recover the land from the* benamdar, *and that without being required to set aside the deed as a preliminary.*

Art. 144 and not Art. 91 of Sch. II of the Limitation Act therefore applied to the suit.

This was an appeal from the decree of the Chief Court of Lower Burma which upheld the decree of the District Court by which the Plaintiffs' suit was decreed.

The facts of the case were simply that the first Respondent sued to recover possession of a grant and asked the Court to declare that a certain deed, dated the 11th June 1885, was a colorable transaction and that a deed of release dated the 30th July 1897 was of no validity. The Defendant-Appellant contended that the deeds were good and that the suit was barred by limitation.

In this suit the first Respondent R. Muniandy Servai, sued the first Defendant, T. P. Petherpermal Chetty, to recover possession of certain land known as the Tawkayan (incorrectly called the Tauk-kyan) Grant: and for the cancellation of certain documents. The second and third Respondents were joined as Defendants because they claimed to be mortgagees under the first Defendant, T. P. Petherpermal Chetty. But as against them except in respect of the taking of account, the suit was abandoned. The real contest was between the Plaintiff, R. Muniandy Servai, and the first Defendant, T. P. Petherpermal Chetty. In the course of the trial this Defendant died, and the suit was continued against his nephew and legal representative of the same name, who is the present Appellant.

The following table shews the relationship between the Plaintiff and the original owner of the land in suit and other persons concerned in previous litigations

T. P. PETHERPERMAL CHETTY *v.* R. MUNIANDY SERVAI.

respecting this land, or otherwise requiring mention—

Ramasawmi Servai ; Peri-ppen Servai+Sigappi

Chellum Servai R. Muniandy Servai Muniandy Maistry
(Plaintiff) (Original owner)

S. Muniandy Servai

The Tawkayah Grant was originally the property of Muniandy Maistry who died in 1890. Letters of administration to his estate were granted to his mother Sigappi, in the year 1891, although the grant was opposed by his cousins, Chellum Servai, and R. Muniandy Servai, the present Respondent. Sigappi died in the year 1893, and Chellum Servai obtained letters of administration to so much of the estate of Muniandy Maistry as had not yet been administered. On 11th June 1895, Chellum Servai executed what purported to be a conveyance of the land in suit to the Defendant, T. P. Petherpermal Chetty for Rs. 30,000. This instrument was duly registered. On 3rd August 1895 V. A. K. Arunachellum Chetty sued Chellum Servai as Administrator of Muniandy Maistry's estate to recover a considerable sum due on a mortgage of the Tawkayan Grant. This suit was contested on the ground, amongst others, that the mortgaged property had been sold to the Defendant, T. P. Petherpermal Chetty ; and the latter was thereupon made Defendant in the suit. The suit was successful and a mortgage decree against the land was given, the Court holding that Petherpermal Chetty had notice of the lien of the Plaintiff, Arunachellum Chetty. In June 1896, Chellum Servai died, the Plaintiff-Respondent, R. Muniandy Servai, being, it is said, at the time absent in Madras. He is said to have returned about six months after Chellum's death. On 5th June 1898, he applied for letters of administration to the estate of Muniandy Maistry not yet administered. In this application he impeached the alleged conveyance to the Defendant in this suit, Petherpermal Chetty, on the ground that it was made without the leave of the Court, and on the ground of fraud. The application was refused on the ground that there were no assets of the estate in the jurisdiction of the Court to which the application was made. The applicant was referred to a regular suit to have the conveyance set aside. This order was passed on 15th July 1897.

On 30th July 1897, after signing a document (Exhibit A) which was one of the instruments sought to be set aside in this suit, the Plaintiff-Respondent, R. Muniandy Servai, left Rangoon for Madras.

The Plaintiff Respondent, R. Muniandy Servai, having returned to Burma, in or about July 1898, on 25th April 1900 applied for leave to institute the present suit as a pauper. The application was rejected on 15th June 1900. On 24th July 1901 the present suit was filed.

The Plaintiff's case was that, in 1895 Chellum was in bad health and threatened by Arunachellum Chetty with a suit affecting the land now in dispute. He accordingly arranged to convey the land, ostensibly, to the Defendant, T. P. Petherpermal Chetty, for the sum of Rs. 30,000, on the understanding that the transfer was to be merely nominal, and that the land should be returned afterwards. The object of the transfer was to enable Petherpermal Chetty to collect the rents from the tenants on the grant, and also

to defeat Arunachellum Chetty's claim by setting up Petherpermal Chetty's title as a purchaser in good faith for consideration without notice. No part of the consideration was actually paid. It was part of the Plaintiff's case that a fraud on Arunachellum Chetty was intended, but this fraud was not successfully carried out as the suit of Arunachellum Chetty was successful.

The Defendant's case was that the conveyance of June 1895 was a genuine transaction for value and was all along intended to be operative; that he actually paid the amount of the purchase money, or at least a substantial part of it; namely, Rs. 19,000; and that the Plaintiff, in July 1897, executed a deed of release (Ex. A) renouncing all his claims and agreeing to abandon the litigation in consideration of the receipt of Rs. 1,000. Incidentally, and in addition to his defence on the merits, the Defendant denied the Plaintiff's interest in the land and his right to sue, and pleaded that the suit was barred by limitation.

The following questions were raised at the trial.

(1) Whether the conveyance of 11th June 1895 was intended to be operative or was merely a fictitious transaction entered into partly as a matter of convenience and partly in order to facilitate a fraud?

(2) If the conveyance was not intended to be operative, but was executed with a fraudulent intent, whether the Plaintiff was entitled to disregard it and to recover possession of the land?

(3) Whether in order to do so, he must first have the conveyance set aside?

(4) If so, whether the suit was barred by limitation?

(5) Whether the Plaintiff was bound by the alleged release (Ex. A)?

(6) Whether his suit to set it aside was barred by limitation?

Both the Courts below concurrently found that the conveyance to Petherpermal was without consideration and intended to deceive creditors. Also that Ex. A was obtained by Petherpermal by misrepresentation.

The Chief Court (White, C. J., and Birks, J.) were of opinion that the fraud intended by Chellum Servai to be practised on his creditors not having been carried out, the Plaintiff was not precluded from recovering the property from the Defendant, that sec. 91 of Sch. II of the Limitation Act had no application to this case and there was no bar of limitation. The Chief Court in this view affirmed the judgment of the District Court decreeing the Plaintiffs' suit.

Mr. Upjohn, K. C. and *Mr. Baelhache, K. C.* for the Appellants contended that in the interest of commercial morality deeds like those in this case should be upheld and that this case fell within the legal maxim, *in pari delicto potior est conditio possidentis* and that the suit was barred by limitation.

Mr. Leslie DeGruyther for the first Respondent (the other Respondents did not appear) contended (1) that the sale deed dated the 11th June 1895 was not a real transaction and that the deed of release dated the 30th July 1897 was obtained by fraud and (2) that the suit was not barred by limitation.

T. P. PETHERPERMAL CHETTY v. R. MUNIANDY SERVAI.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother, Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the Appellant (hereinafter called "Petherpermal the elder,") and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy District, Lower Burma. One Arunachellum Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September 1895, Arunachellum Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry deceased, and Petherpermal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last-mentioned conveyance, and that the Defendant, Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12 with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the Defendant Chellum Servai to pay to the Plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal Defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellum Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is, therefore, clear that, whatever may have been the design to effect which the deed of the 11th June 1895 was executed, Arunachellum Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced, at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

T. P. PETHERPERMAL CHETTY *v.* R. MUNIANDY SERVAI.

On the 30th July 1897 R. Muniandy Servai and Petherpermal the elder executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the Appellant that, on an issue of fact such as this, the finding of the Judge who tried the case and saw the witnesses, approved as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are—

1. Is the Plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

2. Is his right of action barred by the 91st Article of Schedule II to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

"446 . . . . . Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away. . . . . . . where they had intended to defraud creditors, who, in fact, were never injured. . . . But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *In pari delicto potior est conditio possidentis*. The Court will help neither party. 'Let the estate lie where it falls'."

Notwithstanding this, it is contended on behalf of the Appellant that so much confusion would be imported into the

law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently that the cause of commercial morality would be so much prejudiced if debtors who desired to dafraud their creditors were not deterred from trusting knaves like the Defendant, that in the interest of the public good," as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the Plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the Defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And further, the purpose of the fraud having been not only not been effected, but absolutely defeated, there is nothing to prevent the Plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers* (1), and the authorities upon which that decision is based clearly establish this. *Symes* v. *Hughes* (2), and *In re Great Berlin Steamboat Co.*, (3), are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley* v. *Thomson* (4).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to a good overt act of the conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the Plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his

(1) 1 Q. B. D. 291 (1876)
(2) L. R. 9 Eq. 475 at p. 479, (1870).
(3) 26 Ch. D. 616 (1884).

(4) 24 Q. B. D. 742 (1890).

obtaining the relief he claims. The 144th, and not the 91st, article in the second Schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The Appellant will pay the costs of the appeal.

Appeal dismissed with costs.

J. W. A.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE ORDER
No. 431 OF 1906.

GEIDT, J.
CHITTY, J.
1908.
10, February.

DUKH HARAN SINGH and others, Defendants, Appellants,
v.
MUSST. BIBEE SOGHRA, Plaintiff, Respondent.

Landlord and Tenant—Landlord jointly interested in holding—Partition, if effects a division of the holding.

Plaintiff held land in joint tenancy with the Defendants under herself as the landlord. The shares of the Plaintiff and the Defendants having been separated by partition, the Defendants contended that the Plaintiff could not sue them for rent jointly but must bring a separate suit against each tenant,

Held—***That there was only a division of the land and not a division of the holding and the tenants remained jointly liable to the landlord for the entire rent.***

This was an appeal preferred on the 12th of November 1906, against an order of J. N. Ghosh, Esq., District Judge of Zillah Patna, dated the 10th September 1906, reversing that of Babu Jadunandan Prosad, Munsif of Patna, dated the 30th of April 1906.

The facts of the case material to this report will appear from the judgment.

Babu Khetra Mohan Sen for the Appellants.

Mr. A. Chaudhuri and *Moulvi Mahomed Ishfaq* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff is the owner of some 100 bighas of land known as English land. She and the Defendants in this case held that land in joint tenancy under herself, her share being 1 anna 15 dams and the share of the Defendants being 14 annas 5 dams.

In the year 1900 the Plaintiff obtained a decree for partition of her own share and under that decree, plots were allotted to her separately to represent her share and other plots were also allotted separately to the other tenants to represent their respective shares in the tenancy.

The present suit is brought to recover rent of the land allotted to the Defendants, that is to say, 14 annas 5 dams share of the entire rent as it formerly existed, the rent being at an uniform rate of 3 annas per bigha.

The defence is that the Plaintiff cannot maintain the suit in its present form, that she is not entitled to sue the Defendants jointly and that she must bring a separate suit against each of the tenants in respect of the land which

was allotted to him under the partition decree.

The Munsif upheld the contention of the Defendants and dismissed the suit but the District Judge on appeal held that there was no separate tenancy created in favour of each of the Defendants separately and he accordingly remanded the case under sec. 562 for trial on the merits.

We are of opinion that the decision of the District Judge is quite correct.

It is argued on behalf of the Defendants who have appealed to this Court that the act of the Plaintiff in bringing a suit for partition and thus affording an opportunity to the Defendants to get their shares separated amongst themselves amounts to a recognition of the division of the holding. In that contention we are unable to agree. What was divided was not the tenancy but merely lands which were held by the tenants. There was no recognition of the division of the holding or of distribution of rents. As between them and the landlord the tenants are still jointly liable to the landlord for the entire rent.

In this view the appeal fails and is dismissed with costs, the hearing fee being assessed at two gold mohurs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 297 OF 1904.

RAMPINI, J. SHARFUDDIN, J. 1908. Heard, 25, February & 5, March. Judgment, 10, March.

RAJA SHYAM CHUNDER MARDRAJ and others, Claimants, Appellants, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, Opposite Party, Respondents.

Land Acquisition Act (I of 1894), sec. 3 (a) —"*Land*"—*Fishery-rights, if can be acquired—Incorporeal rights, not land—Second acquisition—Pleading.*

Government having acquired the foreshore of the sea under the Land Acquisition Act leased the fishery-rights therein to certain persons for a term of years and they transferred or sublet their rights to others. Government subsequently took proceedings under the Land Acquisition Act to re-acquire these fishery-rights,

Held—*That these incorporeal rights, detached from the land out of which they arose, were not subjects for acquisition under the Land Acquisition Act. Nor could Government acquire rights which had already been acquired by it in a previous proceeding.*

It is only land including the rights arising out of it, but not rights detached from the land, that can be acquired under the Act.

Fishery-rights are not land within the meaning of the Act.

BABUJAN *v.* SECRETARY OF STATE (2) *referred to.*

The legality of the proceeding before the Land Acquisition Collector and of

(2) 4 C. L. J. 256 (1906).

the reference to the Court could be enquired into by the Court of its own motion.

BIBI LADLI BEGUM v. BIBI RAJE RABIA (1) *relied on.*

This was an appeal against the decree, dated the 23rd of February 1904, of Babu Annada Churn Sen, Land Acquisition Judge of Balasore.

The appeal related to certain sea fisheries or *khattys* extending along the sea coast at Balasore and a portion of a river fishery, which had been acquired for the Proof Range as interfering with artillery practice. The Appellants claimed Rs. 30,000 as compensation above what was awarded by the lower Court and also questioned the validity of the proceedings.

The case had come up before the High Court once before and was remanded by Mookerjee and Holmwood, JJ, in order that certain books of account showing the annual value of the fisheries, which had been rejected by the lower Court might be received in evidence. Upon this point the Appellants' case was that the books of the Das zemindars which had been filed in Court in the year 1898 and the books of the Raja of Nilgiri, which were separately kept while his estate was under the Court of Wards corroborated one another and were undoubtedly genuine and that upon those books the annual value for the years 1305, 1306, 1307, 1308 and 1309 was established

Evidence having been taken as directed in the remand order the appeal came up for hearing before Rampini and Sharfuddin, JJ.

The Court desired to hear the Government Pleader upon the point whether the present acquisition could be supported in law.

Babu Ram Charan Mitra, Senior Government Pleader, referring to *Babujan* v. *Secretary of State* (2) argued that the right of Government being a restricted right it was competent to it to acquire the fishery-rights which it had settled with the zemindars in 1897 for a term of 30 years. He referred also to the definition of "person interested" in sec. 3 (*b*) of the Land Acquisition Act.

Mr. Arthur Caspersz (with him *Babus Jogesh Chandra Dey* and *Joy Gopal Ghosha*) for the Appellants referred to the Military Lands Acts of 1892 and 1900 and to the definition of "land" in the Lands Clauses Consolidation Act of 1845 and in the Land Acquisition Act of 1894, and contended that sea fisheries could not be taken up in this country unless and until the Land Acquisition Act was amended upon the English lines. The acquisition in 1896 was therefore bad so far as the sea fisheries were concerned. The Crown further is estopped from relying upon the invalidity of its present notification. *Dadoba Janardhan* v. *The Collector of Bombay* (3), *The Municipal Corporation of the City of Bombay* v. *The Secretary of State for India in Council* (4), but if this Court in its inherent jurisdiction holds that the present proceedings are illegal, it should also hold that those of 1896 were also illegal. The claimants had no opportunity of

(1) I. L. R. 13 Bom. 650, 653 (1888).

(2) 4 C. L. J. 256 (1906).

(3) I. L. R. 25 Bom. 714 (1901).

(4) I. L. R. 29 Bom. 580 (1904).

proving their title to their fisheries which they had held from Mahratta times, because that title was never questioned in the lower Court. Their title was also admitted in the settlement proceedings of 1897.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against a decree of Babu Annada Churn Sen, Land Acquisition Judge of Balasore, dated the 23rd February 1904. The decree was passed on a reference made by the Land Acquisition Deputy Collector of Balasore under sec. 18 of Act I of 1894 for the purpose of determining the amount of compensation to be paid to the claimants of certain fishery rights on the fore-shore of the Proof Range at Chandipur acquired by Government for a public purpose by notification No. 1150 L. R. of the 3rd March 1903, published at page 292, Part I of the *Calcutta Gazette* of the 4th March 1903.

The fisheries are 11 in number.

The only question contested in the Court of first instance seems to have been the question of compensation. The Land Acquisition Judge allowed Rs. 1,565-5-3 for the fisheries in Taluk Majhibala, Rs. 4,463-2 for the fisheries in Taluk Joydeb, and Rs. 881-13-8 for the fisheries in Taluk Padmapur, that is, sums considerably in excess of the compensation awarded by the Deputy Collector.

The claimants were not satisfied and appealed to this Court, complaining that certain evidence had been excluded by the 1st Court. This Court by its decree of the 2nd January 1907, allowed this contention and remanded the case to the first Court for the admission and recording of the evidence excluded.

The lower Court has admitted and recorded this evidence.

The whole appeal is now before us.

It appears to us that the proceedings of the first Court, as well as those of the Collector, are from beginning to end without jurisdiction.

The fishery-rights taken up are described in the reference by the Collector as follows: "The fishery rights contained within the boundaries of the lands, as already acquired by Government, for the Military Department at Chandipur, thus bounded :—North :—The remaining unacquired portion of the villages Srikona and Mirzapur. South :—The remaining unacquired portion of the village Joydeb Kosba: East :—Sea. West :—The remaining unacquired portions of the villages Srikona, Hidga, Guddu, Nidhipura and Joydeb Kosba."

Now it appears that by a previous declaration No. 777 L. R. of the 10th February 1896, published in the *Calcutta Gazette* of the 12th February 1896, Part I page 187, the following lands were acquired :—"A piece of land measuring, more or less 909 mans 1 ghunt and 11 biswas of standard measurement. It is bounded on the north by the remaining portion of the village of Chandipur and Roman Catholic Mission Bungalow, south by the remaining portion of village Barkia, east by the sea, and west by the remaining portions of the respective villages of Chandipur, Srikona, Higan, Ransahi, Guddu, Joydeb Kosba, Barkia and Nidhipura." Hence, the lands, over which the fishery rights now acquired are exercised, were acquired by Govern-

ment in 1896. The fishery-rights now to be acquired are in fact exercised over the foreshore off Chandipur in the Balasore District. The eastern boundary of the lands previously acquired was "the sea." In the reference of the Deputy Collector in these proceedings, the eastern boundary of the fisheries to be acquired is described as "the sea."

The first matter which strikes us in connection with, and which seems to be a fatal objection to, these proceedings is that the rights of fishery which have now been acquired were previously acquired by Government in 1896. The Government then took up the foreshore over which the fishery rights now to be acquired are exercised, and consequently acquired the foreshore and all rights existing in connection with it and exercised over it. The Government cannot therefore take them up again. The second objection to these proceedings is that the Government is now taking up fishery-rights, that is, incorporeal rights without taking up the land over which they are exercised and which, as already pointed out, Government has already taken up, and which is its own property. Government cannot in our opinion do this under the Land Acquisition Act. Land is defined in the Act as including benefits arising out of land, etc. But land is not defined as meaning benefits arising out of land. Therefore, fishery rights are not land, and it is only land, including the rights arising out of it, but not the rights detached from the land, that can be acquired under the Act. The Government pleader calls our attention to the definition of "persons interested," in which it is said that a person shall be deemed to be interested in land, if he is interested in an easement affecting the land." This is no doubt correct, but it does not follow that because a person interested in an easement affecting the land may be entitled to share in the compensation awarded for the land that an easement comes within the definition of land, and can be acquired under the Act detached from the land affected by it.

The Government pleader has further explained that after Government acquired the foreshore off Chandipur, it, in 1897, leased the fishery-rights in the sea, that flows over the foreshore to certain persons for 30 years and they have transferred or sublet their rights to others. Government now repents of its having done so. It now wishes to cancel its settlement of these fishery rights, and to give it a good title to them, and to save it the trouble and danger of dealing with the settlement holders and their transferees, it has adopted the plan of taking the fishery-rights up under the Act.

In our opinion, though it is doubtless convenient to it to do so, Government cannot for the two reasons already assigned adopt this course.

The Government pleader's next argument is that the parties interested have only contested the amount of compensation awarded. This is not so, for all the claimants in their written statements, plead that "by contesting the amount of compensation they are not in any way waiving their right of questioning the Land Acquisition proceedings in the Civil Court on the ground that these fisheries cannot be legally acquired under Act I of 1894." See pp. 8, 12, 16 and 20 of

the paper-book. Again, in their memorandum of appeal to this Court, their second ground of appeal is:—"That the Court below should have held that the right to fishery in respect of the space between the high-water and low-water mark, being neither land nor profits arising out of land, the subject-matter is beyond the scope of the Land Acquisition Act and it cannot thus be acquired." Mr. Caspersz too for the Appellants contends that the proceedings of the Deputy Collector are without jurisdiction. He goes further; for he asserts that the proceedings of 1896 are illegal and that Government could not then legally acquire under the Act the foreshore off Chandipur. We need not enter into that question now. We are not at present concerned with the legality of the proceedings of 1896.

But even if the Appellants had not raised this plea, we consider we would have been entitled of our own motion to enquire into the legality of the Collectors' proceedings and of the reference see *Bibi Ladli Begum* v. *Bibi Raje Rabia* (1).

The Government Pleader finally calls our attention to the case of *Babujan* v. *Secretary of State* (2). In this case it has been said, "The matter being referred to the District Judge, at the instance of Behijan who claimed to be the proprietor of the land, the Judge held that the Collector had no jurisdiction to deal with the case as he had done, and that he could not, therefore, entertain the reference. He, however, did not stop there, but went on to hold, that the Act did not apply to a case in which the Collector claims the land, on behalf of the Government or the Municipality.

"Mr. Forester was no doubt right in holding that the first proceedings and the reference thereunder were bad, because what has to be acquired in every case under the Land Acquisition Act, is the aggregate of rights in the land, and not merely some subsidiary right, such as that of a tenant."

These passages are, we think, in favour of the views we have expressed. They show (1) that what is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right, as in this case, fishery-rights: (2) that it is the duty of Civil Court to set aside proceedings of, and a reference by, the Collector which are bad, being contrary to the provisions of the Act.

We accordingly decree this appeal. We set aside the proceedings and the reference by the Collector in this case. The Appellants are entitled to all their costs in both Court.

N. G. *Appeal allowed.*

(1) I. L. R. 13 Bom. 650, 653 (1888).
(2) 4 C. L. J. 256 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE.
No. 317 OF 1906.

MACLEAN, C. J.
DOSS, J.
1908.
20, February.

SRINATH GHOSH and others, Defendants, Appellants,
v.
MUKUNDRAM CHUCKERBUTTY, Plaintiff, Respondent.

*Will—Probate—Revocation—*Locus stand *of co-executor to challenge genuineness of Will.*

SRINATH GHOSH v. MUKUNDRAM CHUCKERBUTTY.

When a probate having been granted in the name of several persons as executors, one of them applied for revocation on the ground that the Will was a forgery and that he himself did not apply for probate and was not cited, and that the probate was obtained behind his back,

Held—*That he was entitled to have his name struck out of the probate, but he had no* locus standi *to challenge the Will.*

This was an appeal preferred on the 23rd of August 1906, against the decree of R. R. Pope, Esq., District Judge of Zillah 24-Pergunnahs, dated the 25th of May 1906.

This appeal arose out of an application by the Respondent for the revocation of a probate of the will of one Bhagaban Ure granted to the seven Appellants and the Respondent. The applicant stated so far as he was aware Bhagawan Ure left no will. But whether he did or not, he himself knew nothing about it and neither the application for probate nor the vakalatnama filed in the probate case was signed by him. The Appellants objected that the Respondent had no *locus standi* to apply for the revocation of the probate, that this case did not come under the provisions of sec. 50 of the Probate Act.

The District Judge observed that in his opinion there was really one issue involved in the case and it was: "Did Bhagaban Ure validly execute the Will of which probate was granted, and on the evidence he held that the Will set up was not genuine. Accordingly he decreed the suit.

The present appeal was preferred against this decision.

Babus Harendra Narayan Mukerjee and *Monmotha Nath Mukerjee* for the Appellant.

Babu Ram Chandra Mazumdar for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a somewhat novel application. On the 1st of June 1903, one Bhagaban Dass Ure is alleged to have made a will. He appointed no less than eight executors, one of whom is the present Respondent. On the 18th of September 1903, probate was granted to the eight executors. On the 22nd of November 1905, two years afterwards, the present application is made by the Respondent. He says that the proceeding for probate was taken behind his back; he was not cited; that he did not want to have anything to do with the matter and the Will set up was a forgery. The case came before the District Judge of 24-Pergunnahs, and he said that the real issue was whether the Will was fraudulent or whether it was not. The present Respondent went into a considerable amount of evidence to show that the Will was fraudulent, and induced the Court to hold that it was fraudulent. The other seven executors have appealed: and, they say that the present Respondent could not go into that question; for, he was in this difficulty: if he had any interest, it was only on the footing of the Will being a valid Will, and of his being one of the executors of that Will; if he says that there was no Will he has no *locus standi* to challenge it. He is not one of the heirs, or anywise interested in the estate. He could not challenge

the Will: and it is difficult to see how the judgment of the Court below can stand.

But there is something in the point which he now raises that he did not apply for probate and does not wish to be in the position of an executor of a Will which, he says, is no Will. Apparently he did not apply for probate: and he says he does not wish to act as an executor. We can treat his application as one for revocation as far as he is concerned, and strike his name out of the probate; and thus free him from liability as an executor. As regards the other seven executors the probate must stand. The present Respondent has no *locus standi* to contend that the Will is a fraudulent Will.

We, therefore, discharge the decree of the District Judge and we make an order revoking the grant so far as it relates to the name of Mukundram Chuckerbutty, the present Respondent.

The Appellant must have the costs of this appeal: the hearing fee is assessed at three gold mohurs.

DOSS, J.—I agree.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1493 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
22, January.
Judgment,
24, January

DHARMADAS KAWAR and anr., Petitioners,
v.
THE EMPEROR, Opposite Party

Criminal Procedure Code (Act V of 1898), secs. 195 (b) and 476—Sanction to prosecute—Instigating the chowkidar in lodging a false information—Sessions Judge's power to grant sanction—Indian Penal Code, sec. 211.

A chowkidar lodged an information at the thana of the murder of a girl. On the Police report, the Magistrate entered the case as false and declined to issue process against the accused and directed that the chowkidar alone should be first prosecuted under secs. 182 and 211, I. P. C., and not his instigators. On an application being made to the Sessions Judge with the view of obtaining sanction for the prosecution of the instigators, the Sessions Judge granted the sanction;

Held—*That the Sessions Judge had no jurisdiction either under sec. 195 or sec. 476, Cr. P. C., to sanction the prosecution for an offence under sec. 211, I. P. C., as the offence if any of the alleged instigators was committed by those persons before the Police and not before any Court or in the course of any judicial proceeding or of any proceeding in any Court.*

This was a rule granted on the 19th of December 1907, against an order of Mr. F. Roe, Sessions Judge of Hooghly, dated the 3rd of December 1907, directing the prosecution of the Petitioners under sec. 211, I. P. C.

The facts of the case material to this report will appear from the judgment.

Babus Dassarathi Sanyal and *Suresh Chandra Mukerjee* for the Petitioners.

Babu Atulya Churn Bose for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a rule to show cause why the order of the Sessions Judge dated

DHARMADAS KAWAR v. THE EMPEROR.

the 3rd December 1907 directing the prosecution of the Petitioners for an offence under sec. 211, I. P. C., should not be set aside.

The order of the Sessions Judge is as follows :—

"There can be no reasonable doubt that Dharmadas Kawar and Awlat Koyal instigated the chowkidar to lodge this information. I direct that they be prosecuted under sec. 211, with Khetter Duby."

The facts are that false information of the murder of a girl was lodged at the thana, by a chowkidar named Khetter Duby. The Police made an enquiry and reported the case to be false. The Magistrate passed the following order :—"From the evidence on record it is clear that the girl died a natural death at her husband's place and I suspect that the girl's father-in-law having refused to give her ornaments to her father, the latter wanted to make a row, but the gomostha having intervened the ornaments were given to the girl's father and the enemies of the gomostha caught hold of this opportunity and induced the chowkidar to make a false report to the Police. The case shall be entered false and no processes shall be issued against the accused. In his information to the Police however the chowkidar took all the responsibility upon himself. He shall therefore for the present be alone prosecuted under secs. 182 and 211, I. P. C."

The complainant Abdul Jabbar then applied directly to the Sessions Judge for sanction to prosecute the Petitioners Dharmadas Kawar and Awlat Koyal who, it is alleged, induced the chowkidar to give the false information to the Police.

The legality of the Sessions Judge's order is impugned on the grounds (1) that if it be a sanction under sec. 195 (b), Cr. P. C., he had no jurisdiction to grant it, as no offence under sec. 211 had been committed in or in relation to any proceeding in any Court: (2) that if it be an order under sec. 476, Cr. P. C., it is bad for a similar reason and (3) that the order of the Sessions Judge is not in conformity with the provisions of sec. 195, sub-sec. (4), Cr. P. C. These grounds must prevail. The offence, if any, was committed before the Police and not before any Court, or in the course of any judicial proceeding or of any proceeding in any Court. The Sessions Judge had therefore no jurisdiction to make it, either under sec. 195 (b) or sec. 476, Cr. P. C. Further, in the order not the slightest attempt has been made to comply with the provisions of sec. 195, sub-sec. (4).

It is much to be regretted that more care is not taken by Judicial Officers in the granting of sanction to prosecute for offences against public justice. Much time and labour are at present wasted owing to easily avoided irregularities in the granting of sanctions.

We make the rule absolute and set aside the Sessions Judge's order as prayed.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 25 OF 1908.

RAMPINI, J. SHARFUDDIN, J. 1908. Heard, 4 and 5, February. Judgment, 5, February.	BIPRA DAS GIRI and anr., Petitioners, v. NIRADAMONI BEWA, Opposite Party.

Charge, defect in—Charge, omission to frame—Conviction, validity of—Embezzlement—Indian Penal Code (Act XLV of 1860), secs 406 and 116.

Where the charge against the accused was to the effect that he on or before the 21st day of June 1907 committed breach of trust in respect of some deeds which he took from the complainant and was thereby guilty of an offence punishable under sec. 406, I. P. C., but at the trial he was convicted of embezzling not the deeds but amounts obtained by dealing with those deeds;

Held—*That the conviction is bad and ought to be set aside.*

Where an accused, who was tried with the other accused against whom the above-mentioned charge was framed, was convicted under sec. 406 read with sec. 116, I. P. C., without any specific charge having been framed against him, but it appeared that he knew of the charge as he put in a written statement denying it,

Held—*That his conviction is also bad and ought to be set aside.*

This was a rule granted on the 9th of February 1908, against an order of Mohanta Radhasyam Das Adhikari, Honorary Magistrate of Contai, dated the 6th of December which order was, on appeal, affirmed by the Joint Magistrate, Midnapore, (S. W. Goode, Esqr.) on the 2nd January 1908.

The facts of the case material to this report will appear from the judgment.

Mr. Eardley Norton and *Babu Dasarathi Sanyal* for the Petitioners.

Mr. Orr, Deputy Legal Remembrancer for the Crown.

Babus Atulya Churn Bose and *Joygopal Ghosha* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule, calling upon the District Magistrate of Midnapore to show cause why the convictions of and sentences passed on the Petitioners should not be set aside.

The Petitioner No. 1, Bipra Das Giri, has been convicted of an offence under sec. 406, I. P. C. and the Petitioner No. 2, Khirode Chandra Das, of an offence under sec. 406 read with sec. 116, I. P. C. The former has been sentenced to undergo rigorous imprisonment for one month and the latter to pay a fine of Rs. 50, or, in default, to suffer one month's rigorous imprisonment.

The Petitioners were tried by an Honorary Magistrate, Mohanta Radha Syam Das Adhikari. The charge drawn up against the Petitioner No. 1 is admittedly very vague. It is to the effect that he, on or before the 21st day of June 1907, committed breach of trust in respect of some deeds, which he took from the complainant, and was thereby guilty of an offence punishable under sec. 406, I. P. C. There is no charge whatever against the Petitioner No. 2, who, however, has been convicted of an offence under sec. 406 read with sec. 116, I. P. C.

Now, the judgment of the Honorary Magistrate shows that notwithstanding

BIPRA DAS GIRI *v.* NIRADAMONI BEWA.

the wording of the charge against the Petitioner No. 1, the Petitioners have been convicted, not of embezzling some deeds, but of embezzling amounts obtained by dealing with those deeds. We have tried to find out what the "some deeds" are; but so far as we can see, that does not appear from any part of the record or from the judgment of the Honorary Magistrate or from that of the appellate Court. The learned pleader for the Opposite Party, however, has pointed out the deeds upon the record. He says they are three in number, one, dated the 1st July 1905, on which the Petitioner No. 1 is said to have obtained Rs. 44; another, dated the 5th June 1905, the exact amount obtained for which the learned pleader cannot tell us, but the principal of which, he says, is Rs. 108, and the third, dated the 24th October 1904, the principal of which was Rs. 50.

Now, in the first place, we may observe that none of these deeds are dated the 21st June 1907, which is the date specified in the charge as that on which the Petitioner No. 1 committed the embezzlement, and the pleader for the Opposite Party cannot tell us what really took place on the 21st June 1907.

The learned pleader for the Opposite Party calls attention to two other *kobalas*, one dated the 23rd March 1906, on which, he says, Rs. 200 were obtained, and another, bearing the same date, on which Rs. 128 were obtained. And then there is a third deed of the 15th July 1905, on which a sum of Rs. 200 is also said to have been obtained. Now the pleader for the Opposite Party says that the charge relates to the first three deeds and not to the three. All we can say is that this may be so; but it does not appear from the record or the charge. The pleader for the Opposite Party further argues that the charge is correct, and that the Petitioner has been tried for embezzling the deeds and not the money obtained on the deeds. That, however, does not appear from the judgment of the Honorary Magistrate to be the case. On the contrary, from that judgment it appears that the Petitioner was convicted of embezzling certain sum of money; but what sums he embezzled and on what dates he committed the embezzlements does not at all appear from the record or from the evidence.

Then, as for the Petitioner No. 2, Kherode Chandra Das, there is nothing to show what the specific charge against him was. The pleader for the Opposite Party contends that he knew very well what the charge was, because he put in a written statement denying it. That may be so, but we cannot, from the evidence, or from the record, tell what the charge was.

The proceedings in this case have, in our opinion, been highly irregular; and we think that the Petitioners should neither have been tried nor convicted as they have been. The learned Joint Magistrate who heard the appeal against the decision of the first Court should have discovered the defects in the proceedings and ordered a retrial.

We, therefore, set aside the conviction and sentences, and, as we are unable to see whether the Petitioners have committed any offence or not, we direct that a retrial should take place for any offence of embezzlement which the Petitioners may have committed. They must, how-

BIPRA DAS GIRI v. NIRADAMONI BEWA.

ever, be tried by some Magistrate, other than Mahanta Radhasyam Das Adhikari, whom the District Magistrate may select for that purpose.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 15 OF 1908.

RAMPINI, J. SHARFUDDIN, J. 1908. Heard, 5, February. Judgment, 18, February.	MANIRUDDIN and ors., Petitioners, *v.* THE EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 99 and 147—Rioting—Common object—Difference between common object charged and common object found—Conviction, validity of—Right of private defence.

Where the accused were convicted on a charge of rioting committed with intent to dispossess the complainant, and on appeal the Sessions Judge upheld the conviction but found that the common object was enforcement of their right or supposed right,

Held—*That although there was a difference between the common object charged and the common object found, the difference was very slight and as both common objects raised the same question of law and the accused had not been in any way prejudiced in their defence, the conviction was not bad.*

That under the circumstances of the case the right of private defence under sec. 99, I. P. C., could not arise.

This was a rule granted on the 6th of January 1908, against an order of Mr. C. H. Moseley, Sub-divisional Magistrate of Habiganj, dated the 8th of May 1907, which order was, on appeal, affirmed by Mr. Phillimore, Sessions Judge of Sylhet on the 18th of November 1907.

The facts of the case will appear from the judgment.

Babu Sarat Chandra Roy Chowdhury for the Petitioners.

No one appeared to show cause against the Rule.

The JUDGMENT OF THE COURT was as follows:—

This is a rule to show cause why the conviction of and sentences passed on the three Petitioners, *viz.*, Maniruddin, Sadal Chand Shaha and Sheikh Chamari, should not be set aside. The three Petitioners have been convicted by the Sub-divisional Magistrate of Habiganj of offences under sec. 148, I. P. C., and sentenced, Maniruddin to 8 months' and the other two to 6 months' rigorous imprisonment. The Petitioner, Maniruddin, has further been convicted of an offence under sec. 324, I. P. C., and sentenced to undergo a further term of four months' rigorous imprisonment.

The facts are that the accused on the 8th March last were members of a large body of men about 40, 50, or 60 in number, who came armed with *lathis*, bikals (or spears) and kuchasolas (apparently heavy billets of wood) and attacked the complainant, Basir Mahomed and his father Dengu, severely wounded them and destroyed the crops sown by the complainant on a certain piece of land. There had been a partition of certain land of which the disputed plot formed a part. There was a dispute as to the share to which the disputed plot had

MANIRUDDIN *v.* THE EMPEROR.

fallen on partition. The complainant claimed it as having fallen to the share of his landlord. The accused Maniruddin raised a similar contention. The Magistrate found that the complainant was in possession and had grown the crop destroyed by the accused. He therefore charged the accused with rioting armed with dangerous weapons "with the common object of dispossessing Basir Mahomed from certain land in his possession and with having used violence in prosecution of that common object."

The Petitioners appealed to the Judge, who dismissed their appeal. But he said:—"It seems to me that neither party can be said to have been in exclusive or undisturbed possession of the land. . . . I find that the Appellants' common object was to enforce the right or supposed right of Sadai to cultivate the land as a tenant of Maniruddin and that they committed rioting."

The rule was therefore applied for and issued on the ground that the Judge had found the accused guilty of rioting with a different common object than that specified in the charge.

In support of the rule, it has been urged (1) that the accused committed no offence, as on the findings of the Judge the Petitioners only exercised the right of private defence; (2) that they have been convicted of rioting with a different common object from that specified in the charge and (3) that the two Petitioners, Sadai Chand Shaha and Sheikh Chamari took no active part in the riot. They had no weapons and used violence to no one.

As to the first of these pleas it appears to us that it cannot prevail. In our opinion the accused cannot be said to have been acting in the exercise of the right of private defence. They deliberately went to the land armed with deadly weapons and in very large numbers with intent to enforce their right or supposed right to the land. The witness Dengu says that as the Petitioners passed his house on the way to the field Maniruddin said: "Come out *haramjada*, you and your sons, I am going to the field." This shows the Petitioners went to the disputed field deliberately intending to fight and defied the complainant and his father to come and oppose them. There was no occasion for their going to the field that day. The crop had been previously sown by the complainant and was growing. The Petitioners were not suddenly called on to protect their rights or supposed rights. There was no attempt on the day of the occurrence to invade or encroach upon them. In any case, they had plenty of time to have recourse to the authorities, civil, criminal and police and deliberately ignored them and took the law into their own hands. In these circumstances, under sec. 99, I. P. C., no right of private defence can have arisen.

The second plea is of a very technical nature. The accused were charged with rioting with intent to dispossess the complainant from certain land. The Magistrate found them guilty of rioting with this intent. The Judge thinks the question of possession of the land is not clear, but says that in any case the accused committed an offence under sec. 148, I. P. C., as they committed rioting with the intention of enforcing their rights or supposed rights to the land.

MANIRUDDIN *v.* THE EMPEROR.

The difference between the common object charged by the Magistrate and that held by the Judge to have actuated the accused is very slight. Both common objects raise the same questions and the accused have in no way been prejudiced or misled in their defence so as to induce them to omit to bring forward any evidence. They knew very well they were charged with an offence under sec. 148, I. P. C., and that it was advisable for them to establish their claims to the land, in order to justify their proceedings. In fact, they were charged with a more serious, and have been found to have been actuated by a somewhat similar, but less serious, common object.

The Petitioners' third plea seems to us not to be correct. There is ample evidence that both Sadai Chand Shaha and Chamari carried weapons and took an active part in the riot. Thus, Basir Mahomed says, "Chamari beat me on my right leg with a *lathi*. Nobin Chamar, Mansar, Sadai Shaha and Eakub beat me with *lathis* and also my father." Dengu says :—"Chamari struck me on my left hand with a *lathi*." Biramuddin says: "Chamari beat Dengu." Kewajulla says: "Chamari struck him (Basir) with a *lathi* on the head. Jasud, Sadai Shaha, and Nobin and all the accused beat with *lathis* and bikals." Hridoy Mistri and Mohabatullah gave similar evidence. There can, we think, be no doubt that the 2nd and 3rd Petitioners took an active part in the riot and are not deserving of any leniency. The Magistrate observes "Maniruddin is clearly the person who deliberately engineered the riot and it appears that he has spent most of his life doing this sort of thing, having been imprisoned several times for similar offences. His offence therefore requires an extra severe punishment."

We accordingly discharge the rule.

B. C. *Rule discharged.*

[CRIMINAL APPELLATE JURISDICTION.]

GOVT. APPEAL No. 1 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
4, March.

THE DEPUTY LEGAL REMEMBRANCER on behalf of the Government of Bengal, Appellant,
v.
RASH BEHARY DASS, Accused, Respondent.

Indian Penal Code (Act XLV of 1860), sec. 477A—"Fraudulently," meaning of—False entries made for concealing fraud previously committed.

Certain sums of money were received at a Munsifi for payment into Government treasury but they were never paid. The accused, an accountant in the Munsif's Court, did not enter these sums in the Chalan *Register. But after the commencement of an enquiry into the matter, he, for the purpose of concealing the non-payment, made false entries in the* Chalan *Register showing that these sums had been paid to the credit of the Collector,*

Held, per GEIDT, J.—*That inasmuch as the accused, in making the false entries, was in reality furthering the fraud which had been committed upon the Government, he acted fraudulently and was therefore guilty under sec. 477A, I. P. C.*

Per WOODROFFE, J.—*That even if the intention with which the false entries were made was to conceal a fraudulent or dishonest act previously committed, the inten-*

tion would be to defraud and the case would fall within sec. 477A of the Indian Penal Code.

EMPRESS OF INDIA v. JIWANAND (1), QUEEN-EMPRESS v. GIRDHARI LAL (2), ABDUL HAMID v. THE EMPRESS (3), LALIT MOHUN SARKAR v. QUEEN-EMPRESS (4), QUEEN-EMPRESS v. RAMASAWMI (5) *referred to.*

This was an appeal preferred by the Deputy Legal Remembrancer on behalf of the Government of Bengal, against the order passed by Mr. P E. Cammiade, Additional Sessions Judge of Sylhet on the 19th of September 1907 acquitting the accused of the offences with which he was charged under sec. 477A, I. P. C.

The material facts of the case as they appear from the judgment of the Sessions Court are as follows :—

The accused, an accountant of the Munsif's Court at Habigunj, was charged with having made three false entries in column 8 of the *chalan* Register in order to defraud Government. The entries were :—the date 23 March 1906—purporting to be the date of credit of Rs. 177-12 to Collector's account ;—the date 6 November 1906 purporting to be the date of credit of Rs. 16-10 to Collector's account : and the date 18 November 1906 purporting to be the date of credit to Collector's account of Rs. 105. These sums were never paid into the treasury, and the charge against the accused was that he made the entries with intent to defraud Government.

The defence was that the accused did not make the entries ; that he had nothing to do with the misappropriation of the money, and that even if the story for the prosecution were believed, it must be held that the entries were made not in order to defraud Government but in order to cover a fraud already committed, and that, therefore, the offence did not fall under sec. 477A, I. P. C.

The case against the accused arose in this way :—

In January 1907, while passing three payment orders in respect of deposits of rents the District Judge discovered that the third parts of the *chalans* under which rents were supposed to have been deposited had neither been filled in nor signed. The Judge then ordered an enquiry to be held on this subject. While this inquiry was in progress, on 28th January 1907, the sheristadar of the first Court, in passing an application for a payment, found that the two *chalans* in the record of the case appeard to be in the writing of different persons and he also found that in part II of one of the *chalans* the designation of the payee (cashier or sub-treasury officer) had been penned through. He then called for the *chalan* Register and found that in the entry relating to the suspicious *chalan*, Entry No. 686, the date of credit to Collector's account had been altered, and had been penned through with ink that was quite fresh. The accused admittedly had the custody of the *chalan* Registers containing the false entries ; and it admittedly was his duty to write out those Registers. He drew up a report which he submitted to the Munsif's first Court, the Munsif took the statement of the

(1) I. L. R. 5 All. 221 (1882).
(2) I. L. R. 8 All. 653 (1886).
(3) I. L. R. 13 Cal. 349 (1886).
(4) I. L. R. 22 Cal. 313 (1894).
(5) Vol. I Weir. 554 (1888).

THE DEPUTY LEGAL REMEMBRANCER *v.* RASH BEHARY DASS.

accused on oath, and, finding his explanation unsatisfactory, suspended the accused. The matter was reported to the District Judge, who directed that the case should be sent to the police for investigation with the result that the accused was put on his trial before the Sessions Court. The Sessions Judge disagreeing with the assessors acquitted the accused with the following remarks:—"The intent to defraud is essential to the commission of an offence under sec. 477A. The money deposited under the disputed *chalans* was admittedly embezzled. If there had been evidence to show the false entries had been made at the time this money was embezzled, there might have been an intent to defraud: and the case would have been covered by the ruling in *Queen-Empress* v. *Ramasawmi* (5); but there not only is no evidence to prove exactly when these entries were made, but the facts point to their having been made after the enquiry was started in connection with rent-deposit cases. The entries moreover all appear to have been made at one and the same time. In these circumstances, the case is covered by the rulings in *Empress of India* v. *Jiwanand* (1), *Abdul Hamid* v. *Empress* (3), *Queen-Empress* v. *Girdhari Lal* (2), and I find the accused has not committed an offence under sec. 477A, I. P. C.

"The assessors have found the accused guilty of the charges, but I disagree with them on the point of law and it is unnecessary to go into the facts. The accused should in my opinion be prosecuted under sec. 409, I. P. C."

Mr. Orr, Deputy Legal Remembrancer for the Crown.

Babus Dassarathi Sannyal and *Suresh Chandra Mukerjee* for the accused, Respondent.

The JUDGMENT OF THE COURT was as follows:—

GEIDT, J.—This is an appeal against a judgment of acquittal. The accused was charged with having committed offences punishable under sec. 477A of the Penal Code.

We find ourselves in some difficulty in dealing with this case, because the Sessions Judge has not come to any findings of fact as to what the accused had actually done with respect to the offences with which he was charged. He assumes that if the case for the prosecution be true, the accused had committed no offence. Now, the case for the prosecution is this, that in the months of March and November 1906 certain sums of money had been received at the Habigunj Munsifi for payment into the Government Treasury there. The accused was the accountant in the Munsif's Court and it was his duty to have made entries of the receipt in the *chalan* Register; this he failed to do. Sometime afterwards when the Register was found to be irregularly kept, an inquiry was held, and the allegation against the accused is that the sums were never paid into the Government Treasury, and that after the commencement of the enquiry, for the purpose of concealing the non-payment, he made entries in the Register showing that on the 23rd March 1906

(1) I. L. R. 5 All. 221 (1882).
(2) I. L. R. 8 All. 653 (1886).
(3) I. L. R. 13 Cal. 349 (1886).
(5) Vol. 1 Weir. 554 (1888).

a sum of Rs. 177-12 had been paid to the credit of the Collector; on the 6th November another sum of Rs. 16-10 and on the 18th November a sum of Rs. 105 had been similarly paid to the credit of the Collector. The view apparently taken by the Sessions Judge is that as these entries were made not for the purpose of defrauding Government but for the purpose of concealing the fraud that had been previously committed, the case does not fall under sec. 477A of the Penal Code. In support of this view the Judge relied on the rulings in *Empress of India* v. *Jiwanand* (1), *Queen-Empress* v. *Girdhari Lal* (2) and *Abdul Hamid* v. *The Empress* (3), and he accordingly acquitted the accused.

It seems to me that in making the entries which are charged against him, the accused was in reality furthering the fraud that had already been committed. If the accused had been successful, the money, to which Government was entitled, would have continued to be kept out of the possession of Government. Having regard to this consideration I have no hesitation in holding that the accused, if the case for the prosecution is true, acted fraudulently. In my opinion the view taken by the Sessions Judge is wrong. The order of acquittal is reversed and the accused must be retried by the Sessions Judge on the charges already framed against him.

WOODROFFE, J.—In my view, the case is covered by the rulings in *Lalit Mohun Sarkar* v. *Queen-Empress* (4), and in *Queen-Empress* v. *Ramasawmi* (5), which have not been referred to by the Sessions Judge. He should therefore have considered the facts.

In my opinion, even if the intention with which the false entries were made was to conceal a fraudulent or dishonest act previously committed, the intention would be to defraud and the case would fall within sec. 477A of the Indian Penal Code.

I agree, therefore, with the order passed by my learned brother.

B. C. *Appeal allowed.*

(1) I. L. R. 5 All. 221 (1882).
(2) I. L. R. 8 All. 653 (1886).
(3) I. L. R. 13 Cal. 349 (1886).

(4) I. L. R. 22 Cal. 313 (1894).
(5) Vol. 1 Weir. 554 (1888).

THE
Calcutta Weekly Notes.

Vol. XII.] **MONDAY, MAY 4, 1908.** [No. 25

Contents.

NOTES

THE SECOND CALCUTTA CRIMINAL SESSIONS WILL commence its sittings from [illegible]. Mr. Justice Fletcher will preside.

THE BAR PROPOSED TO GIVE A DINNER TO THE Hon'ble Mr. O'Kinealy, the retiring Advocate-General of Bengal. But owing to ill-health Mr. O'Kinealy was unable to accept the honour. Mr. O'Kinealy was a very unassuming man of retiring habits. He was deeply learned in case law and his opinion was always greatly prized. His apparent coldness of manner often made people think that like most scholars he had little or human interest in [illegible]. But those who were more intimately acquainted with him knew that behind his cold exterior he had many a sterling quality of the head and heart that won the respect of his fellow men. He was always eminently fair both as counsel and as legal adviser to the Government. He was a man of character and honest to the core both in his professional dealings and in the discharge of his public duties. Retirement of such men from the Bar leaves it decidedly weaker.

THE ATTAINMENT OF THE POSITION OF THE PRIME Minister by a leading member of the Bar of Mr. Asquith's position is at once a refutation of the theory that prevails in India that lawyers should be weeded out from our Legislatures. The English *Law Journal* pays the following tribute to Mr. Asquith's abilities

The promotion of a member of the Bar to the highest position to which a British subject can attain is a notable event in the history of the legal profession, in which all its members can take a legitimate pride. Mr. Asquith has won his way to the Premiership by a combination of intellectual gifts of the highest order. A cultured and logical mind, a calm and independent judgment, a remarkable power of lucid statement, a courageous belief in his convictions, a fine sense of patriotism—these are among the great qualities which have won for him the confidence and admiration of the nation. His career at the Bar, much more distinguished than that of many an advocate who lives in the glare of sensational trials, has now, presumably, been finally closed, for the right hon. gentleman, though he created a precedent by resuming his practice after he ceased to be Home Secretary, is scarcely likely to create yet another by returning to the Bar as an ex-Prime Minister. In the performance of his high duties he has, irrespective of political feeling, the sincere good wishes of every member of his old profession.

THE FOLLOWING PARAGRAPH ALSO TAKEN FROM OUR contemporary shows conclusively how the lawyer influence is in the ascendant in the British Legislature. If nature was allowed to take its own course, the same would be the case in India. But because lawyers are making their influence felt in the Indian Legislatures, a scheme is being specially devised for the reconstitution of the Legislatures on such lines that lawyers will not easily find place in them.

[illegible] was at the head of the Government. The [illegible] lawyer to occupy the position was Mr. Spencer Perceval, who was assassinated [illegible] in 1812. Mr. Perceval who, like Mr. Asquith, was a member of Lincoln's Inn, was successively Solicitor-General and Attorney-General in the Addington Administration. He may, indeed, be regarded as the only [illegible] member of the profession who [illegible] Prime Minister. Grenville was called to the Bar at the Inner Temple in 17[illegible], and Pitt at Lincoln's Inn in 1780, but neither made any prolonged attempt to practise, Pitt's only active connection with the Bar being a single journey on the Western Circuit. It has apparently [illegible] less difficult for practising members of the Bar to win distinction in the Legislature. Mr. Asquith will preside over a Cabinet in which the legal element is unprecedentedly large. Lord Loreburn, Mr. Haldane, Mr. Birrell, Mr. McKenna, Sir Henry Fowler and Mr. Lloyd-George have all been practising lawyers. If the rumour that Mr. Lloyd George will succeed Mr. Asquith as Chancellor of the Exchequer prove to be well founded, the two chief members of the Cabinet will be lawyers, the one a barrister and the other a solicitor.

THE ENGLISH COURT OF CRIMINAL APPEALS IS TO come into existence shortly. It is interesting to find that a set of rules has been framed by the Home

Secretary for payment of counsel's and solicitor's fees in the case of appellants who may be too poor to secure professional help. The following abstract which we take from the columns of our English contemporary shews how anxious the executive authorities in England are that even the humblest of His Majesty's subject should not be prejudiced in his trial or appeal because he happens to be poor

> One of the best features of the Court of Criminal Appeal, which will come into existence in the course of a few days will be that no Appellant will be without legal assistance merely because he has not the means to pay for it. The judges, in the Rules they have framed for regulating the procedure of the Court, have adopted the provisions of the Poor Prisoners' Defence Act, with the result that it will be the duty of Clerks of Assize to keep lists of counsel and solicitors who are willing to act for poor appellants—a task in which, so far as solicitors are concerned, they will have the help of the officials of the law societies in different parts of the country. On another page will be found the regulations made by the Home Secretary as to the rates of payment to be made for the expenses of the defence. They differ in some respects from the regulations made by his predecessor under the Poor Prisoners' Defence Act. The fee of a solicitor on the hearing of an appeal has been fixed at 2l. 2s., and of a barrister at 1l. 3s. 6d.; but, if the Court is of opinion that the case is one of difficulty, the barrister's fee is to be 2l. 4s. 6d. It is recognised that there may be cases of exceptional length and difficulty and it is provided that the Court may, in such cases, order the fee of the solicitor to be increased to 7l. 7s., and of the barrister to 11l. The scale of remuneration does not err on the side of liberality, but we have no doubt that the members of both branches of the profession will, regardless of the meagreness of these payments do their best to secure that every appellant has his case fully and skilfully presented to the Court

---

INDIAN CURRENT CASES.

JAMAIT MULLICK *v.* EMPEROR, I. L. R. 35 Cal. 138. *Judgment, contents of.*

"It must appear, on the face of the judgment, that the case of each accused has been taken into consideration, and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each accused."

ALURVA KRISHNA *v.* EMPEROR, I. L. R. 35 Cal. 141. *Cr. P. C., sec. 196—Penal Code, sec. 124A—Sedition—Complaint.*

If the provisions of sec. 196, Cr. P. C., are substantially complied with the conviction is not bad.

The rule laid down in *Queen-Empress* v. *Sham Lal*, I. L. R. 14 Cal. 707 was followed, *viz.*, that an application by a complainant to have his witnesses summoned and the case tried may be regarded as a complaint.

The "article" in question published in the newspaper was held to be seditious.

MANICK LAL SEAL, IN THE GOODS OF, I. L. R. 35 Cal. 156. *Official Trustees Act—Executor*

There is nothing in the Official Trustees Act which precludes the official trustee from being appointed and acting as executor.

BIPIN CHANDRA PAL *v.* EMPEROR, I. L. R. 35 Cal. 161. *Cr. P. C., sec. 234—Joinder of charges.*

Case where it was held that sec. 234, Cr. P. C., was not contravened.

MAKHAM LAL MUKERJEA *v.* NALIN CHANDRA GUPTA, I. L. R. 35 Cal. 171. *Limitation Act, sec. 15 and Sch. II, Art. 84—Taxation of solicitor's costs.*

Art. 84 of Sch. II of the Limitation Act applies to a suit by an attorney for costs and an order for taxation of costs does not come within sec. 15 of the Limitation Act.

Reviews.

ELEMENTARY STUDIES IN MERCANTILE LAW, applicable to British India. *By a Barrister-at-Law and advocate of the High Court, Calcutta. Calcutta, S. K. Lahiri & Co., 54 College Street. 1908.*

This little book is intended for students. A considerable portion of the subject is covered by codified law, *viz.*, the Negotiable Instruments Act and the Contract Act. The arrangement of the codifier is not however the most suitable for students. Besides the Codes necessarily deal with their subject in the abstract. The present work is not merely a resumé of the law as embodied in the Code. It is an intelligible account of the law as it is found to operate in actual business transactions. Quite in keeping with its character of a beginner's book, it does not also deal abundantly in case-law. Only leading decisions and such others as may help the students in understanding the subject, are dealt with. The author acknowledges his indebtedness to Scrutton's "Elements of Mercantile Law." The topics dealt with are —(1) The Law Merchant (2) Negotiable Instruments (3) Sale of Goods (4) Marine Insurance (5) Charter parties and Bills of Lading.

THE INDIAN CONTRACT ACT (IX of 1872) together with an Introduction and Explanatory Notes, Table of Contents, Appendix and Index. *By Sir Henry Cunningham, M. A., Barrister at-law, late one of the Judges of H. M's. High Court, at Calcutta, and Sir Horatio Shepherd, M. A., Barrister-at-law, late one of the Judges of H. M's. High Court at Madras Tenth Edition. Madras. Published by the Lawrence Asylum Press, Mount Road.*

A new edition of a standard work like the present hardly requires a lengthy notice. Since the issue of the last edition Sir Frederick Pollock's edition has made its appearance with some very candid and

original criticisms of the Code and the case law that has gathered round it. The authors have had to take these views of the learned jurist into account in preparing the present edition. Like Sir Frederick and his learned co-adjutor, Mr Mulla, the present authors religiously eschew all reference to cases not reported in the Government Law Reports. So far as these are concerned, the case law has been brought up to date. In other respects also, the notes have been subjected to careful revision which enhances its value to the practising lawyer.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before GEIDT, and WOODROFFE, JJ. CRIMINAL REVISION No. 138 OF 1906. BARFATE MEAN AND OTHERS, Petitioners v. THE EMPEROR, Opposite Party. 6th April 1908.

Indian Penal Code, sec. 448—Criminal trespass—Intent to annoy—Proof of.

The Petitioners entered upon the house of the complainant one Kishen Dayal Koeri for the purpose of searching for a stolen article which belonged to one of the Petitioners, and inspite of the remonstrances of the complainant the Petitioners remained in the premises and searched the house for the stolen article. On these facts the Petitioners were tried by the Sub-Divisional Magistrate of Buxar who convicted them under sec. 448, I. P. C. and sentenced each of them to pay a fine of Rs. 30.

This rule was issued for setting aside the conviction and sentences.

Their Lordships observed.

GEIDT, J.—"It is contended that as the primary object of the Petitioners was not to annoy the complainant, they cannot be convicted of criminal trespass within the definition given in sec. 441 of the Penal Code. The law on the subject is discussed in the case referred to in the Sub-Divisional Magistrate's judgment and reported in I. L. R. 26 Bom 538. I entirely agree with the view taken by the Bombay High Court that 'though there may be no wish to annoy, yet if annoyance is the natural consequence of the act, and if it is known to the person who does the act that it is the natural consequence, then there is an intent to annoy.' Here the natural consequence of searching for stolen property in the complainant's house in his presence and against his protests was to cause serious annoyance and that that would be the result must have been known to the Petitioners. I hold therefore that they intended to annoy."

WOODROFFE, J.—"I reserve my opinion upon the question whether the law is rightly laid down in the Bombay decision cited. It is unnecessary to consider it as the finding is that the alleged trespass was made on the pretex of searching for a stolen Turatt. There is nothing to show that there was any justification for a search of the complainants' premises."

Babu Surendra Nath Ghosal for the Petitioners.

Babu Dwarka Nath Mitter for the prosecution.

Rule discharged

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1082 OF 1906. ASKARAN BAID AND ANR., Appellants v. PEARI BUX *alias* PIR BUX, Respondent. Heard, 3rd, 6th and 7th April 1908. Judgment, 9th April 1908.

Negotiable Instruments Act, secs. 30, 39, 86—Drawer and acceptor—Arrangement—Notice of dishonour.

The Plaintiff was the holder of a *hundi* payable at sight drawn by one Peari Bux of Kishengunge in the Purneah district on Abdus Sobhan, a hide broker in Calcutta. The *hundi* was presented to Abdus Sobhan, along with two bills of lading for parcels of hides despatched by Peari Bux to Calcutta. Abdus Sobhan accepted the *hundi* and promised to pay within 3 days. Subsequently he paid Rs. 1,027 out of Rs. 1,900 the amount of the *hundi*. After about a month, he became bankrupt. The date of the *hundi* was the 17th January. Notice of dishonour was not given to Peari Bux till the 29th January. The Plaintiff, the holder of the *hundi* sued Peari Bux, the drawer, for the balance due to him. Both the lower Courts dismissed the suit on substantially the same grounds, *viz.*, (1) that the notice of dishonour was not given in due time and (2) that the drawer was discharged by the holder of the note giving time to the acceptor to pay the money, an arrangement not notified to the drawer, nor acquiesced in by him. The Plaintiff appealed to the High Court.

Held—That when the holder of the note agreed to receive the money in 3 days' time, and did not give notice to the drawer of the arrangement and did not even give him notice of dishonour till about 10 days subsequently, under the terms of secs. 30, 39 and 86 of the Negotiable Instrument Act the drawer was discharged and the Plaintiff could not recover from the drawer.

Dr Rash Behary Ghose and *Babus Hemendra Nath Sen, Jogendra Nath Mookerji* and *Brojendra Nath Chatterjee* for the Appellant.

Babus Umakali Mookerji and *Joy Gopal Ghosha* for the Respondent.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM APPELLATE ORDER No. 450 OF 1907. IADULLA PAIKAR (auction-purchaser), Appellant *v.* MIROO MONDAL AND OTHERS (Petitioners), and KRISHNA KAMINI CHOWDHURANI (Decree-holder), Respondents. 28th April 1908.

Civil Procedure Code (Act XIV of 1882), sec. 244—Sale, setting aside of—Fraud—Appeal—Limitation Act (XV of 1877), sec. 18 and Sch. II, Art. 178.

The Appellant purchased certain property at auction-sale on 20th June 1898. On 15th December 1907 an application was made by judgment-debtors under sec. 244 of the Code of Civil Procedure to set aside the sale. The Court of first instance held that the application was barred by limitation and refused to set aside the sale. On appeal the sale was set aside, but the District Judge omitted to consider the question of limitation. He observed "I have no doubt that the sale of the property in question was brought about by collusion between the landlord (decree-holder) and his *gomastha*, the present auction-purchaser.

The auction purchaser appealed to the High Court.

Held—That as the judgment-debtors brought not only the decree holder, but the auction-purchaser before the Court, and they raised the contention of fraud, the case came under sec. 244, C. P. C.

Hira Lal Ghose v. *Chunder Kant Ghose*, I. L. R. 26 Cal. 539 at p. 541 followed.

Art. 178, Sch. II of the Limitation Act was applicable to such a case. The judgment-debtors must therefore shew that their application was made within 3 years from the date on which their right to apply accrued, if that date was not affected by the operation of sec. 18 of the Limitation Act.

Kamini Charan Kanji v. *Bhuban Nath Kanji*, 2 C. W. N. 691, followed.

Babu Basanta Kumar Bose for the Appellant.

Babu Shama Charan Roy for the Respondents.

T. M. *Appeal allowed: Case remanded.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J. and DOSS, J. APPEAL FROM APPELLATE DECREE No. 2016 OF 1906. SHOROSHI MOHAN ROY AND ANOTHER, Plaintiffs, Appellants *v.* SHEIKH SHAHABAZ KHAN AND ANOTHER, Defendants, Respondents. 24th April 1908.

Principal and agents—Suit against agents—Death of one of the agents—Heirs not made parties—Indian Contract Act (IX of 1872), sec. 43.

A suit was brought by a principal against his agents for an account. The agents were one Hakim Ali and Defendant No. 2. Hakim Ali died but his heirs were not made parties to the suit. Defendant No. 2 admitted that he was appointed with Hakim Ali to be the Plaintiff's agent. The Court below held that the suit could not proceed against Defendant No. 2 alone.

Held—Sec. 43 of the Indian Contract Act governs this case; and, as there was no suggestion of any express agreement to the contrary, the Plaintiff was entitled to sue Defendant No. 2 alone as one of the joint agents.

Babu Upendra Lal Roy for the Appellants.

Babu Nogendra Nath Ghose (for *Babu Monmotho Nath Mukerjee*) for the Respondents.

A. T. M. *Appeal allowed: Case remanded.*

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C. J. and DOSS, J. APPEAL FROM APPELLATE DECREE No. 1870 OF 1906. UPENDRA NATH SAHU AND OTHERS, Appellants *v.* HARI DAS MUKERJI AND ANOTHER, Respondents. 23rd April 1908.

Civil Procedure Code (Act XIV of 1882), sec. 310A—Decree-holder's share of money deposited, who entitled.

Defendant No. 1 had obtained two decrees against Defendant No. 2. The present Plaintiffs also obtained a decree against Defendant No. 2. Defendant No. 2 had obtained a decree against a third party. Defendant No. 1 attached that decree: and he was substituted for Defendant No. 2 and in the subsequent execution proceeding he was entered as the decree-holder. Then the Plaintiffs also attached the decree which Defendant No. 2 had obtained against the third party, and they were substituted in the place of Defendant No. 2. Then at the instance of Defendant No. 1 the properties of the judgment-debtors were brought to sale. An application was then made under sec. 310A of the Code of Civil Procedure to set aside the sale upon the money provided for by that section being deposited in Court. That was done. The question was as between the present Plaintiffs and Defendant No. 1, who was entitled to the money.

Held—That under the circumstances, the Plaintiffs and Defendant No. 1 stood in the shoes of the decree-holder, Defendant No. 2 and were the decree-holders within the meaning of sec. 310A. The Plaintiffs being as much decree-holders as the Defendant No. 1 were entitled to a share of the money deposited under sec. 310A.

Babus Ram Chandra Mojumdar and *Karunamoy Bose* for the Appellants.

Babu Shib Chunder Palit for the Respondents.

A. T. M. *Decree modified.*

PRIVY COUNCIL.

[APPEALS FROM THE CHIEF COURT OF THE PUNJAB AND FROM THE COURT OF THE AGENT TO THE GOVERNOR-GENERAL IN CENTRAL INDIA.]*

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
1908.
18, March.

HANSRAJ and ors, v. SUNDAR LAL and another, and HANSRAJ and ors, v. DWARKA DAS and anr., (Respondents) and the Secretary of State for India in Council (Intervenant.)

Arbitration—Award—Decree passed thereon—Appeal—Appeal from Governor General's Agent in Bhopal to the Privy Council—Native State.

No appeal lies from a decree passed in accordance with the award made by an arbitrator to whom matters in dispute in the suit had been referred for decision.

Quære: *Whether an appeal lies to His Majesty in Council from a decision of the Governor-General's Agent at Sehore in Bhopal.*

These were two appeals which were heard together and one judgment pronounced in both as will hereinafter appear.

In the former appeal the Chief Court of the Punjab dismissed the appeal from the District Court of Delhi on the ground that no appeal lay from a decree passed in accordance with an award. In the latter appeal, special leave was given to appeal from the order of the Agent to the Governor-General in Central India who had upheld the order of the Political Agent in Bhopal (Central India). The Political Agent of Bhopal had followed the decision of the arbitrator, Mr. Clifford upon which the order of the District Court of Delhi was based.

Mr. DeGruyther for the Appellants in both appeals contended that the suit was to obtain partition of joint family property, read the plaint, the order of the Political Agent, agreement appointing arbitrators and urged that the Chief Court of the Punjab ought to have gone into the merits whether by way of appeal or revision; and in the latter appeal that the award made by Mr. Clifford was invalid in law and could not affect property which lay outside the Court's jurisdiction, that of the Political Agent, and that no decree could be made on the award.

Mr. Cowell (in place of *C. W. Arathoon* deceased) for the Respondents contended that the Chief Court had rightly held, no appeal lay, and had followed *Ghulam Jilani* v. *Muhammad Ahmed* (1); and in the other appeal that the Political Agent was right for the reasons given by him and the Appellants had acquiesced in the Sehore Court proceedings.

Mr. Cohen, K. C., and *Mr. Ross*, for the Intervenant, did not admit that the Privy Council had jurisdiction to hear appeals from the Political Agent, but said that the Political Agent was prepared to adopt the decision of the Chief Court of the Punjab, should it be affirmed by His Majesty in Council.

* The first mentioned appeal was from the decision of the Chief Court of the Punjab, the other appeal from that of the Agent of the Governor-General in Central India.

(1) 6 C. W. N. 226: s. c. L. R. 29 I. A. 58 (1901).

HANSRAJ *v.* SUNDAR LAL.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—The parties to these two appeals or their predecessors in title have been in litigation now for more than 20 years. The subject of litigation is the property of a joint Hindu family engaged in business, with branches in different parts of the country. Part of the family property is situated in British India; part in Native States. The litigation was begun, in 1886, in the Court of the Political Agent at Sehore, in Bhopal, by a suit for partition of so much of the family property as was within his jurisdiction. The next proceeding was a suit for partition, commenced in 1888, in the Court of the District Judge of Karnal, in the Punjab.

In August 1897, after prolonged litigation, the parties to the Punjab suit nominated Mr. S. Clifford, Divisional Judge of Delhi, sole arbitrator to decide the matters in dispute in the suit. The arbitrator was to determine what joint property, moveable and immoveable, except the immoveable property outside British India, was to be partitioned between the parties. The appointment of Mr. Clifford was duly confirmed by the Court.

The arbitrator finally submitted his award on 20th June 1900.

The Appellants filed a great number of objections to the award. These objections were considered and disposed of by the District Judge of Delhi, who passed a decree in accordance with the award.

The objections filed by the Appellants were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of objections, it is perfectly clear that there was no misconduct within the meaning of that expression in the chapter on arbitration in the Civil Procedure Code, nor anything that could justify the Court in setting aside or remitting the award.

From the decree of the District Judge the Appellants appealed to the Chief Court of the Punjab.

The Chief Court dismissed the appeal on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of or not in accordance with the award.

In the meantime the Political Agent in Bhopal had made a decree in accordance with Mr. Clifford's award. There was an appeal to the Court of the Agent to the Governor-General in Central India, but the appeal was dismissed. Special leave to appeal against the order of the Agent to the Governor-General was granted by this Board on the representation that there was or might be an important question as to the jurisdiction of the Court of the Political Agent. And liberty was reserved to the Secretary of State for India in Council to intervene in his official capacity. Mr. Cohen, who appeared for the Secretary of State, not admitting that an appeal would lie to His Majesty in Council from the order of the Agent to the Governor-General in India, intimated that the Court of the Political Agent in Bhopal would be guided by the decision of the Chief Court of the Punjab if His Majesty thought fit to affirm that decision.

In their Lordships' opinion the decision of the Chief Court is perfectly right. Their Lordships will humbly advise His

HANSRAJ v. SUNDAR LAL.

Majesty that both appeals should be dismissed.

The Appellants will pay the costs of the appeals other than the costs of the Intervenant.

J. W. A. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 44 OF 1906.

MACLEAN, C. J. COXE, J. 1908. Heard, 20 and 21, January. Judgment, 21, January.	SRIMATI FARMAN BIBI and anr., Plaintiffs, Appellants. v. SHEIKH TASHA HADDAL HASAIN, Defendant, Respondent.

Transfer of Property Act (IV of 1882), sec. 111—Forfeiture—Denial of landlord's title—Pleading.

Where after the denial of a landlord's title he received rent from the tenant he cannot rely upon the denial as a ground of forfeiture.

Semble: *Sec. 111 of the Transfer of Property Act deals with the whole lease of the immoveable property comprised therein and not with a part or moiety of it; a denial of title by one of several joint lessees cannot therefore entail forfeiture.*

Held—*That a suit for* khas *possession for denial of landlord's title by one of two joint tenants is not maintainable when the other tenant has not been made a party.*

When the tenants did not repudiate their lease but rather stuck to it, and only questioned the right of the Plaintiffs as transferees from their lessor, the alleged transfer appearing to be of a prior date to the lease,

Held—*That there was no denial of landlord's title to cause a forfeiture of the tenancy.*

Where the tenants could not obtain possession of the whole area leased to them and on reference to their lessors got no satisfaction from them and then took a lease of the portion of which they could not get possession from a stranger whom they found in possession,

Held—*That there was no renunciation by the tenants of their character as such so as to entail forfeiture.*

This was an appeal preferred on the 6th January 1906, against the decision of Babu Sri Gopal Chatterjee, Subordinate Judge of Dacca, dated the 1st September 1905, reversing the decision of Babu Mahim Chandra Chakrabutty, Munsif, Naraingunge, dated the 17th July 1904.

The facts of the case appear from the judgment.

Babu Harendra Narain Mitter for the Appellants.

Dr. Rash Behari Ghose and *Mahomed Mustafa Khan* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a suit for *khas* possession of certain land, on the ground that the Defendant who was one of the tenants of the land has forfeited his interest by denying the Plaintiff's title as landlord and that the lease has determined under sub-sec. (*g*) of sec. 111 of the Transfer of Property Act.

The Munsif decreed the suit, and, the Subordinate Judge has dismissed it with costs, on the ground that the lessee has

SRIMATI FARMAN BIBI v. SHEIKH TASHA HADDAL HASAIN.

not renounced his character as such either by setting up a title in a third person or by claiming title in himself. The Plaintiffs have appealed.

We must take the fact as found by the lower Appellate Court. It appears that the lease in question was granted by two persons of the name, Lakhu and Mohabat, on the 18th of Falgoon 1293. It was a *mourasi mokarari potta*, and the Defendant with his brother who was a co-lessee and who is since dead, but whose heirs are not parties to this suit, executed a *kabuliyat* corresponding to the *pottah*, in favour of Lakhu and Mohabat. It appears that at any rate in the years 1892 and 1893, *dakhillas* were granted to the Defendant and they purported to have been given on behalf of Lakhu and Mohabat and not on behalf of the Plaintiffs. The Plaintiffs claim under a *hebanama* dated the 20th of Magh 1292, which was a year or so in date prior to that of the lease to which I have referred. The Plaintiffs' rights under the *hebanama* are not very clear. But the Subordinate Judge finds that "Even if the Plaintiffs really obtained any rights under the *hebanama* they allowed their grantors" (that is to say Lakhu and Mohabat) "still to exercise the right of ownership by granting registered *pottah* to tenant and by realising rent from him So by their conduct the Plaintiffs induced the Defendant to believe that they had acquired no right." It appears, however, that the Plaintiffs brought two rent suits in the years 1891 and 1895, against both the tenants under the above lease, and recovered rent. In those suits the Defendants set up that as regards a part of the property, some 10 cottas, they had never been able to obtain possession of it and that in consequence they had to execute a registered *kabuliyat* in favour of a certain Municipality which claimed to be entitled to those 10 cottas, and paid rent to it. It is suggested that in those rent-suits the present Defendant denied the title of the Plaintiffs. But it has been very properly conceded that inasmuch as after those rent-suits assuming the Plaintiffs to be the Defendants' landlord they received rent, they cannot rely upon that denial as a ground of forfeiture. In 1901, the present Plaintiffs again brought a suit, apparently against the present Defendant only, claiming an injunction: and, in that suit the defence was—unfortunately the defence is not before us and I am taking it from the finding of the Subordinate Judge—that the Plaintiffs' *hebanama* was fraudulent and collusive and that the Plaintiffs had acquired no right under it, and that the Defendant was not a tenant-at-will, as the Plaintiffs had set up in that suit, but a permanent lease-holder under Lakhu and Mohabat, and that the Defendant had been unable to obtain possession of 10 cottas out of the land leased to him by Lakhu and Mohabat as the Government had acquired it and subsequently sold it to the Narsingunj Municipality and the Defendant was obliged to take a fresh lease from the said Municipality. The finding of the Subordinate Judge as regards the 10 cottas in respect of which the Defendant set up the right of the Municipality is that "the evidence, which is on the record, shows satisfactorily that the Defendant failed to obtain possession of the 10 cottas and informed

Lakhu of the fact, but Lakhu did not stir and finally the Defendant executed a registered *kabuliyat* in favour of the Municipality and has been paying rent to it." There are other findings of the Subordinate Judge which are material for the purpose of the present decision. The Judge says, "I have shown that the Plaintiffs by their conduct induced the Defendant to believe that they are mere *benamdars* of Lakhu and Mohabat and that the Defendant had very solid reasons for saying all he said regarding the 10 cottas in question and that his defence in the injunction suit was a substantially true one and made in good faith." He goes on to say, "In none of the three suits the Defendant renounced his character as lessee. On the contrary, he stuck to the registered *pottah* (H) granted by the Plaintiff's grantors, throughout The Plaintiffs, on the other hand, received rent from him up to 1305." "The defence," says the Judge, "in the injunction suit was the same defence as was made in the second rent-suits and the Plaintiffs waived the forfeiture alleged to have occured on the Defendant's denial in these suits. The fact seems to be that the Defendant never refused to pay rent to Lakhu and Mohabat, though he has been obliged to take a fresh lease under the Municipality for the 10 cottas which had been acquired by the Go vernment." And he finds that "as the Defendant has improved the land which has become valuable, they (the Plaintiffs) are harassing the Defendant to compel him to give up the land." Those are the facts upon which we have to come to our conclusion.

The first point is that the lessors of the Defendant are Lakhu and Mohabat, whatever the arrangements may have been between them and the Plaintiffs. The Defendant has never renounced his character as their lessee. All he did and all he said was that inasmuch as he could not get possession of the 10 cottas in respect of which he set up the right of the Municipality, and as he could get no satisfaction from his lessors, he had to make the best term he could with the Municipality in order to prevent them from turning him off the land, the 10 cottas. That is not a renunciation of his character as lessee under the lease. The finding is, as I have said, that he stuck to the registered *potta* and that has been his case throughout. Is this then a case of forfeiture? Although in the two suits to which reference has been made, the Defendants paid rent to the Plaintiffs and in that sense the latter may have been recognised by the former for the purpose of those suits as their lessors, in point of strictness and of fact they are not and never were the lessors of the Defendant, nor are they transferees from the lessors; for, the *hebanama* under which they claim was executed some time before the lease in question.

Then there is another difficulty in the Plaintiffs' path. There were two lessees, one of them is dead and his interest passed to his heirs but they are not parties to the suit. It is not suggested that they have renounced their character as lessees. How then can sec. 111 apply? The section deals with the whole lease of the immoveable property comprised therein and not with a part or moiety of it. The words are "a lease of immove-

able property" that means the lease in its entirety. There has been no renunciation by the other lessee. I doubt in these circumstances if the section can apply. At any rate, the heirs not having been made parties to this suit, this question cannot be determined in their absence.

It is upon the Plaintiffs to make out that the lessee has renounced his character as such by setting up a title in a third person or by claiming title in himself. The finding of the lower Court is that he has done nothing of the sort. The finding is that far from repudiating the lease the Defendant, as I have said, stuck to the registered lease. If so, the Plaintiffs' claim to relief being based upon this alleged forfeiture and no such forfeiture in my opinion having taken place, the suit fails and the decision of the Subordinate Judge was right.

I may add that it is unnecessary to go into the question as to which there seems to be some difference of judicial opinion in this Court, namely, as to whether or not the institution of the suit itself to evict the tenant is an act by the lessor showing his intention to determine the lease or whether there must be some act done by him showing such intention prior to the institution of the suit. In the view we take of the case, that question does not arise.

The appeal is dismissed with costs.

COXE, J.—I agree.

S. C. S. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER

No. 112 OF 1906.

STEPHEN, J.
MOOKERJEE, J.
1907.
Heard, 27, June.
Judgment, 4, June.

BAIKUNTHA NATH DEY and anr., Appellants,
v.
NAWAB SALIMULLA BAHADUR and ors., Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 562—Remand, order of—Erroneous order made with consent—Appeal—Appeal after taking full benefit of order—Election of remedies—Bar—"Final disposal of suit," when.

An order of remand made with consent will bind the parties, though made contrary to the provisions of sec. 562, Civil Procedure Code.

MADHU SUDAN SEN *v.* KAMINI KANTA SEN (2) *referred to.*

Per MOOKERJEE, J.—*An Appellate Court does not act without jurisdiction when it makes an erroneous order of remand, but merely commits an error of law, in making an order of a particular description in the exercise of its undoubted jurisdiction over the subject matter of the litigation. Such error may be cured by consent.*

It cannot be laid down as an inflexible rule of law that under all circumstances the final disposal of a suit must be taken to be the delivery of the judgment.

When a litigant has the right to choose between two remedies which are not co-existent but alternative, and adopts one of those remedies, his act at once operates as a bar as regards the other and the bar is final and absolute.

(2) 9 C. W. N. 895: s. c. I. L. R. 32 Cal. 1023 (1905).

BAIKUNTHA NATH DEY v. NAWAB SALIMULLA BAHADUR.

After having taken the full benefit of an order of remand, it is not open to a party to turn round and appeal against it.

This was an appeal from an order of remand preferred on the 23rd March 1906, against an order of Babu Suraj Narain Dass, Additional Subordinate Judge of Mymensingh, dated the 28th of November 1905, affirming an order of Babu Bepin Behari Das Gupta, Munsif of Kishoregunge, dated the 30th June 1905.

The material facts will appear from the judgment.

Babu Gobind Chandra Dey Roy for the Appellants.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF ... COURT was as follows:—

STEPHEN, J.—This appeal is brought by the Plaintiff in a suit brought to recover possession of 12 kuanis of land which he alleges were comprised in a *putni* lease, dated the 12th Bysak 1209, of the lands of Mouza Prajapatkhila. The respondents deny his title to the land on the ground that it belongs to Mouza Dankia, and was therefore not comprised in the Plaintiff's lease. The sole question of fact in issue is therefore, which mouza the land belongs to and in the Munsif's Court was decided in the Defendant-Respondent's favour. On appeal the Subordinate Judge considered that a local investigation ought to be held to ascertain the exact effect of a *chitta* produced by the Defendants, and decided that "the case must therefore go back to the lower Court, a step to which both parties have agreed before me." He also ordered a Commissioner to be appointed who was to localise on a map already in evidence the dags mentioned in the *chitta*, so as to show whether they fell within or without the disputed land. He accordingly reversed the judgment of the Court below and remanded the case expressly under sec. 562 of the Procedure Code, ordering the lower Court to decide the case according to the instructions contained in his judgment. The Appellant has appealed against this order which is admittedly wrong because, as has been frequently laid down in this Court, the Munsif had decided the case, not, as the section provides on a preliminary point, but on the merits. The Respondent argues, however, that the Appellant is deprived of his right of appeal under the circumstances of the case, and it is therefore necessary to consider what happened on the order, before we deal with further points turning on the defects that it is alleged to contain.

On the order being received by the Munsif certain preliminary proceedings took place of which I need notice one only, namely an application by the Appellant for a postponement of the proceedings on the ground that he wished to appeal to the High Court against the Judge's order, which was refused. The matter is of some importance as showing that the Appellant was then aware of a defect in the order. In obedience to the order a Commissioner was appointed on the 2nd of March and after both parties had appeared before him returned his report which was adverse to the Plaintiff-Appellant's claim. The report came before the Munsif on the 17th March

BAIKUNTHA NATH DEY *v.* NAWAB SALIMULLA BAHADUR.

when the Appellant was present, but he refused to argue his case, saying that he had appealed to this Court against the remand order, which I take as being equivalent to a refusal to appear. After the Respondent had been heard the case was closed on the 20th March, and the Munsif delivered judgment adversely to the Appellant on the 29th March. Meanwhile however the Appellant had filed his present appeal on the 23rd March, that being the very last day on which it was open to him to do so. The Appellant has not appealed against the Munsif's judgment. Do these circumstances show that the Appellant has lost his right of appeal under sec. 588?

As far as proceedings subsequent to the remand order are concerned the case seems pretty plain. From the two cases, *Jotinga Valley Tea Co.* v. *Chera Tea Co.* (1) and *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2), the rule may be deduced that an appeal against the remand order presented before the suit is finally disposed of under that order, that is before the final decree in the suit has been passed, is good, but that a party cannot wait till the final disposal of the suit and then appeal against the interlocutory order without appealing from the decree in the suit. In the earlier case the appeal was presented at some unascertained period before the disposal of the suit, and it was held to be proper; in the latter case the appeal was presented not only after the suit had been disposed of, but after an application for its rehearing under sec. 108 had been made and rejected, and it was held that it could not be heard. We have been asked to extend the ruling in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) by substituting the closing of the case, when the power of either party to affect the issue ceased, for the disposal of the suit, which the language of the Court in distinguishing that case from the earlier one, shows to mean the passing of the final decree, but in so doing we should be acting against both decisions, and imposing a possibly doubtful for a very definite limit. It may be that the decision in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) is not in agreement with the rather broad ruling laid down in *Rameshur Singh* v. *Sheodin Singh* (3), where it was held that a defective order of remand vitiated all subsequent proceedings. But besides that that case was decided on a second appeal, which distinguishes it from the cases I have mentioned, its principle has been departed from in this Court in *Mohesh Chandra Dass* v. *Jamiruddin Mollah* (4) followed in *Durga Kinker Nath* v. *Kouchai Ronza* (5), both also cases decided on second appeal, where it was laid down that proceedings subsequent to an illegal order of remand might be valid under certain circumstances. From this it appears that though the ruling in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) cannot be directly invoked to maintain the argument that the present appeal cannot be heard, it does go to show that a decision on an illegal remand may be conclusive And on the facts

(1) I. L. R. 12 Cal. 45 (1885).
(2) 9 C. W. N. 895: s. c. I. L. R. 32 Cal. 1023 (1905).

(2) 9 C. W. N. 895: s. c. I. L. R. 32 Cal. 1023 (1905).
(3) I. L. R. 12 All 510 (1889).
(4) I. L. R. 28 Cal. 324 (1901).
(5) 5 C. L. J. 71 (1904).

before us I cannot avoid the conclusion that the Appellants' consent to the remand makes it so. The basis of the decision in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) may be regarded as being the consent of the Appellant to the proceedings subsequent to remand, implied by his not appealing against the order of remand during those proceedings. His express consent to those proceedings before they were ordered, must surely have at least as much force. His subsequent appeal, made though it was at the last possible date, and after he could in any way influence the result of the proceedings, may take the case out of direct scope of the ruling I am considering; but I cannot regard it as a revocation of a consent made in the most binding form that was open to him. I must accordingly hold that the Munsif's decision was binding on him, and that in the language of the judgment in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) he cannot be permitted to appeal against an interlocutory order, when he has not appealed against the decree in the suit.

The appeal therefore has been improperly brought; and I need not discuss further other defects that have been alleged to exist in the order.

The appeal is dismissed with costs.

MOOKERJEE, J.—The circumstances under which the present appeal has been preferred on behalf of the Plaintiffs are not disputed and may be briefly outlined.

The Plaintiffs sued for recovery of possession of a parcel of land upon declaration that it is included in a lease granted in their favour by the landlords Defendants. The claim was resisted on various grounds of fact and law by the landlords as also by other persons who claimed to be tenants of the land under them. The Court of first instance went into all the questions raised by the parties and dismissed the suit on the merits. Upon appeal, the Subordinate Judge held that the suit could not be satisfactorily tried without a local investigation, and observed that "the case must therefore go back to the lower Court, a step to which both parties have agreed before me." He then gave direction as to the mode in which the case was to be re-tried, reversed the judgment and decree of the Court of first instance, and remanded the suit under sec. 562 of the Civil Procedure Code. This order was made on the 28th November 1905, and was followed by a decree made on the 8th December 1905. The records were received back by the Munsif on the 14th December on which date he directed notices to issue on the pleaders of both the parties, fixed the 22nd January 1906 for the hearing of the case, and called upon the Defendants to deposit fees for the appointment of a Commissioner. After some adjournments the fees were deposited on the 27th January, and four days later, the Plaintiffs applied for postponement of the case till the High Court could dispose of an appeal against the order of remand. As a matter of fact, no appeal had been preferred at that time and the application was refused; the Munsif observed that the parties could not be prejudiced if the local investigation was made with a view to the comparison of the *chitta* on the dis-

(2) 9 C. W. N. 895: s. c. I. L. R. 32 Cal. 1023 (1905).

BAIKUNTHA NATH DEY *v.* NAWAB SALIMULLA BAHADUR.

puted locality. On the 15th February, a Commissioner was appointed with the sanction of the District Judge. The Commissioner held a local investigation after due notice to both the parties, who, as the record shows, were represented before him, and took part in the proceedings. On the 17th March the Commissioner submitted his report which was not altogether favourable to the Plaintiffs, Appellants. The case was set down for final disposal on the 28th March, upon the whole evidence on the record. The pleader for the Plaintiffs stated that he had no other evidence to adduce and intimated that as an appeal had been preferred to the High Court against the order of remand, he would not address the Court; as a matter of fact, we now know that no such appeal had been presented to the High Court up to that time. The pleader for the Defendants was then heard and the Court reserved judgment. On the 23rd March 1906, the Plaintiffs preferred the present appeal to this Court against the order of remand made on the 28th November 1908. It may be observed that the appeal was presented on the very last day allowed by the law of limitation, after every single day to the exclusion of which the Appellants were entitled had been counted out in their favour. On the 29th March 1906, the Munsif delivered judgment and dismissed the suit. Against this decision, no appeal was preferred by the Plaintiffs, and the time, within which an appeal could have been preferred, has long since expired. The present appeal against the order of remand now comes on far disposal. In support of the appeal it is argued on behalf of the Appellants, *first*, that the order of remand, which purports to have been made under sec. 562 of the Civil Procedure Code, is in contravention of the provisions of sec. 564 and consequently void, with the necessary consequence that all the subsequent proceedings before the Munsif and the decree in which they resulted are invalid and infructuous; and *secondly* that the directions given by the Subordinate Judge for the retrial of the case are erroneous and prejudicial to the Appellants because they improperly restrict the scope of enquiry In answer to this argument, it is contended by the learned Vakil for the Respondents, *first*, that even if the order under sec. 562 be assumed to be in contravention of sec. 564, it cannot be treated as made without jurisdiction, that it is at most an irregular order and that the defect, if any, was cured as the order was made by consent of both the parties, and *secondly* that even if the directions given in the order for further inquiry be assumed to be open to objection, the Appellants are not entitled to attack it on that ground, because they have made an election and taken the benefit of the order and their remedy, if any, was by way of an appeal against the final decree of the Munsif made after remand.

In support of his first contention, it has been argued by the learned Vakil for the Appellants, that as the case was not disposed of upon a preliminary point in the Court of first instance, upon the authority of the decision of this Court in *Abraham* v. *Abraham* (6), the Subordinate Judge had no power unde

(6) I. L. R. 17 Cal. 168 (1889).

BAIKUNTHA NATH DEY v. NAWAB SALIMULLA BAHADUR.

sec. 562 to make an order of remand, but he should, if necessary, have proceeded under sec. 568. It was argued, on the other hand, by the learned Vakil for the Respondents that as laid down in *Perumbra* v. *Subramanian* (7), which has been subsequently affirmed by a Full Bench in *Sadhu Krishna* v. *Kuppan Ayyangar* (8), sec. 562 is not exhaustive and a Court of appeal has inherent power to remand a suit for retrial as the justice of the case may require. It is not necessary to examine the broad question raised on behalf of the Respondents, because in my opinion, their contention that the Plaintiffs, by reason of their consent, are estopped from questioning the validity of the order, is well founded and must prevail. The learned Subordinate Judge states in his judgment that both parties agreed before him that the case should go back for local investigation and fresh decision. It was suggested, however, on behalf of the Appellants that if under sec. 564, the Subordinate Judge had no jurisdiction to make an order of remand under sec. 562, the consent of the parties could not confer upon him a jurisdiction which was not vested in him by law. This argument, in my opinion, is not well founded. No doubt, as laid down by their Lordships of the Judicial Committee in *Ledgard* v. *Bull* (9), where a Court has no inherent jurisdiction over the subject matter of a suit, such jurisdiction cannot be conferred by consent. Here, however, there is no question of the inherent incompetency of the Court to deal with the matter before it. The question is in substance not one of jurisdiction but rather of the power of the Court. This is clear from the decision of this Court in *Gurdeo Singh* v. *Chandrikah Singh* (10), where the essential elements of the jurisdiction of a Court are analyzed and explained. The question here is substantially as to the power of the Court to make an order of a particular description in the exercise of its undoubted jurisdiction over the subject matter of the litigation. That in the exercise of such jurisdiction, it may commit an error of law, in other words, that a Court has jurisdiction to decide wrong as well as right, is manifest from the judgment of their Lordships of the Judicial Committee in *Malkarjun* v. *Narhari* (11). To treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. If, therefore, the erroneous order of remand did not destroy the jurisdiction of the Court, the question arises whether the defect was curable by consent. That the defect is curable under certain circumstances is obvious from the decisions of this Court in the cases of *Mohesh Chandra* v. *Jamiruddin* (4), and *Durga Kinkar* v. *Konchai Rozna* (5), in which it was ruled that although when a Court of first appeal purporting to act under sec. 562, C. P. C., remands a case to the Court of first instance which had not decided the suit merely on a preliminary point, the order is erroneous, yet if the order of remand has

(7) I. L. R. 23 Mad. 445 (1899).
(8) I. L. R. 30 Mad. 54 (1906).
(9) L. R. 13 I. A. 134: S. C. I. L. R. 9 All. 191 (1886).

(4) I. L. R. 28 Cal. 324 (1901).
(5) 5 C. L. J. 71 (1904).
(10) 5 C. L. J. 611 (622) (1907).
(11) I. L. R. 25 Bom. 337 (347) (1907).

BAIKUNTHA NATH DEY *v.* NAWAB SALIMULLA BAHADUR.

been carried out, the subsequent proceedings are not void merely because of such error, and will be set aside only if it is established that the erroneous remand has affected the merits of the case. It is not necessary to discuss whether the error is rightly regarded as an irregularity or may more fittingly be described as an illegality, as it is due to a contravention of an express provision of the law; it is sufficient to hold that the error does not affect the jurisdiction of the Court, and consequently may be cured by consent. It may also be pointed out that the provisions in secs. 562 and 564 are introduced for the benefit of litigants, so as to guard against a fresh trial of the whole cause by the Court of first instance and to protect them from the delay, trouble and expense of a fresh appeal; if, therefore, litigants find it the more advantageous course that the whole case should be retried and consent to such a procedure, an order of remand contrary to the provisions of sec. 564 is not null and void. It would be unreasonable to hold that a party, who has consented to such an order, is entitled to treat it as void and incapable of being validated by consent or waiver. The view, I take, is supported by the decision of Mr. Justice Subramania Ayyar in *Manager of the Court of wards* v. *Ramasami* (12). The first point taken on behalf of the Appellants, namely, that the order of remand is void as made contrary to the provisions of sec. 564 must be overruled on the ground that the order was made with their consent.

The second ground taken on behalf of the Appellants seeks to assail the order of the Subordinate Judge on the merits. Here, again, they are met with the objection taken on behalf of the Respondents, that as the order of remand was carried out before the present appeal was filed, it is not open to the Appellants to challenge that order except by way of an appeal against the final decree. In support of this position, reliance is placed upon the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (2) in which it was ruled that although sec. 588 allows an appeal against an order of remand, the party affected must avail himself of the privilege before the final disposal of the suit. In reply it is contended on behalf of the Appellants upon the authority of the decision in *Jatinga Valley Tea Co.* v. *Chera Tea Co.* (1), that if an order of remand is made in violation of sec 562, and is subsequently reversed, the final decree in the suit, which may meanwhile have been made, necessarily falls through; and the case of *Madhu Sudan* v. *Kamini Kanta* (2) is sought to be distinguished on the ground that there the appeal against the order of remand was preferred after final judgment had been pronounced by the Court of first instance, whereas here the appeal was preferred after close of argument but before delivery of judgment. It must be conceded that there is this distinguishing feature between the two cases, and it may be a convenient rule to hold that a suit is not completely disposed of till judgment had been pronounced. It must be observed, however, that for some

(12) [illegible] M. (190[illegible].

(1) I. L. R. 12 Cal. 45 (1885)

(2) 9 C. W. N. 895: s. c. I. L. R. 32 Cal. 102[illegible] (190[illegible])

purposes, a suit is treated as disposed of, as soon as the arguments have been completed, although the Court takes time to consider judgment. Thus, if one of the parties dies after close of arguments and before delivery of judgment, judgment may be entered *nunc pro tunc* [*Cumber* v. *Wane* (13), *Surendra Keshab* v. *Durga Sundari* (14); *Chetan* v. *Balabhadra* (15).] This rule can be justified on the fiction that the judgment, wherever it may be delivered, relates back to the date when the Court took time to consider judgment. Again if after judgment has been reserved, the Judge dies or vacates his office, leaving a judgment, it may be pronounced by his successor [*Parbutty* v. *Higgin* (16).] On the other hand, even after a case has been heard and judgment reserved, there is nothing to prevent the parties from coming to a settlement and obtaining judgment in accordance with the terms of compromise. Under these circumstances, it can not be laid down as an inflexible rule of law that under all circumstances the final disposal of the suit must be taken to be the delivery of the judgment. Even if we restrict, however, the final disposal of a suit to the delivery of judgment for the purposes of the rule laid down in *Madhusudan* v. *Kamini Kanta* (2), the objection taken by the Respondents ought to prevail on a wider ground. In my opinion, they ought to succeed on the ground that the Appellants are barred by the doctrine of election of remedies, indicated in the case of *Beni Madhub Das* v. *Jotindra Mohun Tagore* (17). There can be no doubt that when a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adapted than the other to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other, and the bar is final and absolute. It may be a question of some nicety in any individual case, whether the remedies are alternative or co-existent and cumulative, for instance, there may be room for discussion whether upon the facts of the case of *Beni Madhub* v. *Jotindra Mohun* (17), the doctrine of election of alternative remedies had any application. The present case, however, seems to me to be reasonably free from any such difficulty. When an order of remand has been made, its validity may be challenged directly and immediately by an appeal under sec. 588, cl. (28) or indirectly under sec. 591. when an appeal is preferred against the final decree in the suit [*Maheswar Singh* v. *Bengal Government* (18)] The party affected by the order of remand, however, must make his election. He may, if he chooses, prefer an appeal against the order of remand and obtain a stay of proceedings during the pendency of the appeal; he may, on the other hand, carry out the order of remand, take the chance of a successful termination of the suit in his favour and

(2) 9 C. W. N. 895 ; s. c. I. L. R. 32 Cal. 1023 (1905).

(13) 1 Strange 426, 1 Smith L. C. 325, 338, 23 C. Y. C. 840 (1794).

(14) I. L. R. 19 Cal. 513 (1892).

(15) I. L. R. 21 All. 311 (1899)

(16) 17 W. R. 175 (1872).

(17) 11 C. W. N. 765 ; s. c. 5 C. L. J. 580 (1907)

(18) 7 Moo. I. A. 302 (1858)

BAIKUNTHA NATH DEY v NAWAB SALIMULLA BAHADUR.

in the event of defeat, prefer an appeal against the final decree in which the validity of the order of remand may be questioned. He cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an appeal against the order of remand. In the present case, the Plaintiffs lost in the Court of first instance. They preferred an appeal and obtained, by consent of the Defendants an order for retrial of the suit, with liberty reserved to the parties to adduce fresh evidence. It may be conceded that their consent extended only to the form of the order and did not include the instructions which were given by the Subordinate Judge as to the mode in which the further enquiry was to be held. It may also be conceded that the Plaintiffs might have, therefore, questioned the order of remand on the merits by way of an appeal. They did not, however, do so. They fully availed themselves of the order of remand and assisted in the local investigation held by the Commissioner, the result of which did not, however, turn out to be entirely favourable to them. At the final hearing before the Munsif, they had an opportunity to present their whole case before the Court, but refused to do so upon the erroneous assertion that an appeal had been lodged in this Court. When the decision of the first Court turned out to be adverse to them, they had ample opportunity to prefer an appeal, but neglected to adopt that obvious course. Under these circumstances I must hold that when the Plaintiffs had once made the election, it was final and could not be retracted. This view is amply supported by the principle deducible from the cases of *Edwards* v. *Godfrey* (19), *Taylor* v *Hampstead Colliery Co.* (20), *Neale* v. *Electric, etc., Co.* (21). The cases of *Beckley* v. *Scott* (22) and *Isaacson* v. *New Grand* (23) do not lay down any inconsistent principle, but only illustrate the remark that it may be difficult occasionally to determine whether two remedies are concurrent or alternative, and whether what has been done amounts to an exercise of option or election on the part of a litigant, so as to estop him from the pursuit of an alternative remedy.

On these grounds I must hold that it is not open to the Appellants to assail the order of the Subordinate Judge upon the second ground urged on their behalf.

The appeal consequently fails and must be dismissed with costs.

N. G. *Appeal dismissed.*

CIVIL REVISIONAL JURISDICTION.

RULE NO. 2 OF 1908.

MITRA, J., CASPERSZ, J. 1908. Heard, 16, March. Judgment, 27, March.	HARIHAR PERSHAD SINGH and anr., Petitioners, v. MATHURA LAL and ors, Opposite Party.

Civil Procedure Code (Act XIV of 1882), sec. 461—Mitakshara joint family—Suit by managing member for family debt—Representing minor co-parcener as next friend—Withdrawal of decretal money from Court—Next friend if must furnish security.

(19) (1899) 2 Q. B. 333.
(20) (1901) 1 K. B. 838 (844).
(21) (1906) 2 K. B. 558.
(22) (1902) 2 I. R. 504.
(23) (1903) 1 K. B 539.

HARIHAR PERSHAD SINGH *v.* MATHURA LAL

A suit to recover a joint family debt was instituted by the managing member of a joint Mitakshara family appearing for himself and as next friend of the other member of the joint family who was a minor. A decree having been obtained and the decretal amount deposited in Court by the Defendant, the Plaintiffs applied for the withdrawal of the amount;

Held—*That sec. 461 of the Civil Procedure Code did not apply to the case and the managing member could not be required to take the Court's leave and to give security under that section before being allowed to withdraw the money.*

This was a rule granted on the 2nd of January 1908, against an order of Babu Satkari Haldar, Munsif of Arrah, dated the 14th of June 1907, rejecting the application of the Petitioners for withdrawal of the decretal amount deposited in the Court in a rent suit.

The facts of the case will appear from the judgment.

Babu Jogendra Chandra Ghosh for the Petitioner.

The JUDGMENT OF THE COURT was as follows :—

MITRA, J.—Harihar Pershad Singh and Bhaskar Pershad Singh are brothers, members of a joint family governed by the Mitakshara system of Hindu Law. Harihar Pershad is an adult and is the managing member; Bhaskar Pershad is a minor. The brothers instituted a suit against one of their tenant in the Court of the Munsif at Arrah, Bhaskar Pershad being represented in the suit by his brother as next friend. They obtained a decree for rent and the tenant, Defendant, deposited the amount of the decree in Court to their credit. Thereafter, they applied for the withdrawal of the amount but the Munsif declined to make an order for payment, on the ground that no order for payment could be made until the next friend of the minor Plaintiff had complied with the provisions of sec. 461 of the Code of Civil Procedure by obtaining leave of the Court to receive the money and by filling a security bond for the protection of the minor's interest.

The order of the Munsif was appealed from to the District Judge of Shahabad, but no appeal lay to him and he referred the matter to the Court in its administrative capacity for direction in this case and in similar cases which are of constant occurrence. The Court, however, declined in its administrative capacity to determine the correctness or otherwise of a judicial order and to give any general directions.

The present application was made under sec. 622 of the Code for revision of the order of the Munsif and a rule was issued. No cause has been shown.

Harihar Pershad is the managing member of the joint family, and he represents it; and though, according to the rules of procedure in this Province, his minor brother is a necessary party in suits for rent, and was properly added as a co-Plaintiff in the present suit, his absence from it as a party would not, according to the well-established principle of Hindu Law regarding joint families, detract from the right of the managing member, the accredited agent of the family, to do acts beneficial to and necessary for the family including the withdrawal of money deposited in Court to

its credit. The introduction of the infant member of the family under the representation of the managing member as a next friend was merely formal,—a matter of procedure and was not necessary so far as the substantive rights were concerned.

The legal constitution under Hindu Law of a joint family governed by the Mitakshara system is such that a coparcener has no defined share in the family property, the co-parceners are in the nature of a body corporate with joint rights followed on the death of a member by survivorship. The interest of co-parcener is not capable of definition, it being under a constant liability to variation on the birth of a new member or the death of an existing member. In the case of the birth of a male member, he acquires an interest at once by birth, and supposing money were deposited in Court to the credit of the family represented at the date of the decree in a suit by the then living members, the new member would at once acquire an interest in it, thus decreasing the definable shares of the other co-parceners. On the other hand, the death of a coparcener increases the definable shares. Such variation, however, is not due to legal representation in the sense that the words are ordinarily used but owing to the rule of survivorship.

The fact that a minor member has no defined share, that it cannot be said at any time before partition what is the present interest of a minor Plaintiff in money deposited in Court when he has sued with the adult managing member, takes the case out of the purview of sec. 461. The section was not framed with an eye to the peculiar constitution of joint Hindu families. The minor Plaintiff's share in the amount deposited in Court being undetermined, the bond would have to be, if any were, executed for an indefinite amount; but such a contingency, as also, the execution of the bond itself for the benefit of a coparcener are opposed to the spirit and language of sec. 461. It would appear that in framing sec. 461, attention was not given to the preculiar constitution of joint Hindu families governed by the Mitakshara School.

In *Sham Kuar* v. *Mahanunda Sahoy* (1), the Court held that a guardian under Act VIII of 1890 cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate estate, the reason of the decision being that the introduction of a guardian of a share which is unascertained and unspecified would tend to disorganise the family and being about a separation without a partition. The foundation on which families governed by the Mitakshara system rest as laid down in *Appovier* v. *Rama Subba* (2), would be completly shaken, if the rules of procedure and practice intended to apply to persons and their rights and liabilities of an altogether different character were made applicable to the co-parceners of such families. The same principle was applied in *Gharibullah* v. *Khalak Singh* (3), by the Judicial Committee of the Privy Council to a mortgage executed by the karta of a joint family governed

(1) I. L. R 19 Cal. 301 (1891).
(2) 11 M. I. A. 75 (1866).
(3) I. L. R. 30 I. A. 165 (1903).

HARIHAR PERSHAD SINGH v. MATHURA LAL.

by the Mitakshara system of Hindu Law for himself and a minor co-parcener notwithstanding that a guardian of the minor had been appointed by Court. The Privy Council ignored the status of the guardian appointed by Court and uphled a mortgage executed without the permission of the Court.

We, therefore, make the rule absolute and set aside the order of the Munsif and direct him to pass a payment order as asked for by the Petitioners.

CASPERSZ, J.—The question for our decision in the rule is whether the managing member of a joint Hindu family, governed by the Mitakshara, who was appointed the guardian *ad litem* of his minor brother for the purpose of a rent suit in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by sec. 461 of the Code of Civil Procedure.

Sec 461 (2) of the Code runs thus:—"When the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

The object of the section is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exceptions may be deduced. The language used is general and applicable to every case where property is received by a mere guardian *ad litem* on behalf of a minor. To read an exemption into the section must, therefore, be justified only by the clearest necessity.

Now, the facts upon which this rule has to be decided are not such as are contemplated by the section. The adult Plaintiff, who was the manager of the joint family, was never appointed or declared to be the guardian of his minor brother's property under the Guardian and Wards Act, VIII of 1890. But he could not be so appointed because, as is now settled law, the interest of the minor co-Plaintiff, is not individual property at all. It may be said that, if the adult Plaintiff represented the joint family, the addition of his minor brother as a co-Plaintiff was either unnecessary or intended to imply that the minor had some separate interest in the arrears of rent to recover which was the object of the suit. It is, however, too late to contend that, according to strict principles of Hindu law, the managing member of a Mitakshara family can sue without joining the other members as parties to the suit. See *Kattusheri* v. *Vallotil* (4). There may be cases in which a manager alone can sue to recover rent: for example, if he has given a lease in his own name and the suit is for rent due in terms of the lessee. This is not the case here, nor is there any thing to indicate that the minor co-Plaintiff is possessed of any separate property whch might be the subject of proceedings under Act VIII of 1890.

(4) I. L. R 3 Mad. 234 (1881).

HARIHAR PERSHAD SINGH *v.* MATHURA LAL.

On principle, also, joint brother cannot be sureties, one of another, in a Mitakshara family: therefore the adult Plaintiff cannot be called upon to furnish security in respect of money to be received by him on behalf of his minor brother who was made a co Plaintiff in order to obtain a joint decree for rent. The adult Plaintiff represents the joint family, including the minor co-Plaintiff: the decretal amount belongs just as much to the joint family as to the minor brother.

It is not necessary to consider the case of mortgage suits or other cases where minor Plaintiffs are represented by guardians *ad litem* who are managing members under the Mitakshara system.

For these reasons, I agree that this rule must be made absolute.

N. G. . *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1127 OF 1907.

RAMPINI, J.	
SHARFUDDIN, J.	RAJ KUMAR DATTA,
1907.	Petitioner,
Heard,	*v.*
29, November.	THE EMPEROR,
Judgment,	Opposite Party.
2, December	

Extradition Act (XV of 1903), sec 8—Warrant issued by the Political Resident—Endorsement on a warrant, absence of—Power of Magistrate to admit to bail.

When a person arrested under a warrant issued by a Political Resident under the Extradition Act is brought before a Magistrate, the Magistrate has no power to release him on bail binding him to appear before the Political Resident, in the absence of an endorsement on the warrant under sec. 8 of the Extradition Act authorising the Magistrate to admit the arrested person to bail.

This was a rule granted on the 17th of September 1907, against the order passed by the Chief Presidency Magistrate, dated the 11th of September 1907, releasing the said Petitioner on bail on his executing a bond with one surety to appear before the Political Agent at Manipur on the 19th of September 1907, after the arrest of the said Petitioner on a warrant issued by the said Political Agent, for offences under secs. 408 and 417 of the Indian Penal Code.

The material facts of the case as they appear from the verified petition of the Petitioner were as follows:—

The Petitioner who was an inhabitant of the District of Faridpur and was residing in Calcutta, served as a *gomasta* in the firm of Ram Lall Chourajit Paul. On the 6th August 1907 a letter was addressed to the Petitioner by Messrs. Sanderson & Co, acting as Solicitors of the widow of Ram Lall Paul, an inhabitant of Manipur, calling upon the Petitioner to hand over the account books and render accounts of the Aratdari business carried on by him as the Gomasta. The Petitioner replied through his Attorney that he had already made over the account books to the Am-mukteears of the widow who were empowered to obtain the account books from him. Messrs. Sanderson & Co. wrote in reply that they had been informed on enquiries that the account books had not been made over to the Am mukteears. To this letter the Petitioner again replied saying that as a matter of fact the account books had been made over to the Am-mukteears

RAJ KUMAR DATTA v. THE EMPEROR.

and that the books were even then in their possession. Thereupon on the 10th September 1907, the Petitioner was all on a sudden arrested under a warrant issued by the Political Resident of Manipur and addressed to the Commissioner of Police, Calcutta. The warrant was in these terms:—"To the Commissioner of Police,

"Through Complainant's solicitors, Messrs. Sanderson & Co.

"Whereas Raj Kumar Datta of 61/1, Bysack's Lane, Barabazar, Calcutta, stands charged with offences under secs. 408 and 417, I. P. C., you are hereby directed to arrest the said accused Raj Kumar Datta and produce before me. Dated 4th September 1907."

The Petitioner was then taken before the Chief Presidency Magistrate who released him on bail on his executing a bond with one surety to appear before the Political Resident of Manipur on the 19th of September 1907.

This rule was issued against the order of the Chief Presidency Magistrate.

Babu Atulya Churan Bose for the Petitioner.

Mr. Barton for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a rule to show cause why an order of the Chief Presidency Magistrate, admitting to bail the Petitioner, Raj Kumar Datta, who had been arrested under a warrant issued by the Political Resident of Manipur, and directing him to appear before the said Political Resident should not be set aside.

The facts are that there was some correspondence between Messrs. Sanderson & Co., acting on behalf of one Tottal Sijo, and the Petitioner's attorney, with regard to certain books of account, which the Petitioner was said to have withheld but which he denied having done. Subsequently, the Petitioner was arrested by the Commissioner of Police under a warrant issued by the Political Resident of Manipur, in which it was stated that the Petitioner was charged with offences under secs. 408 and 417, Penal Code. It is not stated in the warrant where these offences are said to have been committed —whether in British India or in Manipur.

On being arrested under this warrant, the Petitioner was taken before the Chief Presidency Magistrate who admitted him to bail, but directed him to appear before the Political Resident of Manipur. It is complained that this order was illegal, (1) because the warrant does not show where the offences are alleged to have been committed, and (2) because the warrant had not been endorsed under sec 8, Act XV of 1903 and therefore, the Chief Presidency Magistrate had no authority to pass the order he did.

The Chief Presidency Magistrate states in a letter that he has no cause to show against the rule. But Mr. Barton, counsel, appears for the Crown and contends that we have no authority over the Political Resident of Manipur—also that the Chief Presidency Magistrate's order was legal.

We have clearly no authority over the Political Resident of Manipur. We do not propose to exercise any over him or his proceedings. His warrant for the arrest of the Petitioner, though it does not state where the alleged offences were committed, may be legal or otherwise.

But we consider that the pleader's second argument must prevail. There was no endorsement on the warrant by the Political Resident, as required by sec. 8 of the Extradition Act, authorising the Chief Presidency Magistrate to admit the Petitioner to bail. The Chief Presidency Magistrate had therefore no right to do so, or to direct the Petitioner to appear before the Political Resident of Manipur.

We must therefore make this rule absolute and set aside the Chief Presidency Magistrate's order as prayed, which we accordingly do.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICITON.]

REV. NO. 1203 OF 1907.

KAMPINI, J.
SHARFUDDIN, J.
1907.
3, December.

MOHESH SONAR,
Petitioner,
v.
THE KING-EMPEROR,
Opposite Party.

Magistrate's duty to decide points of law raised at the trial—Postponement of case to enable accused to get a ruling from the High Court—Impropriety of.

Where the trying Magistrate finding it difficult to decide whether certain coins, which the accused was charged with making, were King's coins or not, postponed the case to enable the accused to obtain a ruling of the High Court on the point,

Held—*That the Magistrate was wrong in doing so; it was his duty to decide whether the coins were King's coins or not, and whether any offence was committed under sec. 230, I. P. C. It was not the business of the High Court to decide the point at that stage.*

This was a rule granted on the 28th of October 1907, against the proceedings pending against the Petitioner in the Court of the Deputy Magistrate of Arrah, under sec. $\frac{232}{235}$, I. P. C., for making Murshidabad coins.

The facts of the case material to this report appear from the judgment.

Babu Joy Gopal Ghosha for the Petitioner.

Mr. Douglas White for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a rule, calling upon the District Magistrate of Shahabad to show cause why the proceedings, pending against the Petitioner in the Court of the Deputy Magistrate of Arrah, should not be set aside, on the ground that the coins in question are not King's coins within the definition of sec. 230, I. P. C., and on the ground that the said coins were not used, or intended to be used, as money.

The Petitioner has been charged with making what he calls Shah Alum coins, but the Deputy Magistrate says he is not sure whether the coins in question are King's coins or not. He points out that the law on this point is not clear and that there is no ruling of this Court declaring Murshidabad rupees to be King's coins: so he has obligingly postponed the case to enable the Petitioner to obtain a ruling by this Court on the point.

It seems to us that it was the duty of the Deputy Magistrate to find whether the coins were King's coins or not, and whether the accused has committed an offence under sec. 230, I. P. C. It is not our business to decide points of law when it is not necessary to do so.

MOHESH SONAR *v.* THE KING-EMPEROR

Then, as to the second ground on which the rule was granted, namely, that the coins were not used, or intended to be used, as money, we can only say that it cannot be disposed of without the recording of evidence; and no evidence on the point has been recorded.

We therefore direct that the Deputy Magistrate do try the case and come to a finding of his own. Meanwhile, we discharge the rule for the reasons stated.

B. C. *Rule discharged.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 30 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908
29, January

PARBATI CHURN ROY and others, 2nd party, Petitioners,

SAJJAD AHMAD CHOWDRY, 1st party, Opposite Party.

Review of final orders by Criminal Court—Criminal Procedure Code (Act V of 1898), sec. 145.

A Criminal Court has no right or authority to review final orders passed by it under sec. 145, Cr. P. C.

This was a rule granted on the 9th of January 1908, against an order of Mr. A. Islam, Deputy Magistrate of Jangipur, dated the 3rd of January 1908, reviewing the case and directing both the parties to put in fresh written statements on the 10th of January 1908.

The facts material to the report are these:—

A proceeding under sec. 145, Cr. P. C., was instituted by the Sub-Divisional Magistrate of Jangipur, and the 19th of December 1907 was fixed for hearing the case. On that date the case was called out at 11 A.M., 12 A.M., and 1 P.M., successively; but no one on behalf of the 1st party appeared; and the Sub-Divisional Magistrate having examined a witness on behalf of the 2nd party delivered judgment directing the 2nd party to be retained in possession until evicted in due course of law. Subsequently on the 21st December, the 1st party put in a petition for review of the judgment, whereupon the Sub-Divisional Officer issued a notice on the 2nd party to show cause on the 3rd January 1908, why the review should not be granted. On the said date the Sub-Divisional Magistrate made the following order:—"I have heard both the parties. It appears that an order under sec. 145, Cr. P. C., is not a judgment within the meaning of sec. 369, Cr. P. C., and so I hold that it can be reviewed. I therefore review the case and direct both parties to put in fresh written statements on 10th January 1908. In the meantime Receiver will retain possession. This order is to be communicated to the Receiver and the Police by a special messenger to-day."

Against this order the Petitioners moved the High Court and obtained the present rule to set it aside.

Mr. P. L. Roy and *Babu Anilendro Nath Roy Chowdhury* for the Petitioners.

Babus Dasarathy Sanyal and *Abani Bhusan Mukerjee* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a rule, calling upon the District Magistrate of Murshidabad and also upon the opposite party to show cause why

the order of the Deputy Magistrate of Jangipur, dated the 3rd January last, should not be set aside.

The order purports to be one under sec. 145, C. Cr. P. The facts are these. On the 19th December last the same Magistrate passed an order under sec. 145, C. Cr. P., directing that the second party should remain in possession of the disputed land, until evicted in due course of law. But he afterwards discovered that this order had been passed *ex parte*, and accordingly proceeded, as he says, to review it. He considered himself entitled to do so, because, he says, "It appears that an order under sec. 145, C. Cr. P., is not a judgment within the meaning of sec. 369, C. Cr. P. and so I hold that it can be reviewed" He then goes on to say:—"I therefore review the case and direct both parties to put in fresh written statements on the 10th January 1908. In the meantime the Receiver will retain possession. This order is to be communicated to the Receiver and the Police, by special messenger to-day."

Now, it has been contended before us that this order is entirely without jurisdiction, because the Deputy Magistrate, having on the 19th December 1907 previously declared the second party in possession, had no right to review his order. We consider that this contention must prevail. There is no authority for holding that a Magistrate can review a final order passed by himself under sec. 145, C. Cr P.

The pleader for the opposite party has not been able to show us any direct authority for such a proposition as this. He calls attention to certain cases decided by this Court in its Civil Revisional Jurisdiction, and contends that every Court has inherent power to review its own orders. It is unnecessary for us to consider this question. All we need say is that, so far as we are able to see, a Criminal Court has no right or authority to review final orders passed by it under sec. 145, C. Cr. P.

We therefore consider that the order of the 3rd January last is entirely without jurisdiction; and we set it aside, making this rule absolute.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 26 OF 1908.

RAMPINI, J. SHARFUDDIN, J. 1908. 31, January.	BAISNAB DAS BABAJI and ors., Petitioners, v. THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 107 and 145—Bona fide *dispute as to the right of possession—Binding down one party under sec. 107—Proceeding under sec. 145, proper procedure.*

When there is a bonâ fide *dispute as to the right to the possession of land between two rival parties, giving rise to a likelihood of the breach of the peace, it is unfair to bind down only the party who happen to be in possession under sec. 107, Cr. P. C., to keep the peace.*

The proper order in such a case would be to bind down both the parties under sec. 107, Cr. P. C., or to institute a proceeding under sec. 145, Cr. P. C.

This is a rule issued on the 9th of January 1908, calling upon the District Magistrate of Dacca to show cause why

BAISNAB DAS BABAJI *v.* THE EMPEROR.

the order of Babu Girindra Chandra Banerjee, Deputy Magistrate of Dacca, dated 26th of September 1907, which order on appeal was affirmed by the District Magistrate of Dacca, on the 30th of October 1907, should not be set aside.

The facts material to the report will appear from the judgment.

Babus Atulya Charan Bose and *Sarat Chandra Basak* for the Petitioners.

No one appeared to show cause

The JUDGMENT OF THE COURT was as follows :—

This is a rule calling upon the District Magistrate of Dacca to show cause why the order of the Deputy Magistrate, dated the 26th September 1907, binding down the Petitioners, under sec. 107, C. Cr. P., to keep the peace, should not be set aside.

The facts of the case are these. There was a dispute between the Petitioners, on the one side, and the Maharajah of Susung, on the other, about the right of possession of an *akhra* situate in Dacca. This dispute has given rise to an apprehension on the part of the magisterial authorities of a probable breach of the peace Certain constables were deputed to the *akhra* for two months and it is in evidence that the accused threatened to assault the proprietors' men at the *akhra*. The Magistrate has accordingly bound down the Petitioners to keep the peace.

The learned pleader for the Petitioners now contends before us that the order of the Deputy Magistrate is unfair to his clients, as there is a *bonâ fide* dispute between the parties as to the right to the possession of the *akhra*. He says that his clients have instituted a civil suit for the interpretation of a *kabuliyat*, under which they claimed to hold possession of the *akhra*, and that if the Maharaja and his men do not attempt to disturb their possession, there is not the slightest chance of there being any breach of the peace.

It seems to us that there are some grounds for this contention and that the order of the Deputy Magistrate, binding down the Petitioners alone to keep the peace, is one which it would have been better if he had abstained from passing, because it is one which is likely to prejudice the rights of the Petitioners, seeing that, if the Maharaja's men attempt to turn them out, the Petitioners may be liable to be punished in the event of their resisting them It would have been much better if both sides had been bound down, for then no breach of the peace would have been likely to occur pending the decision of the civil suit. It would also have been better if the Deputy Magistrate, in case he was not inclined to bind down both the parties, had instituted proceedings under sec. 145, Cr P. C. and had declared the party, whom he found in actual possession, entitled to retain possession until the decision of the Civil Court. In the circumstances the order is a one-sided one and is calculated to interfere with the rights of the Petitioners.

We accordingly set aside the order of the 26th September 1907, and make this rule absolute.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 51 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908.
5, February.

CHOKRAJ MARWARI,
Petitioner,
v.
THE EMPEROR,
Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 273—"Noxious," meaning of—Adulteration of ghee *with vegetable oil.*

The word "noxious" in sec. 273, Indian Penal Code, means harmful to health or unwholesome.

In the absence of evidence to show that the adulteration of **ghee** ***with vegetable oil was such as to render it noxious in the above sense, such adulteration cannot be held to constitute an offence under sec. 273 of the Penal Code.***

This was a rule granted on the 14th of January 1908, against an order of Mr. A. E. Scroope, Sub Divisional Magistrate of Gobindapur, dated the 12th of November 1907.

The material facts will appear from the judgment.

Babu Bidhu Bhusan Ganguli for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This is a rule, calling upon the Deputy Commissioner of Manbhoom to show cause why the conviction of and sentence passed upon the Petitioner should not be set aside.

The Petitioner has been convicted under sec. 273, I. P. C., and sentenced to pay a fine of Rs. 15. An offence under that section is constituted when noxious food or drink is sold. In the present case the Petitioner has been found selling *ghee* adulterated with vegetable oil. But there is no evidence to show that this vegetable oil was noxious, that is, hurtful to health. The Sub-Divisional Magistrate says that "noxious" does not mean dangerous to life. That is no doubt quite correct. But he goes on to say that the *ghee*, which was adulterated with vegetable oil, was noxious within the meaning of sec. 273, I P. C, because he seems to think that when a man purchases *ghee*, adulterated with vegetable oil, he purchases a noxious article. He says:—"Every adulterated article of food is noxious, inasmuch as the consumer eats it in the belief that he is eating something else, and nothing can be more noxious for a man than to eat something unawares, especially vegetable oil."

We do not consider that the learned Sub-Divisional Magistrate has taken a right view of the word "noxious." It means harmful to health or unwholesome. But, there is an entire absence of any evidence to show that the adulteration of the *ghee* with vegetable oil in the present case was such as to render it noxious in the sense we have mentioned.

We accordingly set aside the conviction and sentence and make the rule absolute.

B. C. *Rule made absolute*

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MAY 11, 1908. [No. 26

Contents.

NOTES

THE BAR COUNCIL IN THEIR RECENT REPORT HAVE embodied some wholesome rules for the guidance of the profession. The Council has decided that counsel are not entitled to refresher fees for the days on which they are not present. This seems to be so obviously reasonable and just that, let us hope, that counsel will not in future claim any fees for services not actually rendered. The recommendations of the Council that working in barrister's chambers should be made a necessary qualification for call to the Bar, also commends itself to us. The question whether a barrister can communicate answers to legal questions in newspapers for ordinary literary. remuneration was discussed before the Council. The decision of the majority that a barrister does not offend against professional etiquette by communicating such answers provided his name is not disclosed to the public or directly or indirectly brought to the knowledge of the person asking the question, is certainly the more reasonable view. The Bar Council has also decided that a barrister may in a criminal appeal take instructions and fee from the accused without the intervention of a solicitor in the same manner as he can accept a dock defence in the trial.

THE BAR COUNCIL AS ALSO THE INCORPORATED Law Society, representing the solicitors, have resolved that barristers and solicitors who are members of the public bodies should not be professionally engaged in any legal proceedings in which those bodies are interested No barrister, solicitor, pleader or other members of the legal profession should after this accept any engagements either on behalf of or against such public bodies. The reason of this wholesome rule is obvious as by such employment a client not unfrequently expects to derive unfair advantage from the lawyer's connection with the public body. Questions as to the propriety of professional employment of Commissioners in connection with Municipalities have sometimes been raised in India. The decision of the learned societies referred to now sets the matter at rest.

MR. JOHN MORLEY HAVING TAKEN HIS SEAT IN THE House of Lords as Viscount Morley of Blackburn leaves three of the five principal Secretaries of State in the House of Commons. It may not be commonly known that there is a statutory bar that not more than four of His Majesty's Principal Secretaries and Under Secretaries of State can sit as members of the House of Commons. It is interesting to note that under sec. 22 Geo. III, C. 82, not more than two Principal Secretaries of State could sit in the House of Commons. On the creation of the office of the Secretary of State for War in 1855, a statute was passed enabling a third Secretary of State to sit in the House of Commons. On the transfer of India to the Crown the office of His Majesty's Secretary of State for India was created and it was provided by 21 & 22 Vict. C. 106, that four Principal Secretaries and Under-Secretaries of State might sit in the House of Commons.

IT IS THEREFORE RATHER EXTRAORDINARY THAT THE Secretary of State for India, in whose favour a special enabling statutory provision was made for sitting in the House of Commons, should elect to sit in the House of Lords. This, however can make little difference to India. The peculiar statutory constitution of the Government of India by the Act of 1858 does not make the Secretary of State of India directly responsible to the House of Commons in any way. The Government of India Act of 1858 (21 and 22 Vict. C. 106) provides a cumbrous

constitution for the Government of India by the Secretary of State and his Council under which he is neither responsible to his Council nor to the House of Commons. It seems to be time that this statute should be revised and the anomaly removed by making the Secretary of State more or less directly responsible to the House of Commons.

WHAT IS A REGISTRAR OF DEEDS TO DO, WHEN AN *anumatipatra* executed by a minor Hindu, who has attained the age of discretion according to Hindu law, is presented for registration? We are informed by Messrs. G. N. Dutt & Co, Solicitors, that an *anumatipatra* by a minor was presented by them for registration to the Registrar of Deeds and Assurances in Calcutta, but the Registrar refused to register it. The question is certainly of some difficulty.

THE INDIAN MAJORITY ACT (IX OF 1875) IN FIXING eighteen years as the period which a minor must ordinarily complete in order to attain majority expressly provides that nothing contained in the Act shall affect the capacity of any person to act in matters such as adoption, &c, [see sec 2, cl. (a)]. It follows therefore, and it has also been so held by the High Courts in India, that a minor Hindu may on attaining the age of discretion make a valid adoption. There would therefore seem to be nothing in the way of a minor Hindu, say the age of 14 years, from conferring authority on his wife to adopt in case he should die without issue. But if he chooses to reduce his authority in writing, sec. 17 of the Registration Act requires that it must be registered and unless registered such authority, according to sec. 49, will not "confer any power to adopt." Sec. 35, of the Registration Act, at the same time lays down that the registering officer "shall refuse to register" any document presented for registration if "any person by whom the document purports to be executed . . . appears to be a minor &c."

WE DO NOT THEREFORE WONDER THAT THE REGISTRAR of Calcutta hesitated to register the *anumatipatra* in the face of the express provision of sec. 35 of the Act without an authoritative opinion of the legal adviser to the Government of Bengal. The matter was referred to the Legal Remembrancer and he expressed his opinion that an *anumatipatra* by a minor should be registered. It is apparent however that when the provision in sec. 35, to which we have referred, was inserted by the Amendment Act (XII of 1879, sec. 104) the possibility of a difficulty of this kind arising did not occur to the Legislature and it could never have been its intention by that amendment to nullify the provisions of secs. 17 and 49 so far as they apply to *anumatipatras* executed by minors. The opinion of the Legal Remembrancer seems to us to be quite correct and as the matter concerns a very much wider area than Calcutta we feel no hesitation in giving publicity to it.

THE BRITISH EMPIRE IS NOW BEING GOVERNED BY lawyers and this is a fact of which our English contemporaries are justly proud. The *Law Journal* says :—

> The promotion of Mr. Lloyd-George to the second place in the Cabinet will naturally form a subject of congratulation among all members of the legal profession to whatever party they may belong. It is a notable fact, and one of which all lawyears may well be proud, that in what is recognised as one of the strongest Governments of modern times a leader of the Bar is the Prime Minister, and a solicitor who until quite recently was in active practice is his Chancellor of the Exchequer while another solicitor—the Chancellor of the Duchy—who figures as the head of a leading provincial firm, is singled out for advancement to the peerage. The heads of the services, the Army and Navy, are also lawyers, and in Mr. Birrell, K. C., the Secretary for Ireland, the Ministry possesses one of its most popular elements. Lord Loreburn, by his conduct of the business of the House of Lords, not less than by his reforming zeal in the Courts, has proved himself not only a successful Lord Chancellor, but a statesman of no mean order. And there are some half-dozen more members of the Ministry who may be credited to the profession in one or other of its branches. The Ministry of 'all the talents' bids fair to be eclipsed by this Ministry of 'all the lawyers', and with such a combination of forces one may even hope for the creation of that new office, the Ministry of Justice, which has long been regarded as a desideratum by all legal reformers as well as by the public.

CURRENT INDIAN CASES

KARSON DAS *v.* GANGABAI, I. L. R. 32 Bom. 108 *Civil Procedure Code, sec 595—Leave to appeal.*

Under sec. 595, C P. C, the High Court has no jurisdiction to grant leave to appeal against an order refusing to admit an appeal after the period of limitation as it is not a decree passed on appeal.

EMPEROR *v.* NARAYAN, I L. R 32 Bom. 111. *Evidence Act, sec. 167—Cr. P. C, sec. 162—Confession—Evidence.*

Sec. 167 of the Evidence Act applies to criminal trials by jury in the High Court.

Where S a friend of P the accused made a statement before the Police, *held* that having regard to the provisions of sec. 162, Cr. P. C., that document cannot be used as evidence to discredit S who denies in Court that he made such a statement and it cannot be used as evidence against P in that it contained statements corroborating confessions by P.

GANGABAI *v* PURSHOTAM, I L R 32 Bom. 146. *Quia timet action.*

There are at least two necessary ingredients for a *quia timet* action: (1) Proof of imminent danger if no actual damage is proved, (2) Proof that the apprehended damage will, if it comes, be very substantial.

KHETSIDAS v NARATAM DAS, I. L. R. 32 Bom. 152 *Civil Procedure Code, sec. 59.*

Rule as to inspection of documents laid down.

JAN MAHOMED v. SYED NURUDIN, I. L. R. 32 Bom. 155. *Civil Procedure Code, sec. 539—Proper party to appeal.*

In a suit by the Advocate General under sec. 539, C. P. C., he is the proper person to prefer an appeal and not the relators at whose instance the suit was brought.

EMPEROR v. CHINTO, I. L. R. 32 Bom. 162. *Enhancement of sentence—Conviction.*

In a case where cause is shewn why a sentence should not be enhanced the invariable practice in the Bombay High Court is to accept the conviction as conclusive.

Reviews.

PRINCIPLES AND PRACTICE OF THE LAW OF LIBEL AND SLANDER. *By Hugh Fraser, M. A., L. L. D., Barrister-at-Law. Fourth Edition. 1908 Butterworth & Co., Law Publishers, London.*

We are glad to welcome a new edition of this work. As a book of ordinary reference we know of no work on the subject which is more useful. The law on the subject is clearly put in the form of propositions generalized from a vast mass of case-law. These propositions do not, however, go into any unnecessary details as the sections, sub-sections, explanations, exceptions and illustrations in the Anglo-Indian Codes sometimes do. The propositions, into which the law on the subject has been summarized, are very clearly explained by the author in the explanatory notes by reference to specific cases. The mode of annotation is also very different from the plan followed by the annotators of the Indian Codes. The latter follow the plan of preparing a digest of cases under each of the sections, while Dr. Fraser examines all important questions that may arise in an action or suit for libel or slander by reference to such dicta of the judges as go to the root of such questions. The article on "Fair Comment" has been re-written by the author in view of the recent English decisions. The forms, hints and rules of practice embodied in the appendix of the work enhance its usefulness to practising lawyers.

ROBBINS AND MAW'S DEVOLUTION OF REAL ESTATE AND ADMINISTRATION OF ASSETS. *Fourth edition. F. L. Maw. London, Butterworth & Co., 11 and 12 Bell Yard, Temple Bar, Law Publishers, 1908.*

We have great pleasure in recommending to the profession a new edition of this standard work. The chapters on the "Devolution of Real Estate" and "Payment of Debts by the Personal Representative" have been practically rewritten, and the whole work has been carefully revised by the present editor. The chief distinction of the book amongst many others on the same and cognate subjects is that it gives in a short compass nearly all one ordinarily desires to know on the subject. The very limited space available in such a work for discussion of principles has not prevented the author from now and again entering into such discussions in the body of the book and in the foot-notes. See for instance the note on the position of the executor *de son tort* in English law at pp. 20-21 and of the heir in Roman and other systems of law at p. 59. Recent decisions, it need hardly be said, have also been incorporated and discussed.

THE POLICE ACT, V OF 1861, with notes &c. *By H. C. Sinha, Pleader, Sylhet 1907.*

Mr. Sinha has been the first, we believe, in the field with an annotated edition of the Police Act. Certain sections of the Act have been brought into prominence of late by the use made of them by police officers and have formed the subject of decisions in the Calcutta High Court. They have been reported in the *Calcutta Weekly Notes* and we find that they are duly noted in their proper places by the author. This should, as the author expects, prove useful to the police, and the executive officers and such others whom the Police Act may concern. The author's apology for not embodying in the book the rules made by the different Provincial Governments does not seem to us to be satisfactory.

Notes of Cases.

ENGLISH LAW COURTS.

HIGH COURT OF JUSTICE, KING'S BENCH DIVISION.—*Harris* v. *Du Cross.* Before MR. MUIR MACKENZIE, OFFICIAL REFEREE 18th March 1908.

Implied promise to remunerate—Professional work done by a professional man for the benefit of another—Right to get remuneration.

This was an action against an M. P. The Plaintiff who was an editor and director of a newspaper alleged that he prepared three speeches for the Defendant when he was a candidate for election as an M. P., and also composed some leaders for publication in the newspaper and a biographical sketch, for the benefit of the Defendant. The Defendant emphatically denied that the Plaintiff prepared any speech for him and the official referee accepted his denial. As to the other literary works composed by the Plaintiff—it was held that the Plaintiff was entitled to a remuneration of £20. The principles on which a person doing some work for the benefit of another is entitled to be remunerated by the

latter were stated in the judgment in the following words :—

The Plaintiff's action is for remuneration for services rendered to the Defendant, for which the Defendant, as the Plaintiff alleges, is bound to pay. The Defendant, both by his pleading, and at the trial before me, denied that he employed the Plaintiff to render him the alleged or any services. In these circumstances the Plaintiff has to prove, either that he was employed by the Defendant to render the services mentioned in his claim in circumstances from which the law would imply a promise by the Defendant to remunerate him, or that he rendered the services for the benefit of the Defendant, which were accepted by the Defendant, in circumstances from which the law will imply such a promise. At the time when the work for which the Plaintiff claims payment is alleged by him to have been done the Plaintiff was, as he is now, a literary gentleman enjoying a reputation for great ability and capacity in his profession, and as part of his profession was contributor to newspapers and other periodical publications. When a gentleman, practising a profession such as that which the Plaintiff has adopted and practises, gives his services for the benefit of another, either at the request of the latter, or which he adopts, the law, as a general rule, implies a promise by the latter to pay remuneration for the services. But the rule is subject to the qualification that the inference, that where a professional man bestows his services for the benefit of another there is an implied undertaking by the other to remunerate him, may be rebutted by proof that the circumstances in which the services were rendered, or the employment to do the work arose, negative the inference. See *Manson* v. *Baillie* (2 Macqueen's Cases, p. 80), where there was an employment of a professional man to do professional work, but it was held in the circumstances that no claim to payment by way of remuneration arose. Again, where the evidence on both sides puts the question of employment at remuneration in issue, the burden of proof is on the Plaintiff to establish that his services were rendered upon an implied undertaking by the Defendant to remunerate him. This is shown by the following case to which I am going to refer because in many ways it is extremely useful as a guide to me as to how I should deal with the evidence in this case. In the case of *Hingeston* v. *Kelly* (18 L. J. Ex., p. 360) the Plaintiff, a professional gentleman, sought to recover remuneration for services rendered as agent to a member of Parliament when he was candidate at an election It was proved that the Plaintiff with the Defendant's assent acted for him at a Parliamentary contest at which the Defendant was a candidate. The Defendant produced evidence at the trial to show that the Plaintiff's services were given gratuitously. The Judge in directing the jury told them that the Plaintiff, having proved the service rendered, was *primâ facie* entitled to be paid, and that they must find a verdict for the Plaintiff unless the Defendant had distinctly proved to their satisfaction that the services of the Plaintiff were to be gratuitous, in which they ought to find for the Defendant. The jury gave the Plaintiff a verdict. The Defendant appealed to the superior Court, and the verdict was set aside on the ground that the Judge had instructed the jury erroneously on the law. The appeal was heard by three of our greatest and most illustrious Judges. Baron Parke, in giving his reasons for setting aside the verdict and ordering a new trial, said :—"The burthen of proof was never altered. The Plaintiff being a professional man and performing professional services was *primâ facie* entitled to remuneration. . . . . Then came the evidence for the Defendant to how that the agreement was that the Plaintiff should not be paid. After this was given the question for the jury still remained whether on the whole evidence the Plaintiff had made out his title to remuneration. I think if I had been a juryman that on the facts of this case I should have found my verdict against the party whether the Plaintiff or the Defendant on whom I was told by the Judge that the burthen of proof lay." Baron Alderson said :—"If the case was left in doubt, the Plaintiff ought not to succeed." The principle laid down in this case was applied subsequently by Baron Martin in his direction to the jury in *Reeve* v. *Reeve* (1 Foster Finlason, p. 280), where in an action for remuneration for services he said :—"If work is done and there is no bargain for payment either express or to be implied from such circumstances as show an understanding on both sides that payment shall be made, an action cannot be maintained for remuneration merely because it appears to be reasonable."

PRIVY COUNCIL.

[THE SUPREME COURT OF APPEAL FROM CEYLON.]

THE LORD CHANCELLOR.
LORD ASHBOURNE.
LORD MACNAGTEN.
LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.
1908.
29, March.

LOKU NONA, PUNCHI NONA and KAITAN, Accused,
v.
THE KING.

Leave to appeal from conviction in criminal trial—Discrepancies in evidence—Mis-direction of jury.

This was a petition for special leave to appeal against conviction and sentence of Supreme Court of Ceylon.

The petition disclosed that the first Petitioner was the wife of Kalubowilage Migel Appuhami, otherwise Migel Mudalali, the second Petitioner was her sister, twenty-three years of age, unmarried, who lived with her; the third Petitioner was a boy about fourteen years of age, a servant of the first accused's husband.

The Petitioners were charged with having on or about the 31st of July 1907, committed murder by causing the death of one Carlina; and thereby committed an offence punishable under sec. 296 of the Ceylon Penal Code (Ordinance 2 of 1883).

After Magisterial proceedings in the Police Court of Negombo (P. C. Negombo, 8151A), the Petitioners were committed for trial before the Supreme Court. The Petitioners were tried at the Colombo Criminal Sessions, before the Honourable Mr. Justice Wood-Renton, with a jury composed of seven persons.

The trial lasted from the 11th to the 22nd of November 1907, and the jury brought in a verdict of guilty, by a majority of six to one, but recommended the Petitioners to mercy. The Petitioners were sentenced to death. But the sentences were commuted to twenty years' rigorous imprisonment.

The case for the prosecution was that on the night of the 31st of July, at about 10 o'clock, the first accused, Loku Nona, with a club handed to her by Peregrino (a servant), struck her servant Carlina, a girl of about eighteen years of age, on the head; that Carlina fell, crying: "*Amma*" (mother); that Punchi Nona, the second accused, put her hand over Carlina's mouth to stop further cries; and that Loku Nona then told Jane—a servant girl about fourteen years of age—to bring a knife. The prosecution went on to allege that Jane brought a knife from the kitchen and gave it to Loku Nona, who handed it to Punchi Nona, saying: "Cut her throat;" that, while Kaitan, the third accused, held his hand over Carlina's mouth, Punchi Nona, with the knife brought by Jane, inflicted a cut upon Carlina's throat; that Carlina then lay still, apparently dead; and that shortly afterwards, on the orders of the Mudalali (the husband of the first accused), Carlina was carried away towards the shore, to be thrown into the sea. According to the medical evidence, "the cut on the throat was not fatal," and "the cause of death was concussion of the brain due to contusions caused by some blunt instrument like a club." Four distinct contusions upon the head were found by the doctor who made the *post mortem* examination.

The only witness who deposed to having seen the alleged assault was Jane. The first and second accused had been in the habit of punishing Jane for her laziness and other faults. She admitted having been very angry with Kaitan, who had struck her on one occasion with a *katty* (knife).

As to Jane's evidence it was alleged (1) that she was, on her own showing, an accomplice; (2) that there was no corroboration; (3) that she grossly contradicted herself; and (4) that her evidence was satisfactorily rebutted on several points by the evidence of other witnesses.

Jane had told an altogether different story when examined before the Police Magistrate. It was alleged that between the date of proceeding before the Police Court and the trial at the Sessions, Jane was in the house of the Inspector of Police.

At the trial before the Supreme Court, Jane contradicted the evidence she had originally given before the Police Magistrate.

Jane had further deposed that the second accused had misconducted herself with her cousin and betrothed, Girigoris Mahatmaya, that she had seen them sleeping together on three occasions, and that the second accused showed signs of pregnancy. Jane stated that the ladies—the first and second accused—were angry with Carlina, because Carlina had talked freely about the second accused having procured an abortion in Colombo. Dr. Garvin, who examined the second accused at the suggestion of her Counsel, said:—"I am prepared to swear the girl is a virgin," and "I have not the slightest doubt the girl is a virgin" Dr. Garvin was the Medical Officer in charge of the Government General Hospital in Colmbo—the largest in Ceylon—and had 32 years' experience.

Jane's conduct on the morning after Carlina's disappearance also showed that Jane could not have been a witness to the alleged assault on Carlina:

After sentence had been passed on the Petitioners the Petitioners' Counsel applied to the Judge, under the provisions of sec. 355 of the Criminal Procedure Code (Ordinance 15 of 1898), to reserve certain questions for the consideration of two or more Judges of the Supreme Court.

The Judge acceded to the application, stated a case for the consideration of the Collective Court which came up for argument before Sir Joseph Hutchinson, C. J., Wendt and Middleton, JJ., who on the 11th of December 1907, upheld the conviction and sentences.

The Petitioners submitted that, on the evidence, they were entitled to be acquitted of the charge of murder, as neither the cut nor the blow on the head, alleged to have been inflicted by the accused, had been proved to have caused the death of Carlina, as it was on the orders of the Mudalali, not of the accused, that Carlina was alleged to have been thrown into the sea.

Sir R. Finlay, K. C. (with him *Mr. F. W. M. Corbet* and *Mr. E. M. Jayewardene* of the Ceylon Bar) for the Petitioners referred to the discrepancies between the various statements of the only alleged eyewitness Jane and between her statement and the evidence of Dr. Garvin regarding the second accused. This evidence of the doctor destroyed the credit of the witness altogether. The Judge misdirected the jury on various points, and instead of directing the jury as to the absence of corroboration, the Judge actually remarked that if juries were to throw up a case on account of contradiction and falsehood, there would be an end to the criminal law of the Island. Sir Robert submitted that special leave to appeal ought to be granted in this case.

THE LORD CHANCELLOR said their Lordships would

humbly advise His Majesty to accord special leave to appeal.

Sir Robert Finlay applied that the appeal should be expedited, and in the meantime that either the severity of the punishment should be relaxed or even that bail should be allowed.

THE LORD CHANCELLOR said that their Lordships would be ready to hear the appeal as soon as it could be presented to them. In regard to the application for the mitigation of punishment pending the appeal or the admission of the accused to bail it should be addressed either to the Ceylon Governments or to the Spreme Court.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Petitioners.

J. W. A. *Leave granted.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter

CRIMINAL REVISIONAL JURISDICTION. Before GEIDT and WOODROFFE, JJ. CRIMINAL REVISION MISC. No. 31 OF 1908. HAIDAR ALI AND OTHERS, Petitioners *v.* KING EMPEROR, Opposite Party. 11th April 1908.

Adjournment of a case—To enable the accused to prepare their defence—Propriety of.

The material facts of this case were these:—

The Petitioners were committed to the Sessions Court on charges under secs. 302, 395 and $\frac{302}{114}$ and 396 of the Indian Penal Code. The charges against the Petitioners arose out of the murder of Mr. Crabbe, an Inspector of the Railway Police. Before the Sessions Court the Petitioners put in a number of petitions for the adjournment of the trial in that Court on the ground that they had not been able to get copies of the depositions of certain witnesses and consequently their Counsel had not been prepared to defend the case and also on some other grounds. The Sessions Judge rejected all the petitions. Then they applied for adjournment on the ground that they would move the High Court for transfer of the case. The Sessions Judge nevertheless went on with the examination of the prosecution witnesses and after finishing their examination postponed the case. The Petitioners therefore came before the High Court and obtained the rule.

Their Lordships observed—

"We think that the Sessions Judge would have been well advised in granting the adjournment for which the Petitioners asked in order that they might have the opportunity for further cross-examination of the witnesses for the prosecution. It may be quite true that the Petitioners themselves were responsible for the delay in obtaining copies of the depositions and of the statements before the Police; but it is far better that there should be some delay in the trial of a case than that any colour should be afforded for a supposition that the accused persons have not had sufficient time to prepare their defence &c., &c., &c.

Babus Dasarathy Sanyal, Gobinda Chandra Dey Roy, Troylokho Nath Ghose and *Suresh Chandra Mukherjee* for the Petitioners.

Mr. Orr, Deputy Legal Remembrancer, for the Crown.

B. C.

CIVIL APPELLATE JURISDICTION. Before STEPHEN and DOSS, JJ. CIVIL RULES NOS. 320 TO 327 OF 1908 and APPEALS FROM ORDERS NOS. 206 TO 212 OF 1907. SHAM SUNDER PERSAD SING *v.* ARTHUR FORBES. Heard, 14th February 1908. Judgment, 23rd April 1908.

Civil Procedure Code (Act XIV of 1882), secs. 278, 622—Appeal entertained without Jurisdiction—Second appeal—Revision.

The parties are co sharer landlords. The Plaintiff, Sham Sunder Sing, brought suits for his share of rent against certain tenants and obtained decrees in execution of which purchased the holdings of the tenants and took delivery of possession. The Defendant, Mr. Forbes, thereafter brought suits for his share of rent against the original tenants and obtained decrees in execution of which he attached the holdings. The Plaintiff was not made party to the suits of the Defendant. The Plaintiff put in claims under sec. 278, C. P. C., on the ground that he had purchased the holdings and the original tenants against whom Mr. Forbes had obtained decrees had no interest in the holdings. The Munsif allowed the claims and withdrew the attachments. Mr. Forbes thereupon preferred appeals to the District Judge of Bhagulpore against the decision of the Munsif. A preliminary objection was taken before the District Judge that no appeal lay to him. The District Judge overruled the objections on the ground that the case fell under sec. 244, cl. (*c*), C. P. C., as the Plaintiff was representative of the judgment-debtors, the tenants. On the merits also he held that Mr. Forbes could attach the holdings and bring them to sale, and he decreed the appeals. Against his decrees the Plaintiff filed the above appeals to the High Court and also moved under sec. 622, C. P. C., and obtained the above rules which were ordered to be heard along with the appeals in case the Court holds that no second appeals lie. A preliminary objection was taken before the High Court that no second appeals lie and it was argued on the merits that the cases are governed by sec. 22 of the Bengal Tenancy Act as amended by Act I of 1907 and reference was made to I. L. R. 27 Cal., 484. For the Appellant it was contended that the District Judge had no jurisdiction to entertain the appeals and that second appeals would lie against his decree according to the rulings in 2 C. W. N. 138. Sec. 153, Bengal Tenancy Act, is no bar as the suits were

by co-sharer landlord. 8 C. W. N. 472. If no second appeals lie then the rules should be made absolute.

Held—That no second appeals lie against the judgment of the District Judge but as the District Judge had no jurisdiction to entertain the appeals, High Court should interfere under sec. 622, the rules should be made absolute and the judgment of District Judge set aside and that of the Munsif restored.

Babu Kshetra Mohon Sen for the Petitioner.

Moulvi Mahomed Mustafa Khan for the Opposite Party.

A. T. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before MITRA and CASPERSZ, JJ. APPEALS FROM ORIGINAL DECREES NOS. 71 AND 122 OF 1905. MUSSAMMAT BIBI FATIMA, Appellant *v.* BIBI AZIMANNESSA AND ANOTHER, Respondents. Heard, 20th March 1908. Judgment, 20th March 1908.

Transfer of Property Act (IV of 1882), sec. 53—Execution of deed—Onus to prove deed fraudulent and void—Deferred dower—Valuable consideration.

Two suits were instituted by the Plaintiff-Respondent to avoid the effect of certain claim proceedings under sec 278, C. P. C. The Plaintiff claimed title to the two sets of properties covered by the two suits under two *Baimokashas*, one dated the 15th May 1888 and the other dated the 15 h July 1899, the consideration for those deeds being Rs. 9,000 for the first, and Rs. 5,000 for the second, out of a dower debt of Rs. 40,000 payable to the Plaintiff by her husband, the executant of those deeds It was deferred dower. The evidence showed that the deeds were executed by the husband, Mahomed Lateef, and there were good considerations for the deeds.

The Plaintiff was married to Mahomed Lateef in or about the year 1887. Mahomed Lateef's first wife was Bibi Sharifan and she died in the year 1883 leaving two daughters, Kani Fatima, the first Defendant, and Bibi Kulsum who were both infants at the time of the death of their mother. The dower debt payable by Mohomed Lateef to his first wife was also of Rs. 40,000 The first Defendant, shortly after she arrived at the age of majority, instituted a suit for her share of the dower debt payable by her father to her deceased mother. The suit was instituted on the 2nd January 1902 and, after contest, she obtained a decree on the 20th February 1903. In execution of this decree, she attached the properties covered by two present appeals. The Plaintiff put in a claim but her claim was disallowed. The Court below decreed the suits.

Held—That the burden of proof was entirely on the person who asked the Court to declare the instrument to be fraudulent and intended to defraud, when it was proved that the instruments were good,

Rajani Kant Das v. *Gour Kishore Saha* (R. A. No. 238 of 1905) unreported, followed.

A deferred dower debt may be a valuable consideration for a *Baimokasha* if executed by the husband during his life-time.

Mussammat Hamida v. *Mussammat Budhu* (17 W. R. 525) referred to.

Mr. A. Rahim and *Moulvi Mahomed Mustaffa Khan* for the Appellant.

Babus Umakali Mukerjee, Mahendra Nath Roy and *Moulvi Mahomed Ishfaq* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, J. APPEAL FROM ORIGINAL DECREE NO. 128 OF 1906. SHEIKH DOST ALI AND OTHERS, Appellants *v.* MUST. ALI AND OTHERS, Respondents Heard, 27th and 28th April 1908 Judgment, 28th April 1908.

Mahomedan family living in joint mess—Property acquired in the name of one member—Presumption.

The suit was for partition. The parties were Mahomedans. One of the properties was a leasehold interest under the Bettiah Raj. The lessee was Sahamat Ali. So long he was alive, the Battiah Raj granted receipts in his name and his name was used in granting receipts to the tenants in occupation. After his death, his sons Mahomed Yakub and Abdul Gafur, the Defendants, were recognised as tenants by the Bettiah Raj and the tenants in occupation of the land of the village paid rents on receipts granted by those persons. On one occassion, a suit was instituted for rent by Yakub Ali and Abdul Gafur, the tenant denied that they were the sole landlords and set up the title of the Plaintiff, Dost Ali. The suit was decided against the tenant and Yakub and Gafur obtained a decree for rent.

The point argued in the High Court was whether certain preperties standing in the name of one of the members were the properties of the family or the properties of the person in whose name they stood.

Held—That members of a Mahomedan family living in commensality do not form a joint family as under the Hindu law and if an acquisition is made in the name of one member of the family, the presumption is that the property belongs to him only If the other members say that it is joint property, it is for them to show, by evidence, that the acquisition was made with joint fund.

Hakim Khan v. *Gool Khan* (I. L. R. 8 Cal. 826) followed.

Moulvis Mahomed Ishfaq and *Syed Mahomed Taher* for the Appellants.

Moulvi Shamsul Huda and *Babu Chandra Sekhar Prosad Singh* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before BRETT, J. APPEAL FROM APPELLATE DECREE No. 2260 OF 1906. HON'BLE MAHARAJA MONINDRA CHANDRA NANDY BAHADUR, Appellant *v.* ASAR MAHMUD MANDAL AND OTHERS, Respondents. 29th April 1908.

Bengal Tenancy Act (VIII of 1885), sec. 169—Rent, if includes interest.

The case arose out of a proceeding under sec. 169 of the Bengal Tenancy Act in which the question was how much of the amount realised by the sale of the holding which had been sold for arrears of rent, the decree-holder was entitled to. The decree-holder would have it that he was entitled to the rent at the same rate for the period between the institution of the suit and the date of the sale as he had been allowed by the Court which gave him the rent decree for the period to which the suit referred.

The Courts below held that the applicant was entitled to rent at a certain lower rate. The applicant appealed to the High Court and contended *inter alia* that the lower Courts erred in law in refusing to allow the Plaintiff interest on the rents for the years claimed under sec. 169 of the Bengal Tenancy Act.

Held—That there is no provision in the law which enables a Court acting under sec. 169 of the Bengal Tenancy Act to allow interest. The term rent in that section does not include interest.

The dictum in *Bejoy Chand Mahatab* v. *S. C. Mookerjee* (5 C. L. J. 27n) dissented from.

Babus Jogesh Chandra Dey, Promotho Nath Sen and *Hemendra Nath Sen* for the Appellant.

Babu Hem Chander Mitra for the Respondent.

A. T. M. *Appeal dismissed.*

Legislation.

Secs. 2 to 7 of the Indian Tea-cess Act (IX of 1903) shall continue in force until the 31st day of March 1913 —*India Gazette*, 4th January, 1908, Part. I, p. 11.

Act I of 1908 (An act further to amend the Legal Practitioners Act, 1879) received the assent of the Governor-General of India in Council and was promulgated for general information in the *India Gazette*, 4th January 1908, Part IV, p. 1.

Act II of 1908 (An Act further to amend the Indian Tariff Act, 1894) received the assent of the Governor-General of India in Council on the 3rd January 1908 and promulgated for general information in the *India Gazette*, 4th January 1908 Part, IV, p. 3.

The Indian Limitation Bill was introduced in the India Council on the 3rd January 1908 and publishep in the *India Gazette* of 4th January 1908, Part V, p. 1.

Act No. III of 1908 (An Act to further to amend the law relating to Private Trusts and Trustees) received the assent of the Governor-General of India in Council on the 17th January 1908 and was promulgated for general information in the *India Gazette*, dated the 18th of January 1908, Part IV.

A report of the Select Committee on the Bill further to amend the Coroners Act, 1871, and the Prisoners Act, 1900, was presented to the India Council on the 31st January 1908,—*India Gazette*, 1st February 1908, Part V, p. 31.

Act No. IV of 1908 (An Act further to amend the Coroners, Act. 1871, and the Prisoners Act, 1900) received the assent of the Governor-General of India in Council on the 14th February 1908 and was promulgated for general information in the *India Gazette* dated the 15th of February 1908—Part IV p. 7.

A report of the Select Committee on the Bill to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature was presented to the India Council on the 14th February 1908—*India Gazette*, 15th February 1908 Part V p 35.

A Bill further amend the Whipping Act, 1864, and the Code of Criminal Procedure, 1898, was introduced in the India Council on the 13th March 1908—*India Gazette*, 14th March 1908, Part V, p 221.

The Report of the Select Committee on the Bill to consolidate and amend the law for the limitation of suits and for other purposes, was presented to the India Council on the 20th March, 1908—*India Gazette*, 21st March 1908, Part V, p. 223.

A Bill to give greater facilities to the public for calling for and inspecting accounts of public charities was introduced in the India Council on the 20th March 1908 · See *India Gazette*, 21st March 1908, Part V, p. 248.

The Presidency-Towns Insolvency Bill was introduced in the India Council on the 20th March 1908 · See *India Gazette*, 21st March 1908, Part V, p. 249.

The Code of Civil Procedure (Act V of 1908) received the assent of the Governor-General of India in Council on the 21st March 1908 and was promulgated for general information: See *India Gazette*, 21st March 1908, Part IV, p. 9.

PRIVY COUNCIL.

[APPEAL FROM ALLAHABAD.]

LORD MACNAGHTEN. LORD ATKINSON. SIR ANDREW SCOBLE. SIR ARTHUR WILSON. 1908. 2, April.	DALIP SING and others, v. CHAUDHRAIN NAWAL KUNWAR and another.

Benami, *transaction whether—Oral evidence unsatisfactory—Surrounding circumstances and considerations of probability to be looked into.*

Where the question was whether a document which on its face was a mortgage-bond was a genuine or a fictitious transaction, but at the trial persons who might have been expected to be prominent witnesses were not called, and the evidence that was called was open to much adverse criticism,

Held—*That in the circumstances, it was necessary to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct.*

This was an appeal from a decree of the High Court, North-Western Provinces, dated the 17th November 1902, which reversed the decree of the Subordinate Judge of Meerut, dated the 23rd December 1899.

The Respondent Musst. Nawal Kunwar brought this suit for sale upon a mortgage, dated the 10th January 1889, executed by the first Defendant Bakhtawar Singh and his father Partab Singh for self and as guardian of his son Risal Singh, the Defendant No. 2, who was at that time a minor. The amount secured by the mortgage was Rs. 10,000, but the Plaintiff alleged that she had paid only Rs. 8,337-9, which she sought in this suit to recover with interest by sale of the mortgaged property. There was a prior mortgage in respect of the same property in favour of Munna Lal, the father of the third and fourth Defendants. The Plaintiff alleged that this mortgage had been discharged by her. Those Defendants again purchased the mortgaged property from the first two Defendants under a sale-deed, dated the 18th of July 1896, and were made parties to the suit as such. The fifth Defendant Banarsi Das was the grandson of one Shibban Lal who also held a prior mortgage in respect of the property mortgaged to the Plaintiff. The Plaintiff alleged that she paid a part of the mortgage money due to Shibban Lal and now sought to redeem that mortgage by payment of the balance. The sixth Defendant Dalip Singh was the purchaser of a portion of the mortgaged property from the Defendants Nos. 3 and 4. The Defendants Nos. 1 and 2 urged in answer to the claim that Rs. 1,000 only out of the consideration for the Plaintiff's bond was paid and that the said amount had been realized by the Plaintiff from the usufruct of the mortgaged property. The Defendants Nos. 3 and 4, the only Defendants who seriously contested the claim, pleaded that the Plaintiff's mortgage was fictitious and nominal and that it was executed in her favour by Partab Singh with a view to protect his property from creditors. The mortgage-deed purported to be executed by Partab and his sons as aforesaid in favour of the Plaintiff and it provided that she was, as consideration for the mortgage, to discharge certain previous charges on the property, a previous bond of Rs. 500 odd in her own favour, and the expenses of

DALIP SINGH v. CHAUDHRAIN NAWAL KUNWAR.

the transaction, and that a balance of Rs. 1,000 left after these payments was to be paid to Partab.

The principal question to be determined in the case was whether the mortgage in favour of the Plaintiff was a fictitious transaction or not. The Subordinate Judge, Mr. A. Rahman, held that the deed of mortgage was fictitious and he dismissed the suit. On appeal, the High Court (Stanley, C. J., and Banerji, J.) held that the various provisions contained in it were not such as one would expect to find in a document executed fictitiously for the protection of property, but that, on the contrary, they offered clear indications of the genuineness of the transaction; and upon a review of the evidence came to the conclusion that the Plaintiff had advanced under her mortgage-deed a sum of Rs 8,322 9. That out of this sum credit should be given for the amount of a sub-mortgage in favour of Munna Lal. This bond was executed by the Plaintiff on the same day that the mortgage-deed in her favour was executed. It was for Rs. 5,000 out of which Munna Lal was to deduct the amount of his previous claim and to pay the balance in cash. It appeared, however, that the Defendants Nos. 1 and 2 had discharged this bond by a sale-deed which they executed in favour of Jainti Parshad, Defendant No. 3, on the 18th July 1896. A part of the consideration for that sale was a sum of Rs. 10,000 which was stated to have been due under the sub-mortgage. The mortgage-deed in favour of the Plaintiff provided that the mortgagors should apply payments made by them on account of the Plaintiff's mortgage to the discharge of the sub-mortgage made by the Plaintiff. "If," the High Court observed, "on the date of the sale to Jainti Parshad, Rs. 10,000 was due under the sub-mortgage, that sum should be deemed to be payment towards the Plaintiff's mortgage, as it had the effect of discharging the sub-mortgage, or at least a part of it, for which the Plaintiff was liable. This is conceded by the learned Advocate for the Appellant, and he informs us that in valuing his appeal he has deducted out of the amount claimed the amount which the Defendants Nos. 1 and 2 have paid on account of the sub-mortgage. For the purpose of determining what is the amount due to the Plaintiff upon her mortgage we have, therefore, to calculate interest upon the sum of Rs. 8,322-9 mentioned above, up to the 18th July 1896, the date of the sale in favour of Jainti Parshad, and we have also to calculate the amount due to Munna Lal, or his successors in title under the sub-mortgage of the 10th January 1889 up to the 18th July 1896. As the Plaintiff has not claimed interest at the enhanced rate of Rs. 24 per cent. per annum mentioned above, interest upon her mortgage should be calculated at the rate at which she has claimed it, and interest on the amount of Munna Lal's mortgage should be calculated at the rate of 14 annas per cent. per mensem according to the terms of that mortgage. If the amount due upon Munna Lal's mortgage of the 18th July 1896 exceed Rs. 10,000, then a set off to the extent of Rs. 10,000 only should be allowed against the amount found to be due to the Plaintiff; and if a smaller sum than Rs. 10,000 be found to have been due to

DALIP SINGH *v.* CHAUDHRAIN NAWAL KUNWAR.

Munna Lal on the date above mentioned, that smaller sum should be set off against the Plaintiff's mortgage, and upon the balance due further interest should be calculated till the date of the suit at the rate at which the Plaintiff has claimed it. This amount the Plaintiff is entitled to recover by sale of the mortgaged property provided that she pays Banarsi Das, the Defendant, the amount which is now due upon his mortgage of 14th July 1885. We accordingly set aside the decree of the Court below and make a decree in favour of the Plaintiff for the amount which upon the taking of accounts may be found to be due to her, not exceeding the amount at which she has valued her appeal to this Court, and we direct that the Defendants other than Banarsi Das or any of them do pay the said amount together with proportionate costs and interest at the stipulated rate from the date of suit until the date of payment, on or before the 15th May 1903; that in the event of their not paying the said amount on or before that date, the Plaintiff do pay to Banarsi Das the amount due to him under his mortgage of the 14th July 1885 on or before the 15th of August 1903, and that for the realization of the said amount as also of the amount due upon her own mortgage the mortgaged property be sold." In its decree the High Court whilst giving the Plaintiff the right to recover on her mortgage allowed as against her whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal.

The Defendants Nos. 3 and 4 appealed to His Majesty in Council.

Mr. Jardine, K. C., and *Mr. Ross* for the Appellants.

Mr. DeGruyther, K. C., and *Mr. Cowell* for the Respondents.

Their LORDSHIPS' JUDGMENT was delivered by

SIR ARTHUR WILSON.—This is an appeal from a judgment and decree of the High Court at Allahabad, bearing date the 17th November 1902, which reversed those of the Subordinate Judge of Meerut, dated the 23rd December 1899. The substantial question as to which the Courts in India have differed, and which their Lordships have to decide, is whether a certain deed of mortgage, bearing date the 10th January 1889, represents a genuine transaction or a fictitious one.

The mortgagors were one Chaudhuri Partab Singh and his two sons, one of whom was then a minor. The subject-matter of the mortgage was land and houses at Meerut. At the time of the mortgage Partab was indebted to several persons, partly on mortgages and partly on other securities, the principal creditors being one Munna Lal, the heirs of one Shibban Lal, and one Kishan Sahai, and it is clear that at that time Partab was in money difficulties.

The mortgage in controversy purports to be in favour of a lady named Nawal Kunwar, for Rs. 10,000. Nawal Kunwar was at that time residing in Partab's house, and she was the sister of his son-in-law.

The transaction of the 10th January 1889, as it appears on the face of the papers, consisted of two parts. First there was the mortgage now disputed, executed by Partab and his two sons in favour of Nawal Kunwar, according to

DALIP SING v. CHAUDHRAIN NAWAL KUNWAR.

which the lady, as consideration for the mortgage, was to discharge Partab's debts already referred to, a small previous bond in her own favour, and the costs of the transaction, and to pay over Rs. 1,000 to Partab.

The second part of the transaction purports to be a sub-mortgage by the Lady to Munna Lal, who has been already mentioned as a creditor of Partab. It was for Rs. 5,000, out of which Munna Lal was to deduct the amount of his previous claim against Partab, and to pay the balance in cash.

Subsequently, on the 11th July 1896, Partab being dead, his sons sold the mortgaged property to Jainti Parshad, the son of Munna Lal, who was also dead, and on the 18th January 1898, Jainti Parshad sold a portion of the property to one Dalip Singh.

On the 24th September 1898 Nawal Kunwar instituted the present suit in the Court of the Subordinate Judge of Meerut. She joined as Defendants 1 and 2, the sons of Partab; 3 and 4, the sons of Munna Lal; 5, the heir of Shibban Lal; and 6, Dalip, the purchaser of a portion already mentioned. The object of the suit was to enforce payment of the Plaintiff's claim under her mortgage of the 10th January 1889, by the sale of the mortgaged property. It is clear, therefore, that the parties substantially interested in the contest were, on the one hand, Nawal Kunwar, and on the other hand, the sons and heirs of Munna Lal, and, in a lesser degree, Dalip.

The Plaintiff's case at the trial was that the mortgage to her was a perfectly genuine mortgage, and that she paid the greater part of the consideration (the precise amount is immaterial here) partly out of her own moneys and partly by means of the Rs. 5,000 borrowed by her from Munna Lal under the sub-mortgage of the same date. The case on the other side was that the mortgage to Nawal Kunwar was a fictitious transaction and that the only real transaction on that occasion was a borrowing by Partab of Rs. 5,000 from Munna Lal, the name of the lady being introduced purely *benami*.

The Subordinate Judge found for the Defendants, holding the alleged mortgage to her to be *benami*. On appeal the High Court differed from that finding, held the transaction to have been genuine, and gave a decree in the Plaintiff's favour.

Their Lordships are of opinion that the decision of the High Court was right. There was some evidence on each side, bearing directly on the character of the transaction, but on neither side was that evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence that was called is open to much adverse criticism. The testimony of one witness is described by the Judge who heard it as being worthless. In determining, therefore, which story is to be accepted, it has been found necessary in India, and it is equally necessary for their Lordships, to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct.

As their Lordships agree in the conclusion arrived at by the High Court,

and substantially in the reasons for that conclusion, it is unnecessary to examine the evidence in detail, but it may be well briefly to indicate the principal considerations which seem to their Lordships to support the case of the Plaintiff.

The deed itself contains nothing suspicious. Its recitals show with substantial accuracy Partab's previous indebtedness, and the provisions of the deed are such as one expects to find in a deed embodying a real transaction.

The Plaintiff, though a woman residing in Partab's house, was not, in the ordinary sense of the term, a dependent member of his family. She was a person of some independent means, was in the habit of lending money, and lent it to Partab himself not on this occasion only. On the other hand, Partab was in embarrassed circumstances. Only five days after the mortgage in question, he was pressed for payment of Government revenue, and had to borrow Rs. 300 from the Plaintiff to pay it. Partab's motive in the disputed transaction must have been to relieve his difficulties, but if regarded as a *benami* transaction, the mortgage, which was for considerably less than the value of the property, would have afforded no present protection against creditors. It was suggested that by the accumulation of interest, at a penal rate, the deed might in time become a protection, but that is a somewhat remote speculation. If regarded as a genuine transaction, the advantages to Partab of what was done are obvious. He secured a diminution in the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor.

At subsequent dates, Partab and his sons, and those claiming through them, always acknowledged the genuineness of the transaction. Particularly in the conveyance by Partab's sons to Jaint Parshad the mortgage is so recognised. It is true that in that deed it is said that the mortgage had been satisfied, but that is a very different thing from there having been no mortgage at all.

One point of minor importance was raised on the appeal. The High Court, by their decree, whilst giving the Plaintiff the right to recover on her mortgage, allowed as against her, whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal. It was contended that the limitation to Rs. 10,000 was wrong. Their Lordships are of opinion that the limitation was right. That sum was agreed upon on the occasion of the sale by Partab's heirs to Jainti Parshad, and the matter was dealt with on that footing by the substantial Defendants in their written statement.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The Appellants will pay the costs.

Appeal dismissed with costs.

J. W. A.

———

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS

No. 136 OF 1904 and No. 67 OF 1907.

MACLEAN, C. J. COXE, J. 1908. Heard, 3, February. Judgment, 21, February.

SARATMANI DEBI, Defendant, Appellant. v. BATTA KRISHNA BANERJEE and others, Plaintiffs, Respondents.

Civil Procedure Code (Act XIV of 1882), secs. 234 and 244—Judgment-debtor's death—Suit for administration by judgment-creditor against executor—Mal-administration.

Certain persons who had obtained a decree against a person, since deceased, failed to realise the decretal amount by executing the decree against the executrix of the judgment-debtor. They then instituted a suit against the executrix charging her with mal administration and asking for administration of the judgment-debtor's estate;

Held—*That the suit involved a much wider question than one merely relating to the execution of the decree, and was not barred by sec. 244 of the Civil Procedure Code.*

JOGEMAYA DASSI v. THACKOMONI DASSI (2) *referred to.*

KHUSHROBHAI v. HORMAZSHA (1) *followed.*

This was an appeal preferred on the 23rd of March 1904, against the order of G. K. Deb, Esq., District Judge of Zillah Hooghly, dated the 16th of February 1904, reversing that of Babu Kali Dhone Chatterji, Subordinate Judge, 3rd Court of that district, dated the 26th of June 1902 and remanding the case to his Court for trial on the merits.

On the 17th February 1888, one Srimutty Panchcory Debi, the mother of the Plaintiffs obtained a decree for Rs. 28,463 against one Barada Sundari Debi. Panchcory Debi died intestate on 26th September 1889. The Respondents in Appeal No. 136 of 1904, who were the Plaintiffs in the suit out of which the appeal arose, were the sole heirs of Panchcory Debi. Being minors they sued through their father and next friend Mani Lal Bannerjee.

Barada Sundari Debi died on 20th March 1890. The Defendant-Appellant, Saratmani Debi, was the executrix of her will and had obtained probate as such. The Plaintiffs had from time to time partially executed the above decree, but a large sum was still due to them under it. Failing in their endeavour to realise the balance by execution the Plaintiffs instituted this suit in the Court of the 2nd Subordinate Judge of Hooghly for administration against the Appellant, charging her with mal-administration of the estate of Barada Sundari, and alleging that the Plaintiffs had failed to realise the decretal amount on account of such mal-administration and they prayed:

"(a) That an account be taken from the Defendant of the moveable and immoveable properties of the said Barada Sundari Debi and that the same be administered under the directions and orders of the Court.

"(b) That the estate of the said Barada Sundari Debi be placed in the hands of the Receiver appointed by this Court with authority to collect all debts and outstandings due to the estate.

"(c) That an enquiry be made of the dealings of the Defendant with regard to the said estate and should it appear

(1) I. L. R. 11 Bom. 727 (1887).
(2) I. L. R. 24 Cal. 473 (1896)

SARATMANI DEBI v. BATTA KRISHNA BANERJEE.

that any property moveable or immoveable belonging to the said estate had been misappropriated by the Defendant she be directed to make good such misappropriations.

"(d) That necessary orders may be passed for payment to Plaintiffs of the aforesaid decretal amount due to them from the said estate or such portion of the said estate as may be available.

"(e) That all assets and liabilities of the said estate be determined and necessary order be passed for payment of the liabilities according to their priority."

No other creditors of the estate were made parties in this suit.

The Defendant pleaded *inter alia*, that the suit was barred by the provisions of sec. 244 of the Civil Procedure Code, that there were no assets in the hands of the Defendant and that she had not committed any act of mal administration.

The Subordinate Judge dismissed the suit holding that it was barred by the provisions of sec. 244, C. P. C. relying upon the case of *Jogemaya Dassi* v. *Thackomoni Dassi* (2). The Plaintiffs preferred an appeal before the District Judge of Hooghly who decreed the appeal holding that the case relied on by the subordinate Judge was not applicable to the present case and he remanded the case to be tried on the merits.

The Defendant preferred a second appeal being Appeal from Appellate Order No. 136 of 1904 to the High Court.

The appeal came on for hearing before the Chief Justice and Holmwood, J., on the 1st of May 1905 who after hearing the parties made the following order :

(2) I. L. R. 24 Cal. 473 (1896).

"We think the best course is, and the parties assent to it and Mr. Garth's clients, the Plaintiffs who are minors, are not prejudiced by it, that this appeal should stand over and that the Plaintiffs should make a renewed application for execution and if they are so advised apply under sec. 234 of the Code of Civil Procedure for an account as against the Defendant. It may be that this account, if ordered, will give the Plaintiffs all the information they want as to the judgment-debtor's estate. This appeal will stand over until we know the result of those proceedings."

The Plaintiffs thereupon again applied for execution of their decree but the application was dismissed by the Subordinate Judge on the ground that it was time-barred. The Plaintiffs preferred an appeal to this Court, being Mis. A. No. 67 of 1907. Both appeals were heard together.

No. 136 of 1904.

Dr. Rash Behari Ghose, Babus Dwarka Nath Chuckerbutty, Surendra Nath Roy and *Satyendra Nath Roy* for the Appellant.

Mr. Chuckerbutty, Babus Umakali Mukerjee and *Satish Chandra Mukerjee* for the Respondents.

No. 67 of 1907.

Mr. Chuckerbutty and *Babu Sarat Chandra Roy Chowdhry* for the Appellant.

Dr. Rash Behari Ghose, Babus Dwarka Nath Chuckerbutty, Tarak Chandra Chuckerbutty, and *Satyendra Nath Roy* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—Two appeals are now

before us. No. 136 of 1904 and No. 67 of 1907. I will first deal with the former. The only question on that appeal is whether the suit is barred by sec. 244 of the Code of Civil Procedure. The short facts are as follows: On the 17th February 1888 one Srimati Panchcori Debi, the mother of the Plaintiffs, obtained a decree for Rs. 28,463 against one Baroda Sundari Debi. Panchcori Debi died intestate on the 26 September 1889, the present Respondents. the Plaintiffs in the suit, are her sole heirs. They are all minors, suing by their father as next friend and certificated guardian.

Baroda Debi died on the 20th March 1890: the Defendant is the executrix of her will and has obtained probate. The Plaintiffs have from time to time partially executed the above decree, but a large sum is still due to them under it. Failing in this endeavour to execute this decree, the Plaintiffs instituted this suit on the 17th August 1901 to administer the debtor's estate, and although the plaint is not very artistically drawn, the charges in effect amount to charge of mal-administration against the Defendant in the administration of the estate. The charges, doubtless, ought to have been more specific. The Defendant says that such a suit will not lie, having regard to sec. 244 of the Code of Civil Procedure. This is the only question we have to decide.

The District Judge overruled the objection, and the Defendant has appealed.

Is the question involved in the suit merely a "question between the parties to the suit relating to the execution of the decree? We think not. The real question involved in the suit is in substance whether or not the Defendant in administering the debtor's estate has been guilty of mal-administration, and whether the Plaintiffs, as creditors of that estate, are entitled to have the estate administered on that footing. This is a much wider question than one merely relating to the execution of the decree, and though, no doubt, the Judicial Committee, as the Courts of India, has placed a liberal construction upon the language of sec. 244, it would, we think, be going beyond anything yet decided to hold that a suit such as the present is barred by that section. It lies on the Defendant to substantiate that the Plaintiffs' *prima facie* right to bring such a suit, is barred by sec. 244. There is no machinery under the execution chapter (Chap. 19) of the Code which enables the Court, in executing the decree, to go into the question of whether or not the executor has been guilty of mal administration of the estate. Sec. 234 no doubt enables the Court to call for an account of the property of the deceased which has come to the hands of the executor, but that section only applies to an account of the property which has actually come to the hand of the executor. If, as is alleged here, there has been mal-administration on the part of the Defendant, she cannot be held liable in execution proceedings under this section, but a regular suit must be brought, *Khushrobhai* v. *Hormazsha* (1). I agree in that view. There is no final decision of the point in this Court: it was touched upon, however, in the case of *Jogemaya Dassi* v. *Thackomoni Dassi* (2), but a final decision on the point

(1) I. L. R. 11 Bom. 727 (1887).
(2) I. L. R. 24 Cal. 473 (1896).

SARATMANI DEBI *v.* BATTA KRISHNA BANERJEE.

was unnecessary for the purposes of that case. Again the administration suit there was not based on the footing of maladministration. For these reasons I agree with the District Judge and the appeal must be dismissed with costs.

The other appeal (67 of 1907) has reached a rather untoward position. The matter of the last appeal came before this Court on the 1st May 1905 when it was suggested by the Court and all parties acquiesced that the Appeal No. 136 of 1904 should stand over and that the Plaintiffs should apply for an account under sec. 234, it being pointed out that this account, if ordered, might afford the Plaintiffs all the information they wanted as to the estate. The appeal consequently stood over. The Plaintiffs did make an application for an account, but they were met, and successfully met, by a plea of limitation. It was never mentioned when the suggestion of the Court was made on the 1st May 1905, that any question of limitation could arise; if so, it is improbable that the Court would have made the suggestion, but would, at once, have dealt with Appeal No. 136 of 1904. The Sub-Judge of Hooghly has dismissed the application on the ground of limitation and the Plaintiffs have appealed. In the view we have taken of the other appeal it becomes unnecessary to decide this one: and, in the circumstances, we dismiss it without costs though in so doing we do not wish to be understood as agreeing in the view of the Sub-Judge. We express no opinion. This unfortunate litigation has been going on for over 21 years the parties were very near a settlement a few days ago, and I venture to suggest, in the interest of the minors, whether a real attempt to settle the matter should not now be advantageously made.

We fix the hearing fee at 5 goldmohurs.

COXE, J.—I agree.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 565 OF 1906.

STEPHEN, J.
DOSS, J.
1908.
23, January.

RAGHU NATH BHAGAT and others, Defendants, Appellants,

v.

SYED SAMAD SHAH and others, Plaintiffs, Respondents.

Chotanagpur Landlord and Tenant Procedure Act (I of 1879 B. C.), secs. 37 and 42—Suit by assignee from auction-purchaser of permanent tenure to recover from landlord, if possessory suit—Limitation—Limitation Act (XV of 1877), Sch. II. Arts. 138, 142, sec. 14—Exclusion of time if must be asked in plaint—Civil Procedure Code (Act XIV of 1882), sec. 50.

A suit by a transferee from a purchaser of a permanent tenure at a rent sale to recover possession of the tenure from the landlord who denied the title of the Plaintiff on the ground that on the death of the previous tenant, the land reverted to himself, was not a possessory suit to which the provisions of sec. 37 of the Chotanagpur Landlord and Tenant Procedure Act could apply.

Art. 138 of Sch. II of the Limitation Act refers more to questions between the auction-purchaser and the judgment-debtor, and the present case fell under Art. of Sch II of the Limitation Act.

RAGHU NATH BHAGAT v. SYED SAMAD SHAH.

The special limitation provided in sec. 42 of the Chotanagpur Landlord and Tenant Procedure Act did not apply to this case.

The period during which a suit was prosecuted bonâ fide *in a Court without jurisdiction was properly excluded in computing the period of limitation although the Plaintiff in his plaint did not expressly ask for an extension of time on that ground.*

JOGESHWAR ROY v. RAJNARAIN MITTRA (1) *distinguished.*

This was an appeal preferred on the 18th April 1906 against the decree of W. H. Vincent, Esq., Judicial Commissioner of Chotanagpur, dated the 6th December 1905, confirming that of Babu Lal Gopal Sen, Subordinate Judge of Ranchi, dated the 20th June 1905.

The allegations in the plaint were that the Defendants Nos. 1 to 3 were maliks of village Kandur Nowadip, that the lands in suit were the *bhuinhari* lands of Karma Pahan, that Defendants Nos. 1 to 3 obtained a decree for arrears of rent against Karma and put up the land to sale, that Yar Ali Khan purchased the lands at auction sale on the 17th March 1892, and obtained possession on the 22nd July 1892, that Yar Ali sold the lands to Hingan Khan (father of Defendants Nos. 5 to 7) by *kobala* on the 24th March 1893 and Hingan Khan afterwards sold the lands to the Plaintiff by *kobala* on the 21st September 1897.

The Defendants Nos. 1 to 3 raised various objections amongst which the following are material, *viz.*

1. That the suit did not lie in the Civil Court having regard to sec. 37, cl. (6) of Act I of 1879 B. C., and should have been instituted in the Revenue Court

2. That the suit was barred by the general law of limitation and the special limitation provided in sec. 42 of Act I of 1879 B. C.

3. That Karma Pahan having died without male issue in 1947 Sambat, without leaving any male issue, no one cultivated the lands in dispute or paid rents and the Defendants "according to law and the custom of the country" took possession.

The present suit was at first instituted in the Court of the Munsif on 22nd July 1904 but the plaint was returned for presentation in the Court of the Subordinate Judge on 12th January 1905. The Sub-Judge held that leaving out of calculation this period the suit had been instituted within 12 years from the date of the delivery of possession to Yar Ali Khan. That suit was therefore not time-barred under Art. 142 of Sch. II of the Limitation Act. That further the suit was one for recovery of possession upon adjudications of title and therefore secs. 37 and 42 of Act I of 1879 B. C., did not apply to this case. On the third point, the Defendants did not adduce any evidence in proof of the custom alleged. In these circumstances, the Subordinate Judge decreed the suit.

On appeal the Judicial Commissioner was of opinion that sec. 37 of Act I of 1879 closely follows the language of cl. 6 of sec. 23 of Act X of 1859, and a Full Bench had held in *Gooroo Doss Roy* v. *Ram Narain Mitter* (2),

(1) 8 C. W. N. 168 : 8. C. I. L. R. 31 Cal. 195 (1903)

(2) 7 W. R. 186 (1867)

RAGHU NATH BHAGAT *v.* SYED SAMAD SHAH.

that the latter section did not preclude a suit like the present from being brought in the Court of the Sub-Judge, although as a matter of fact this was certainly a case in which it would appear that a tenure-holder had been illegally ejected by his landlord. That for the same reason the special limitation provided in sec. 42 of the Act did not apply to this case. That the limitation applicable to it was that provided in Art. 142 and not Art. 138 of Sch. II of the Limitation Act. In support of this view, he relied on *Joggobundhu Mitter* v. *Purnanund Gossami* (3) and *Hari Mohan* v. *Babur Ali* (4). Applying this article, he held that the suit was not barred by limitation, having regard to the fact that the Plaintiff was entitled to deduct the period during which he was carrying on the suit in good faith in the Munsif's Court which the Munsif was unable to entertain from want of jurisdiction. "It is said" observed the Judicial Commissioner, "that it is necessary under sec. 50, C. P. C., to state specifically any special reason which saves a suit from limitation and that this has not been done and a case, *Jogeshwar Roy* v. *Rajnarain Mitter* (1), is cited to show that this is a fatal defect, but the facts in that case were different."

In this view, he dismissed the appeal with costs.

The Defendants Nos. 1 to 3 preferred this second appeal.

Babus Digambar Chatterjee (for *Babu Jogesh Chandra Roy*) and *Akshoy Kumar Banerjee* for the Appellants.

(1) 8 C. W. N. 168: s. c. I. L. R 31 Cal. 195 (1903).

(3) I. L. R. 16 Cal. 530 F. B. (1889).

(4) I. L. R. 24 Cal. 715 (1897).

Moulvi Mahomed Yusuf and *Mr. G. Sircar* for the Respondents.

The JUDGMENT OF THE COURT was as follows: —

In this case the Plaintiff by reason of a transfer of the interest acquired at an auction-purchase claims to be the tenant of the Defendant and seeks to have his rights declared and for *khas* possession of the land in question. The suit was decreed in the first Court and the appeal before the lower Appellate Court was dismissed.

The points that have been made before us are in the first place that this case is not one which can properly be tried before the Civil Court, that is a possessory suit, and by reason of sec. 37 of Act I (B. C.) of 1879 is maintainable only before the Deputy Commissioner. This is a contention which does not meet with our approval. The question is whether or not this can be considered only as a possessory suit, and substantially the suit is to recover a permanent tenure in which the landlord denies the title of the Plaintiff on the ground that on the death of the previous tenant the land reverted to himself. Here is a dispute going to the root of the Plaintiff's title which seems to us to be plainly a case proper for the jurisdiction of the Civil Court We therefore hold that sec. 37 has no application. And from that it follows that contrary to the Defendant's contention the special limitation provided in the Chota Nagpur Landlord and Tenant Procedure Act has no application.

We then come to the second question which is whether the present suit is bar-

RAGHU NATH BHAGAT v. SYED SAMAD SHAH.

red by general limitation. There is in the judgment of the lower Court what may be taken to be a finding that the Plaintiff's predecessor in title was in possession of the land for one year after the 22nd July 1892, and this suit having been brought on 22nd July 1904 this would bring it within any period of limitation which can apply to it. It may, however, be open to doubt whether the passage I have referred to has in fact the effect of a definite finding of fact, and we are pressed by the consideration that it is not on the fact which seems to be so indicated that the learned Judge has based his judgment. It therefore becomes necessary to consider the cogency of the other grounds which we find in the judgment.

The essential feature of the case is that the auction-sale of the property claimed by the Plaintiff occured on the 7th March 1892 and that the auction-purchaser was put into possession of that property on the 22nd July in the same year. Now the article which the Appellant suggests is applicable to this case is Art. 138, *i.e.*, where there is a suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale. This is to be contrasted with Art. 142, and in our opinion the Judge is right in considering that the case falls under the latter rather than under the former article. Art. 138 refers more to questions between the auction-purchaser and the tenant, but the present case seems to fall under the more general scope of Art. 142. There may be a question as to how far the case referred to by the learned Judge applies to this case, but the facts of that case may be distinguished on the ground of the different relations of the parties to one another. The learned Judge has held that this suit having been instituted before the Munsif within the period of limitation is in time. When the suit came before the Munsif he found that he had no jurisdiction to entertain it and accordingly returned the papers which were subsequently filed with the Subordinate Judge. We consider that the Judge has rightly added the delay so caused to the period of limitation under sec. 14 of the Limitation Act, and that it would be putting too strict a meaning on sec. 14 of the Act taken with sec. 50, C. P. C, to hold that because no claim to that extention of the period in which to bring the action was made in the plaint therefore the case must fail. We have been referred to the case of *Jogesh war Roy* v. *Rajnarain Mittra* (1), where it is decided that the omission to claim any such extention in the plaint is a fatal bar to the claim. But looking at the facts of that case they seem to be sufficiently different from those of the present case as not to be applicable.

The result is that this appeal must be dismissed with costs.

N. G. *Appeal dismissed.*

(1) 8 C. W. N. 168 : s. c. I. L. R. 31 Cal. 195 (1903)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 262 OF 1907.

RAMPINI, J. SHARFUDDIN, J. 1908. 17, February	NABADIP CHANDRA MAITI Decree-holder, Appellant, *v.* BEPIN CHANDRA PAL and ors., Judgment-debtors, Respondents.

Limitation Act (XV of 1877), Sch II, Art. 179—Step in aid of execution—Leave to bid at sale—Prayer for amount bid to be set off against decree.

An application by a decree-holder in which he not merely asked for leave to bid at the sale but further prayed that the amount which he bid might be set off against the decretal amount due to him was a step in aid of execution within the meaning of Art. 179 of Sch. II of the Limitation Act.

SUJAN SINGH *v.* HIRA SINGH (8) *followed.*

TROYLOKYA NATH BOSE *v.* JYOTI PROKASH NANDI (6) and HIRA LAL BOSE *v.* DWIJA CHARN BOSE (7) *referred to.*

This was an appeal preferred on the 24th of June 1907, against an order of Babu Jogendra Nath Mitter, Subordinate Judge of Midnapur, dated the 28th of March 1907, confirming that of Babu Monmotha Nath Bose, Munsif, 3rd Court at Midnapur, dated the 7th of July 1906.

The facts of the case material to this report will apear from the judgment.

Babu Jogendra Chunder Ghose for the Appellant.

Babu Monmotha Nath Mukerjee for *Babu Amarendra Nath Bose* for the Respondents.

(6) I. L. R. 30 Cal. 761, 769 (1903).
(7) 10 C. W. N. 209 (1905).
(8) I. L. R. 12 All. 399 (1889).

The JUDGMENT OF THE COURT was as follows: –

This is an appeal against an order of the Subordinate Judge of Midnapur, dated the 28th March 1907. He has held that a certain decree is barred by limitation. The first application for execution was made on the 5th June 1902 the second on the 19th August 1905, the third on the 16th September 1905 and the fourth on the 9th November 1905. The present application was made on the 3rd February 1906. It is clear that a period of more than three years elapsed between the dates of the first and second applications. At the date of the second application it would seem that execution of the decree was barred by limitation.

The decree-holder, however, contends that he is saved by the application of the 16th September 1902, which he presented to the Court, praying for leave to bid at the sale. The Subordinate Judge has pointed out that the rulings on this point are conflicting. The rulings of the Allahabad High Court and of the Bombay High Court are apparently in favour of the view that such an application is a step in aid of execution. See the cases of *Bansi* v. *Sikreemal* (1), *Vinayakrao Gopal* v. *Vinayak Krishna* (2) and *Dalel Singh* v. *Umrao Singh* (3). The learned Subordinate Judge, however, observes that the Calcutta High Court has taken an opposite view; and he cites the cases of *Torce Mahomed* v. *Mabood Bux* (4), *Raghunandan* v. *Kallydut* (5). He further points out that the correctness of this view has been

(1) I. L. R. 13 All 211 (1890).
(2) I. L. R. 21 Bom. 331 (1895).
(3) I. L. R. 22 All. 399 (1900).
(4) I. L. R. 9 Cal. 730 (1883).
(5) I. L. R. 23 Cal. 690 (1895).

doubted by Banerjee, J., in the case of *Troylokya Nath Bose* v. *Jyoti Prokash Nandi* (6), and by Mookerjee, J., in the case of *Hira Lal Bose* v. *Dwija Charn Bose* (7).

The point is a somewhat important one; and it might have been necessary to refer it to a Full Bench for decision. We are, however, relieved of the necessity of doing so by the fact pointed out by the learned pleader for the Appellant that the decree holder in his application of the 16th September 1902 did not merely ask for leave to bid at the sale, but further prayed that the amount which he bid might be set off against the decretal amount due to him, and this application was granted and a set off of Rs. 78 was permitted to be made on the 19th September 1902. Now, it is clear that, whether the application for leave to bid at the sale was a step in aid of execution or not, the application for a set off was a step in aid of execution. This has been held in the Full Bench case of *Sujan Singh* v. *Hira Singh* (8); and no ruling to the contrary effect, either by this Court or by any other Court, has been cited. We do not therefore think it necessary to refer the question as to the correctness of the ruling in *Raghunandan* v. *Kallydut* (5) to the Full Bench; and we must decree this appeal and remand the case to the lower Appellate Court so that execution of the decree may proceed.

The Appellant is entitled to the costs of this appeal, which we assess at three gold mohurs.

N. G. *Appeal allowed.*

(5) I. L. R. 23 Cal. 690 (1896).
(6) I. L. R. 30 Cal. 761, 769 (1903).
(7) 10 C. W. N. 209 (1905).
(8) I. L. R. 12 All. 399 (1889).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1012 OF 1906.

BRETT, J. SHARFUDDIN, J. 1908. Heard, 1, April. Judgment, 8, April.	GIRISH CHANDRA CHONGDAR, Plaintiff, Appellant, v SATISH CHANDRA SARKAR and ors, Defendants, Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 60—Registered proprietor, suit for rent by—Tenant's defence on ground of title—Admissibility—Title upon which registration obtained declared void by Court.

Sec. 60 of the Bengal Tenancy Act does not preclude a tenant Defendant from proving that the title under which the Plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect.

Where this was proved, held, *that this was a good defence to the suit.*

This was an appeal preferred on the 15th of June 1906, against the decree of Arthur Goodeve, Esq., District Judge of Zillah Birbhum, dated the 9th of March 1906, reversing that of Babu Hari Proshad Das, Subordinate Judge of that district, dated the 25th of March 1906.

The facts of the case are as follows:—The Plaintiff purchased, on the 31st January 1896, the 16 annas of the zemindari right of Lot Bajeh Santra recorded in the Burdwan Collectorate

GIRISH CHANDRA CHONGDAR v. SATISH CHANDRA SARKAR.

against Defendants Nos. 5 to 9 and their co-sharers. The villages Bajeh Santra and Chakrabunbati were comprised within zemindari No. 1274. The Defendants Nos. 1 to 3 had taken an *ijara* lease of the 10 annas share of the Defendants Nos. 5 to 9 in the said zemindari together with other mehals by 3 *pattahs*. The Plaintiff having got himself recorded as proprietor of the said zemindari brought this suit for an apportionment of rent due to him on account of the said 10 annas share and for recovery of the arrears of rent and cesses of 1307 to 1310 together with interest at 37½ per cent. per annum, according to the stipulation in *kabuliyat*.

The Defendants Nos. 5 to 9 did not appear. But the Defendants Nos 1 to 4 who appeared urged *inter alia* that no relation of landlord and tenant existed between the Plaintiff and themselves, that they had been paying this rent to their lessors, that the sale at which the Plaintiffs purchased had been set aside by the Additional Judge of Burdwan in a suit instituted by one Golam Karim, a co-sharer of the zemindari. In that suit Defendant No. 5, amongst others, appears to have been joined as a *pro forma* Defendant but not Defendants Nos. 6 to 9.

On the issue raised upon the above pleadings, the Munsif observed that though the sale had been set aside by the Additional Judge of Burdwan, an appeal had been preferred to the High Court and the same was pending; that Golam Karim after obtaining the above decree applied for mutation of names but his application was rejected on the ground that the Plaintiff had preferred an appeal to the High Court and his appeals to the Collector and Commissioner were dismissed. Under the circumstances he was of opinion that the Plaintiff was still the recorded proprietor and as such was entitled to get rent from the Defendants under sec. 60 of the Bengal Tenancy Act.

The Defendants Nos. 1 to 4 appealed to the District Judge. By the time this appeal came on for hearing the appeal of the Plaintiff to the High Court against the order of the Additional District Judge setting aside the sale was heard and decided, the High Court having upheld the order of the Additional District Judge. [Vide *Girish Chandra Chongdar* v. *Golam Karim* (1)]. A copy of the High Court's judgment was filed before the District Judge. The District Judge held that as in the view of the High Court the Court of Birbhum which held the sale at which Plaintiff purchased had no power to sell the property in suit and the sale proceedings were void *ab initio*, the foundation on which Plaintiff's case rested was swept away and the Plaintiff's suit must be dismissed. The learned District Judge concluded his judgment as follows:—

"It has been contended that as Golam Karim and others and not the Defendants were parties to the above mentioned proceedings and that as the Defendants themselves tried unsuccessfully, up to the High Court, to have the sale cancelled, the High Court's judgment alluded to above should be held not to be applicable to them; but this contention does not seem to me to be sound. A perusal of the judgment shows that it is a judgment in *re* and not in *personam* and

(1) 10 C. W. N. 347 (1906)

GIRISH CHANDRA CHONGDAR v SATISH CHANDRA SARKAR.

should be considered to apply to any one who is affected by it."

The Plaintiff preferred this second appeal.

Babu Nalini Ranjan Chatterjee for the Appellant.

Babu Hemendra Nath Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The present appeal arises out of a suit brought for apportionment of rent and for recovery of arrears of rent. The Plaintiff claimed to be entitled to a 10 anna share of the rent by virtue of a purchase made by him of the zemindar right of Lot Bajeh Santra recorded in the Burdwan Collectorate as Towzi No 1274 in execution of a certificate of the Birbhum Collectorate against Defendants Nos. 5 to 9 and their co sharers. The Plaintiff after his purchase got his name registered as proprietor under the Land Registration Act and sued to recover rents from the tenant Defendants Nos. 1, 2, 3 and 4.

The Court of first instance decreed the suit, but on appeal the District Judge set aside the judgment and decree of the Court of first instance and dismissed the suit.

It appears that in a suit brought by one Golam Karim and some of the *pro formâ* Defendants in the present suit against the present Plaintiff with the object of setting aside the sale held in pursuance of the certificate granted under the Public Demands Recovery Act (Act I (B C) of 1885), that being the sale at which the present Plaintiff made his purchase and claimed his title as landlord, it was held on appeal to this Court that there was no power in the Burdwan Court to send the certificate for execution to the Birbhum Court and therefore that the subsequent proceedings under which the property was sold by the Birbhum Court were not legal as that Court had no power whatever to sell the property. The sale was accordingly held to be vitiated and void *ab initio.*

The learned Judge of the lower Appellate Court relying on that judgment of this Court in the case brought by some of the original co-sharer proprietors of the estate to have the effect of declaring that the sale under which the Plaintiff claimed his right as purchaser was void, held that the Plaintiff in the present suit was not entitled to recover rent even though he had been registered as a part proprietor, by purchase, in the estate.

The Plaintiff has appealed and it has been contended that the Defendants were precluded from setting up the defence on which the lower Appellate Court relied by the provisions of sec. 60 of the Bengal Tenancy Act. It seems, however, doubtful whether this case, having regard to its peculiar circumstances, can be regarded as one which properly comes within the purview of that section. No doubt the object of that section was to give to a registered proprietor facilities for recovering rent and to prevent tenants from setting up false and vexatious defences by pleading that a third person not registered was entitled to receive rent. But the proof furnished by the proprietor of registration under the Act would only amount to proof of the title under which he claimed to bring the suit, and if, as in the present case, it

GIRISH CHANDRA CHONODAR *v.* SATISH CHANDRA SARKAR.

were proved that the title which he claimed to hold and in respect of which he had been registered had been held by a Court properly constituted to be void and of no effect, then it seems questionable whether the provisions of sec. 60 could be held to apply to prevent a tenant from giving in defence to a suit brought against him for rent evidence to prove that the title under which the Plaintiff claimed to recover rent and in respect of which he had been registered had been held to be invalid. In our opinion the contention advanced on behalf of the Appellant in this appeal cannot prevail. The judgment of this Court on which the learned District Judge has relied clearly lays down that the sale at which the Plaintiff claimed to acquire his title by purchase was void and of no effect and that being the case it must be held that the Plaintiff acquired no title under the sale The mere fact that he had afterwards been registered on the basis of a title found to be void would not be sufficient to support the claim to recover rent when proof has been given by the Defendants that the title in respect of which the Plaintiff had been registered had no real existence. Though we are unable to agree in all the remarks made by the District Judge in his judgment we think that the conclusion at which he has arrived is correct and we therefore dismiss the appeal with costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDER
NOS. 334 AND 351 OF 1906.

MITRA, J.
CASPERSZ, J.
1907.
15, April and
22, August.

RAM RATAN CHUCKERBUTTY, Appellant,
v.
JOGESH CHANDRA BAHTTACHARYA and ors., Respondents.

Registration Act (III of 1877), sec. 17—Mortgage decree for 100 rupees or upwards—Sale by unregistered deed—Validity—Civil Procedure Code (Act XIV of 1882), secs. 232, 559—Preferring a second appeal against parties against whom there was no appeal—Application to make parties to appeal after expiry of time.

A mortgage decree for Rs. 100 or more is assignable without registration.

The validity of an assignment of a decree cannot be questioned after the assignee has been placed on the record as substituted decree-holder.

GOUS MAHOMED *v* KHAWAS ALI KHAN (1) *and* BAIJ NATH LOHEA *v.* BENOYENDRA NATH PALIT (2) *followed.*

KOOR LALL *v.* NITTYANUND SINGH (3) *considered.*

A Respondent should not be placed on the record under sec. 559 of the Civil Procedure Code, after the time for appealing against him has expired.

In a second appeal no decree can be passed against a Respondent against whom there was no first appeal.

These were appeals preferred on the 9th of August 1906, against an order of S. N. Huda, Esq, District Judge of

(1) I. L. R. 23 Cal. 450 (1896).
(2) 6 C. W. N. 5 (1901).
(3) I. L. R. 9 Cal. 839 (1883).

Zillah Pubna and Bogra, dated the 11th of May 1906, affirming that of Babu C. N. Ghosh, Subordinate Judge of that District, dated the 31st January 1906.

The facts of the case are as follows :—

One Deb Nath Saha and others obtained a mortgage decree for about Rs. 2,600 in the Sub-Judge's Court of Pubna and Bogra against Mahim Chandra Saha and others on a registered mortgage bond the consideration of which was Rs. 1,000. The decree-holders afterwards sold the mortgage decree to Ram Ratan Chuckerbutty by a deed which was unregistered for a consideration of Rs. 1,000 and the latter at first executed the decree and sold some of the mortgaged properties but the sale was set aside on the ground of irregularity and consequent loss The execution case was struck off. Ram Ratan Chuckerbutty again proceeded to execute the decree Jogesh Chandra Bhattacharya, a judgment-debtor and Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri, two other judgment-debtors, separately took various objections, one of them was that the purchaser could not proceed against the mortgaged properties as the sale deed was not registered. The Sub-Judge allowed the objection. Ram Ratan Chuckerbutty preferred two appeals before the District Judge one against Jogesh Chandra Bhattacharya and another against Mahim Chandra Saha. No appeal was preferred against the Chaudhuri judgment-debtors. The appeals were filed before the Judge on the 9th March 1906 and they were heard on the 11th May next. At the close of the argument, Ram Ratan Cuckerbutty (Appellant) prayed that Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri might be substituted as Respondents in the appeal preferred against Mahim Chandra Saha, but the Judge refused the application. The appeals were rejected by the Judge. Ram Ratan Chuckerbutty preferred a second appeal against Mahim Chandra Saha in which Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri were made Respondents and the appeals were heard together, and at first, in the absence of the pleader for the Chaudhuri Respondents who later on obtained a re-hearing. The judgments of the High Court on the first hearing, and on the re-hearing are given below :—

At the original hearing,

Dr. Rash Behary Ghosh and *Babu Hem Chandra Sen* appeared for the Appellant ;

Babu Debendra Nath Bagchi for the Respondents.

At the re-hearing,

Babu Baikuntha Nath Das for the Appellant ;

Babu Mohini Mohun Chakravarti for the Chaudhuri Respondents.

The JUDGMENT OF THE COURT at the original hearing was delivered on the 15th April 1907 and was as follows :—

MITRA and CASPERSZ, JJ.—The assignor of the present Appellant obtained a decree on a mortgage and thereafter he assigned his interest in the decree to the present Appellant. The deed of assignment was not registered. The Appellant applied under sec. 232 of the Code for an order to be substituted on the record as the decree-holder.

It appears that the usual notices under sec. 248 of the Code were issued, and the transferee was allowed to execute the

decree. No question was raised at that stage of the proceedings as regards the authority of the Appellant to be placed on the record as the substituted decree-holder. The execution of the decree was carried out and the mortgaged property was sold. Thereafter, on the objection of the judgment-debtor, the sale was set aside and when the Appellant again applied for execution, an objection was raised as to his power to ask for the sale of the hypothecated property, the ground alleged being that the decree being one for sale of immoveable property within the meaning of sec. 17 of the Registration Act, the assignment of it by means of an unregistered instrument did not transfer the right to execute the decree as if it was a mortgage decree. This contention has been allowed by both the lower Courts.

We think that the lower Courts are not correct in the view that they have taken, because, in the first place, the contention raised by the Respondent was not tenable after the transferee was placed on the record as the substituted decree-holder for the purpose of executing the decree and secondly a mortgage decree has been held, at least in two cases of this Court, to be assignable without a registered instrument. The earliest case is *Gous Mahomed* v. *Khawas Ali Khan* (1). In *Baij Nath Lohea* v. *Benoyendra Nath Palit* (2), Hill and Brett, JJ. followed and relied on the decision in *Gous Mahomed* v. *Khawas Ali Khan* (1). The Bombay Court has taken a different view. The decision in *Koeb Lall* v. *Nittyanund Singh* (3), is not in conflict with the later decisions of this Court. We see no reason at present to differ from the later decisions of this Court, and we accordingly direct that the appeals be decreed and the case sent back to the lower Court for the execution being proceeded with. Costs which we assess at one gold mohur will be added as costs in the cause.

Our judgment in appeal No. 334 will govern appeal No. 351.

The JUDGMENT OF THE COURT upon re-hearing was delivered on the 22nd August 1907 and was as follows :—

MITRA and CASPERSZ, JJ.—This appeal must fail as against the Respondents, Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri. They were not made parties, Respondents, in the lower Appellate Court and though an application was made after the hearing was finished, the lower Appellate Court refused the application. The application seems to us to have been properly refused inasmuch as the application was made long after the time for presenting the appeal. They could not, at the stage in which the application was made, be made parties, Respondents, in the lower Appellate Court. In this Court, however, Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri were added as Respondents. But this was done without the leave of the Court and it is doubtful also whether leave of the Court would have been given, if an application were made. But it is quite clear that there could be no decree against them inasmuch as they were not made parties in the appeal in the lower Appellate Court. The appeal as far as it covers the interest

(1) I. L. R. 23 Cal. 450 (1896).
(2) 6 C. W. N. 5 (1901).
(3) I. L. R. 9 Cal. 839 (1883).

of Prasanna Narayan Chaudhuri and Kamal Narayan Chaudhuri is dismissed with costs, one gold mohur.

For the reasons given by us in our judgment, dated the 13th April 1907 the appeal against the original judgment-debtor Mohim Chandra Saha will be decreed. We assess the hearing fee at one gold mohur.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 26 OF 1906.

MACLEAN, C. J.
DOSS, J.
1908.
17, March.

GIRISH CHANDRA DAS MAZUMDAR, Defendant, Appellant,
v.
KUNJO BEHARI MALO and ors., Plaintiffs, Respondents.

Limitation Act (XV of 1877), Sch. II, Art. 116—Breach of covenant by lessee—Suit for damages—Registered pottah *but no* kabuliyat—*Limitation—Failure to pay rent due by lessor to superior landlord—Sale of lessor's interest by superior landlord—Measure of damages—Contract Act (IX of 1872), sec. 73* (n)—*Contributory negligence.*

A suit to recover damages for breach of covenants contained in a lease, the terms of which were embodied in a registered **pottah** ***executed by the lessor only is governed by Art. 116 of Sch. II of the Limitation Act.***

AMBALAVANA v. VAGURAN (1), KOTAPPA v. VALLUR ZAMINDAR (2), ZEMINDAR OF VIZNAGRAM v. BEHARA SURYANARAYANA (3) *relied on.*

APAJI v. NILKANTHA (4) *dissented from.*

Where the lessee agreed with his lessor to pay the rent due by the latter to the superior landlord but failed, and the superior landlord then recovered a decree for rent against the lessor and sold his interest in the lease-hold property in execution of the decree,

Held—*That the sale was not the natural consequence of the lessee's default, as the lessor ought to have paid the rent due to the superior landlord when he came to know of the lessee's default, and the lessee should not be made liable for the value of the property sold.*

This was an appeal preferred on the 31st of January 1906, against the decree of Babu Mohendra Nath Mukerjee, Additional Subordinate Judge of Zillah Khulna, dated the 15th of September 1905.

The Plaintiff, who was the predecessor in title of the Respondents, sued in *forma pauperis.* His case was that on executing a mortgage bond on the 14th Ashar 1299 B. S., in favour of the Defendant No. 1, Girish Chandra, he borrowed Rs. 2,500, that on the same day Defendant Girish took an *ijara pottah* from him in the name of Defendant No 2, Umesh, by which his properties, Amarbunia under Iswar Mall and Gulshekhali under Maharajah Durga Charan Laha, were leased, with Rs. 2,487 as. 6 as *hastabud*, on condition that he would pay Rs. 1,340 as. 7 annually to the superior maliks as rent, that Rs 100 would be deducted annually for collection charges, that Rs. 200 yearly would be paid to Maharajah Durga Charan Law on account of a kistibundi deed from 1299

(1) I. L. R 19 Mad. 52 (1895).
(2) I. L. R. 25 Mad. 50 (1901).
(3) I. L. R. 25 Mad. 587 (1901).
(4) 3 Bom. L. R. 667 (1901).

GIRISH CHANDRA DAS MAZUMDAR v. KUNJO BEHARI MALO.

to 1301, B. S., and Rs. 100 in 1301, and that the rest would be credited to the reduction of the mortgage money due to the Defendant No. 1 yearly, and the properties in question would be brought into his khas possession in 1304, after satisfaction of the mortgage debt in full. The rate of interest stipulated in the *kat kobala* was 1 Re. 6 as. per cent. per mensem, and the debt was repayable by Cheyt 1303, B S., and the *ijara* lease also ran for 5 years. The plaint further stated that if the Defendant had acted according to the terms of the *ijara* lease, the Plaintiff would have received from him Rs. 966 at the end of the year 1303, that as the Defendant did not pay off the Maharaja's kistibundi debt, the latter brought a suit thereon in No. 19 of 1897 and obtained a decree in execution of which his property Gulshekhali was sold on the 21st February 1898 at Rs. 4,100, which was credited in reduction of the decretal amount of which Rs. 388 as. 7 p. 6 still remained due and unpaid, that as the rent due to the Maharaja up to the last kist of 1302, B. S., was not paid, he brought suit No. 2 of 1896 and obtained a decree for Rs. 1,848 as. 8 which also were due with interest, that the Maharaja again brought another suit for rent numbered 40 and obtained a decree for Rs. 965 as. 4 which was also due with interest, that as Iswar's rent was not paid, he brought suit No. 245 of 1895 and obtained a decree for Rs. 1,131 As. 5 in execution of which his Chuk Amarbunia was sold at auction at Rs. 1,100, which was applied in part satisfaction of the decretal amount, and the balance was still due, and that as the Plaintiff suffered loss through the default of the Defendant, he was entitled to recover from him compensation on the following heads :—

(1). Rs. 966 which he should have received at the end of the year 1303, B. S.

(2). Rs. 1,848 as. 8 the decretal amount due under decree in suit No. 2 of 1896.

(3). Rs. 388 as. 7 p. 6, the balance due under decree in Suit No. 19 of 1897.

(4). Rs. 50 the balance due under decree in Suit No. 245 of 1895.

(5). Rs. 965 as. 4 as due under decree in Suit No. 48 of 1897.

(6). Fifteen times of Rs. 1,043 as 15 = Rs. 15,659 as. 1.

The Plaintiff further prayed for a declaration that his mortgage to the Defendant No. 1 had been satisfied.

Upon the Defendant's pleadings various issues were raised of which the following only are now material.

(1) Whether the claim or any part of it was barred by limitation.

(2) What amount of damages was the Plaintiff entitled to get?

The Subordinate Judge gave the Plaintiff a decree for Rs. 13,000 odd with costs and interest. Out of this Rs. 10,000 represented the value of the properties the Plaintiff lost by reason of the sales.

The Defendant appealed and challenged the decision of the Sub-Judge, first, on the ground that the suit was time-barred, and secondly that the Subordinate Judge had erred in determining the amount of damages.

D. Rash Behary Ghose, Babus Tarak Chandra Chuckerbutty and *Bhujayendra Mustaphi* for the Appellant.

Babus Mohendra Nath Roy and *Brojo Lal Chuckerbutty* for the Respondents.

GIRISH CHANDRA DAS MAZUMDAR *v.* KUNJO BEHARI MALO.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is an action upon a covenant contained in a *pottah*, dated the 27th of June 1892. By that *pottah* one Umesh Chandra Ghose who admittedly was a *benamdar* for the principal Defendant, Defendant No. 1, Girish Chandra Dass,—and for the purposes of this argument Girish Chandra Dass has been treated as the covenantor and the person liable under the covenant,—took an *ijara pottah*, for a certain term of certain land: and, the agreement between the lessor and the lessee was that the lessee was to pay to the superior landlords the rents which the Plaintiffs were bound to pay to them under their contract with the superior landlords and to make certain other payments. The covenant was that out of the *hastabud* of Rs. 2,487 odd the lessee was to have Rs. 100 every year to the end of the term for collection charges, that out of the balance he was to pay the rent due to the maliks, the amount being Rs. 1,234 annually; that he was also to pay the Road-cess and Public Works Cess—matters with which we are not concerned to-day,—and out of the *hastabud* of Rs. 2,487-6 he was also to make certain other payments, and to pay the ultimate surplus to the Plaintiffs. The lessee did not execute the *pottah*, and no *kabuliyat* was executed: but it has not been disputed that the only contract between the parties was that contained in the *pottah*, and the Defendant No. 1 has always treated that as being the contract between the parties. The Defendant No. 1 failed to pay the rent due to superior landlords, and the Plaintiff brought the present suit claiming to recover the amount due to them under the covenant as rent. It was held by this Court that they could not sue for the amount as rent, that they must sue for damages for the breach of the covenant I have referred to; and, the suit was then remanded to the Subordinate Judge, and the Subordinate Judge has allowed the Plaintiffs a sum of between thirteen and fourteen thousand rupees, in respect of damages for breach of this covenant. The Defendant No. 1 has appealed: and, only two points have been submitted for our consideration. Both are points of law. The first is that, inasmuch as there was no default in making the payments within three years from the date of the suit, which was instituted on the 17th of April, 1900, the suit is barred under Art. 115 of the second Schedule to the Limitation Act. The Plaintiffs, however, contend that it is Art. 116 and not Art. 115 which applies to the present case, Art. 116 giving them a period of six years instead of three years: and, if the six years' rule applies, there will be, at any rate, a substantial sum due to them from the Defendant. This is the first point.

The second point is that the Subordinate Judge has proceeded upon an erroneous principle in measuring the damages. It appears that, after the Defendant had failed to pay the rent due to the superior landlords, they sued the Plaintiffs who were his tenants, and recovered the amount and in execution of their decree the tenures were sold and the Plaintiffs consequently lost their property. The Subordinate Judge has held that Defendant No. 1 is liable for this loss

GIRISH CHANDRA DAS MAZUMDAR v. KUNJO BEHARI MALO.

under his covenant, and has assessed the amount at over Rs. 10,000. He has also allowed a sum of three or four thousand rupees in respect of the rents which the Defendants ought to have paid to the superior landlords and which they failed to pay. The Defendants contend that this is a wrong principle and that the Plaintiffs can only recover in respect of damages on the covenant the moneys which the Defendant covenanted to pay to the superior landlords, with interest on the same. Those are the two questions we have to deal with.

Upon the first question which is not free from difficulty, my view is that Art. 116 applies. The only contract between the parties was that which was evidenced by the *pottah*, the terms of which were accepted by the Defendant and acted upon by him, although he did not sign the *pottah* nor did he execute any *kabuliyat*, and, that contract was in writing and registered. Does it not then fall within the language of Art. 116 as "a contract in writing registered." It is said that that article does not apply, because the *pottah* was not executed by the Defendant, and 'contract' must mean a contract executed by both parties. If there had been a *kabuliyat* executed by the Defendant No. 1 as ordinarily there would have been, no question could have arisen. But does the fact, as this is admittedly the only contract between the parties, make it less a "contract in writing registered," because the Defendant has not himself executed it? If it is conceded, as it is conceded, that this was the only contract between the parties, then, it is difficult to say that it is not a "contract in writing registered." The matter is not free from authority, although there appears to be no authority in this Court. But there are two or three decisions of the Madras High Court which certainly support the view I have stated. I may refer to the case of *Ambalavana* v. *Vaguran* (1) where it was held that in a suit for rent accrued due more than three years before the date of the plaint, where it appeared that the contract between the landlord and tenant was comprised in a registered document which was signed only by the latter, the suit was not barred by limitation: in other words, that the case fell within Art. 116. And, the learned Judges there say this: "In our opinion a contract which has, in fact, been registered is no less a 'contract in writing registered' within the meaning of Art. 116, because it bears the signature of only one of the parties in the absence of any statutory provision requiring the signature of both parties." The same view was taken, or at any rate the same principle was adopted in two cases reported in the twenty-fifth volume of the Madras Series. The first is the case of *Kotappa* v. *Vallur Zamindar* (2), where it was held that "the undertaking in the mortgage was an 'agreement in writing registered' within the meaning of Art. 116 of the Limitation Act and that consequently the claim was not barred The fact that the instrument was not signed by B did not take the case out of the operation of that article." I may also refer to the case of *Zemindar of Viznagram* v. *Behara Suryanarayana* (3), where the same view was

(1) I. L. R 19 Mad. 52 (1895).
(2) I. L. R. 25 Mad. 50 (1901).
(3) I. L. R. 25 Mad. 587 (1901).

GIRISH CHANDRA DAS MAZUMDAR v. KUNJO BEHARI MALO.

taken. No doubt, a contrary view has been taken by the Bombay High Court in the case of *Apaji* v. *Nilkantha* (4), where it was held that the words "contract in writing contemplate an agreement in writing signed by both parties affected thereby." That view seems to import words into the section which are not to be found there. There is no Statute of Frauds in India which in order to bind Defendant No. 1 would make it necessary that the *pottah* should have been executed by him. Here the assent of the Defendant No. 1 to the term of the *pottah* has been clearly substantiated, and the document has been acted upon by him: and, though the point is not free from difficulty, I think the case falls within Art. 116 and that the suit is not barred by limitation.

Then on the other point I am unable to agree with the learned Subordinate Judge. His damages for the loss of the Plaintiffs' property which was attributable to their own default are too remote. It was entirely their fault that they allowed the property to be sold The Plaintiffs were primarily liable for the rent: and directly they found that the Defendant No. 1 had broken his covenant and had not paid the rents, they ought to have paid it. If they have done so, the property would not have been sold and they would have sustained no loss. I do not think that the loss, which they sustained and which is attributable to their own default, is the natural consequence of the default of the Defendant No 1 to comply with his covenant. It is reasonably clear, if we look at sec. 73 of the Indian Contract Act, that the Plaintiffs were only entitled to compensation for any loss or damage which naturally arose in the usual course of things from the breach of the contract: and, illustration (*n*) to that section supports this view.

The result then is that the decree of the Subordinate Judge must be discharged, and the matter must go back to him to ascertain what sums the Defendant No. 1 defaulted to pay under his covenant: and, those sums the Plaintiffs are entitled to recover, with interest, and both parties will be entitled to proportionate costs of this appeal, and also to proportionate costs of the suit.

We are now told that there was a breach of the covenant to pay Rs. 200 a year for three years and Rs. 100 for the fourth year as rent due to the maliks—Maharajah Durga Churn Law and others. We are told now,—I did not understand it before,—that there has been a breach of that covenant also. If there has been a breach of that covenant, and if these sums have not been paid by Defendant No. 1, and the Plaintiffs have had to pay them, then the Plaintiffs are entitled to recover them against Defendant No. 1 with interest.

DOSS, J.—I agree.

Appeal allowed:

N. G. *Case remanded.*

(4) 3 Bom. L. R. 667 (1901)

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MAY 18, 1908. [No. 27

Contents.

NOTES

THE HON'BLE THE CHIEF JUSTICE HAS BEEN GRANTed furlough on urgent private affairs with effect from the 22nd May 1908 or from any subsequent date on which he may avail himself of it to the 27th August 1908 inclusive. During his absence the Hon'ble Mr. Justice Rampini, the senior Puisne Judge, will for the second time officiate as Chief Justice. Mr. A. E Ryves, Government Advocate, United Provinces, will fill the vacancy thus created on the Bench till the vacation.

WE ARE CREDIBLY INFORMED THAT THE DECISION OF the Special Bench of the Calcutta High Court in *Radha Prosad Mullick* v. *Ranimoni Dassi* (10 C. W. N. 695: s. c. I, L R. 33 Cal. 947) affirming the judgment of Woodroffe, J. (9 C. W N. 1033), has been upset by the Privy Council. The telegram to one of the attorneys is as follows :—"Ranimoni, decree varied. Testator's daughters take only life interest with benefit of survivorship between themselves. Estate pays costs." It is not clear from the above whether their Lordships of the Privy Council have decided that there is an intestacy after the life interests of the daughters Ranimoni and Premmoni or that the daughter's sons alive at the death of the testator take a vested remainder under the Will. But one thing is certain and that is that the daughters do not under the Will take an absolute interest, as was held by the Calcutta High Court.

IN *Jogendra Mohan Sen* v. *Uma Nath Guha* reported at p. 646 of this issue, we observe that their Lordships, the Chief Justice and Das, J., have expressly dissented from the judgment of Pratt and Gupta, JJ., in *Munshi Ganga Bishen* v. *Sheikh Mahomed Jan*, 10 C. W. N. 948: s. c. I. L. R. 33 Cal. 1193 and have held that the law as to the mode of appropriation of payments by a debtor as laid down in secs. 59 and 60 of Contract Act applies to the case of payments of land revenue. At the time the latter judgment was reported we expressed doubts as to the soundness of the reasons given therein for the contrary opinion (see 10 C. W. N. ccxlv). We pointed out that the principle of sec. 59 of the Contract Act is actually embodied in secs. 8 and 15 of the Revenue Sale Law and the view that the Sale Law is self-contained and precludes reference to the principles of the law of Contract, can hardly be maintained. We are therefore glad to observe that the correct view of the matter has at last prevailed.

WE INVITE ATTENTION TO THE FULL BENCH DECISION of the Bombay High Court, reported at p. 111 of I L. R. 30 Bom In that case one P., a clerk in the General Post Office, was charged with having committed theft in respect of a registered letter, which contained some currency notes. S, a friend of the accused had made a statement to the police officer. which had been reduced to writing. At the trial S. denied having made the statement, whereupon the Judge presiding at the Criminal Sessions admitted the statement in evidence both to discredit S. and also as evidence against the accused in that it contained statements corroborating the confessions which the accused had made.

ON A CERTIFICATE GRANTED BY THE ADVOCATE-General the question arose for the decision of the Full Bench whether the writing or the statement was admissible in evidence. The Full Bench held that having regard to sec. 162 of the Criminal Procedure Code the writing ought not to have been admitted or used in evidence against the accused. But it seems there was some diversity of opinion as to the admissibility of the statements contained in the writing or the writing itself for impeaching the credit of the witness who made the statement before the police. Russel, (acting) C. J., held that the document might be used to contradict the witness by putting it in the hands of the police officer to refresh his memory. Chandravarkar, J, held that not the writing but the statement contained in the writing could be used only for the purpose of con-

tradicting the witness at the trial. Batty, J., was of opinion that the statement could be used for the purpose of impeaching the credit or in corroboration of the witness who made it. But Beaman, J., held that the writing ought not to have been admitted at all, or its contents allowed to be used by the prosecution for the nominal purpose of contradicting the witness

---

MR. JUSTICE BEAMAN GIVES ELABORATE REASONS FOR the opinion arrived at after a full consideration of sec. 162, Cr. P C At page 141 of the report he remarks "I gather from some passages in the judgments which have been delivered by my learned colleagues that while the use of the writing itself as substantive evidence against the accused was clearly and certainly wrong, it is by no means clear in the opinion of some of them, that the statement, that is to say, the contents of the writing might not have been quite properly used, if proved, sentence by sentence, by the police man who recorded it against the prisoner. And I take it that that view rests upon a distinction between the "writing" and the "statement" which is embodied in the writing. With all respect and deference to my learned and and honourable colleagues I think that that distinction is a distinction of form rather than of substance. If the "statement might properly be admitted and used to contradict the prosecution witness who made it, as under the general rule of evidence it undoubtedly could, then I see no reason in principle why that statement should not be provable in the usual way and by the best evidence of it, namely the written record of it"

THE LEARNED JUDGE THEN POINTS OUT THAT SEC 162, Cr. P. C, embodies an exception to the general law of evidence and the proviso to that section engrafts an exception upon this exception. Before the amendment of the Criminal Procedure Code in 1898, statements made to the Police and recorded by them could be used by the accused in his favour but not against him. But now under sec. 162, Cr. P. C., the record of the statement cannot be used as evidence at all. But when a witness is called for the prosecution whose statement to the Police has been taken down in writing, the Court shall, on the request of the accused, refer to such writing, and may then direct that the accused be furnished with a copy thereof: and such statement may be used to impeach the credit of such witness. It thus appears that the only purpose for which such a statement can be used is to impeach the credit of a witness called for the prosecution and this use of the statement is to be made by the accused and not by the prosecution.

UNDER THE EVIDENCE ACT, SECS. 155 AND 157, former statements made by a witness may be proved either to impeach his credit or corroborate his testimony. But the statements when used for the purpose of corroboration must have been made before any authority legally competent to investigate the fact or at or about the time when the fact (relating to which the statement was made) took place. If these two sections of the Evidence Act applied to statements of witnesses made before the Police, there would have been practically no necessity for the enactment of sec. 162 of the Criminal Procedure Code. So that it is reasonable to suppose that the Legislature by enacting this section declared that the general rule of evidence is not applicable to the case of such statements Some of the learned Judges in the Full Bench case seemed to hold that by sec. 162 only the writing embodying the statement is made irrelevant, but the statement contained in the writing is not made irrelevant

---

BEAMAN, J., VERY PERTINENTLY OBSERVES, IF THE statements are relevant under the Evidence Act, why should the writing, which is the best evidence of the statements, be excluded as evidence? You want to prove the statement, but you are precluded from proving the writing which contains the statement in order to show that the statement was really made. It might be said that the Police officer may not have correctly recorded the statement or may have recorded many things which the witness did not say, so that if the writing is allowed to go in, many things, which the witness did not say before the Police, will be admitted in evidence. But this danger is not obviated by allowing the Police officer to depose that such and such statements were made to him by the witness, either from his own recollection or by refreshing his memory by reference to the writing. But if the statement as well as the writing be excluded from evidence, except that it may be used by the accused to impeach the credit of a prosecution witness, no such danger could arise. It might be urged that failure of justice might sometimes take place if such statements are not allowed to be used even for the purpose of impeaching the credit of a witness who makes a statement at the trial contrary to his statement made before the Police. But investigating Police officers may take the statement of witnesses before respectable persons who might be called to impeach the credit of those witnesses when they make different statements in Court.

Reviews.

WORKMEN'S COMPENSATION CASES VOL. IX. *Edited by Mr. R. Minton-Senhouse, Bar-at-law, His Honour Judge Ruegg, K. C., and F. J. Coltman, Bar-at law Butterworth & Co., Law Publishers, London.*

This work presents in a collected form the reports.

of cases decided under the Workmen's Compensation Act from September 1906 to August 1907. The fact that these series of reports have reached their 19th year shows that it is of some utility both to the profession and to the employees of labour and workmen in England. But we must say that as the Acts on which the decisions turn have no application to this country, this series of reports are only of academic importance to the profession in India.

MOZELEY AND WHITELEY'S LAW DICTIONARY. *Third Edition. By L. H. West, L. L. D, and F. G. Neave, L. L. D. Messrs. Butterworth & Co. Law Publishers, London.*

The Indian practitioners are sure to find this work very useful. Within its short compass not merely explanations but, in many instances, a short exposition of the law connected with the legal terms are given. For instance under the term "assizes" a short history of the jurisdiction and its subsequent modifications under the statutes are given and under the heading Courts of Assizes expressions such as "Oyer and Terminer" are explained. Cross references are given in appropriate places for tracing out such terms under proper headings. As other instances, we may mention that under the heading "Lords" the precise significance of the terms "Lord Mayor's Court," "Lord Justices of Appeal," "Lords of Appeal," "Lords of Appeal in Ordinary" is given. Under the title of Reports we find a list of 14 pages giving the names of Reports and the abbreviations generally used in their connection. In the present edition a larger member of Latin maxims with translations are given. Indian readers will find it interesting and even instructive to turn over the pages of this work at random when they have nothing particular to do.

OUTLINES OF MEDICAL JURISPRUDENCE FOR INDIA. *Hehir and Gribble. Fifth edition. Higginbotham & Co., Madras, 1908.*

The authors, one a member of the Indian Medical Service and the other (now deceased) a member of the Indian Civil Service in its judicial branch, have endeavoured in this work "to deal with Indian Medico-legal matters from a practical standpoint, although, when absolutely necessary to the elucidation of the text, the scientific aspect has not been neglected." The result is a work eminently adapted to the requirements of all students of Medical Jurisprudence and of others who though not belonging to the medical profession still require in the practice of their profession a working acquaintance with the subject, such for instance as pleaders, police-officers and members of the judicial service. The present edition brings the informations contained in the work up to date as may be seen from the references to the earthquake at Dharmasala in the chapter on wounds and injuries. The subject of injuries has been dealt with in a very elaborate manner which makes this work of special value. The advantages of the combined authorship is specially observable in the chapters on "Poisons," "Rape," "Unnatural Offences," "Abortion" and "Exposure of infants." These subjects are dealt with in a more practical manner than in the standard works on Medical Jurisprudence by medical men alone. The chapters on "Identification" and "Chemico-legal examination" give valuable hints to guide medical men. The chapter on Insurance is a special feature of the book. The few paragraphs dealing with extortion of confessions (paras. 129—134) are also instructive. Altogether the book is admirable as a work of ready reference. It will also prove useful to students, though perhaps from their point of view, more illustrative cases than are to be found in it would have added to the interest of the work.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION NO. 201 OF 1908 DEONARAIN SINGH AND OTHERS, Petitioners, v. THE EMPEROR. 27th April 1908.

Indian Penal Code secs. 147, 325, 326, separate sentences under—Commitment to the sessions, propriety of.

The facts of the case were briefly these:—

There was a serious riot in connection with the cutting of a pyne in the course of which several persons of the complainant's party were wounded. One of them R received wounds on the back of his head; he was taken to the hospital and about 8 days after his admission gangrene set in and he subsequently died. The Petitioner Behari Singh was the person who inflicted the wounds on R. Another Petitioner Gonesh Singh fractured the scapular bone of a man P. Behari was convicted by the Deputy Magistrate under secs. 147 and 326, Gonesh under secs. 147 and 325, whilst the other Petitioners under sec. 147, I. P. C. On appeal the sentences were upheld. The present rule was issued on the grounds (1) that they ought to have been committed to the Court of Sessions and (2) that separate sentences under secs. 147 and 326 or 325 upon Behari Singh and Ganesh Singh were bad in law and that one of them ought to be set aside.

Their Lordships observed:—

"It is quite clear that the reason why the Deputy Magistrate did not commit the accused persons to the Court of Sessions was that there was no sufficient ground for supposing that the death of R. was the

result of the wound inflicted by the accused, Behari Singh. No doubt Behari Singh did inflict an incised wounds on the back of the head of R. But the man's death was the result of the gangrene. And the medical evidence shows that there was no apprehension of the life of R. when the gangrene set in. It further shows that the gangrene was due to an anæmic condition of body and old age. . . .

As to the alternative part of the rule namely why one of the separate sentences inflicted upon Behari Singh and Gonesh Singh should not be set aside, the learned Counsel for the Petitioners has not in his address to us said anything. But we have considered this question and we think that Behari Singh and Gonesh Singh have been rightly sentenced under both sections. The injury which Behari Singh inflicted on the head of R was not committed in prosecution of the common object of the unlawful assembly. Similarly the fracture of the scapular bone of P. by Gonesh Singh was not committed in the course of the prosecution of the common object. They were individual acts of these individual persons. The Deputy Magistrate has cited the case of *Nilmoni Poddar* v. *Queen Empress* (I. L. R. 16 Cal. 442) in which it has been held that separate sentences passed upon persons convicted of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt.'

Mr. P. Mitter with *Babu Chandra Shekhar Prosad Singh* for the Petitioners

Mr. Ashgar with *Babu Atul Chandra Dutta* for the Opposite-party.

B. C. *Rule discharged.*

CRIMINAL REVISIONAL JURISDICTION. Before WOODROFFE and COXE, JJ. CRIMINAL REVISION No. 225 OF 1908. MENARADDI AND OTHERS, Petitioners, v. THE EMPEROR AT THE PROSECUTION OF KALU SHEIKH, Opposite-party. 24th April 1908.

Indian Penal Code, sec. 147, charge under—Three alternative common objects alleged, legality of.

The Petitioners were convicted under sec. 147, I. P. C. and sentenced to various terms of imprisonment. In the charge against the Petitioners 3 alternative common objects were mentioned *viz.*, to dispossess Kalu from a field by criminal force, or to compel Kalu by criminal force not to transplant paddy in that field which he was legally entitled to do, or to obtain possession of that field by means of criminal force. It appears the Sessions Judge in appeal did not find which of the common objects had been proved. This rule was obtained to set aside the conviction on the ground *inter alia* that the charges against the Petitioners were unsustainable in law.

Their Lordships observed :—

"The points raised are reasonably clear. They are these: that, three alternative common objects were alleged in the charge. It is contended that the charges are unsustainable. It is further contended that no common object as stated in the charge has been found in the judgment.

It is necessary that the Appellate Court should determine whether the charges are sustainable, if so, which of them has been made out. The rule, must therefore, be made absolute. The appeal must be re-heard."

Mr. Caspersz with *Babu Tarak Chandra Chakravarty* for the Petitioners.

Mr. Orr, Deputy Legal Remembrancer for the Crown.

B. C. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 1292 OF 1906 CHANDER DUTT JHA, Defendant, Appellant v RAGHUNATH BHAGAT AND OTHERS, Plaintiffs, Respondents. 12th May 1908.

Survey Khatian, entry in, as Brahmottur—*Onus to prove tenancy.*

The appeal arose out of a suit for confirmation of possession in and declaration of title to land. The Plaintiffs alleged that the disputed land had all along been in their possession as their *mal* land and that the Defendant first party, Chunder Dutt Jha, fraudulently got the land recorded in the Settlement Khatian as his *brahmottur* land, although he was never in possession. The Defendant first party urged that the land in question was his *brahmottur* land and that he had been in possession of that land. The Plaintiffs were admittedly the maliks of the Mouzah. In the Thakbust papers of 1848 there was no mention of the *brahmottur* land in that year. It was admitted that the land in question was entered in the *khatian* of the survey proceedings as a *brahmottur* land.

The Court of Appeal below threw the onus on the Defendant, reversed the judgment of the first Court and decreed the suit.

Held—The onus was not on the Defendant to prove his tenancy but on the Plaintiff to show that the entry made was incorrect.

C. R. Macdonald v. *Babulal Purbi*, 4 C. L. J. 519 *followed.*

Babu Kulwant Sahay for the Appellant.

Moulvi Mahammad Mustafa Khan for the Respondents.

A. T. M. *Case remanded.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 11 OF 1907.

HARINGTON, J. 1908. 3, March.

SETT MUNNA LALL PARRUCK *v.* FREDERICK GAINSFORD and another.

Provident Fund, attachment of—The Provident Funds Act (IX of 1897 and IV of 1903)—The Calcutta Municipal Act (III, B. C. of 1899), sec. 73—Trustees of the Fund, claim of—Suit—Application.

The Provident Fund established by the Corporation of Calcutta to which the provisions of the Provident Funds Act IX of 1897 (and consequently the amending Act IV of 1903) were made applicable by the Local Government Notification, dated 8th July 1902, is not liable to attachment.

The suit was instituted on the 9th January 1907 against the Defendants who were the Secretary and Chief Accountant respectively of the Corporation of Calcutta for the recovery of Rs. 3,513 and interest due on their joint promissory note, dated 14th December 1905. On the 25th June 1907, the Plaintiff applied for and obtained a rule calling upon the Defendant Gainsford to show cause why he should not furnish security to satisfy any decree that might be passed against him in the suit on or before the 22nd November 1907, and why in default thereof, the sum of Rs. 6,000 payable to him out of the Provident Fund created under sec. 73 (*c*) of the Cacutta Municipal Act (III of 1899, B. C.) should not be attached until the final determination of the suit or until the further order of the Court. The trustees of the Provident Fund were also by that order prohibited and restrained from making payment of the said sum of Rs. 6,000 until the cause was shown. The order was served on the trustees on the 11th July 1907. No cause was shown.

The trustees of the Corporation Provident Fund thereupon applied upon notice to the Plaintiff for an order that the sum of Rs. 6,000 payable to the Defendant Gainsford out of the said Fund was not liable to attachment and that the said order of the 25th June 1907 be vacated or modified.

Mr. S. P. Sinha appeared in support of the application on behalf of the trustees. He pointed out that, in the exercise of the powers vested in the Government under sec. 6 of the Provident Funds Act (IX of 1897), the provisions thereof were extended to the Provident Fund established by the Corporation of Calcutta by Government Notification, dated 8th July 1902, and published in the *Gazette of India* on the 12th July 1902, and that sec. 2 of the Provident Funds Act as amended by Act IV of 1903 forbids any attachment of compulsory deposits to the Fund. Besides, he showed, that under Rule 25 of the Rules framed by the Corporation pursuant to the power granted to it by sec. 73 (*c*) of the Calcutta Municipal Act (III, B. C. of 1899), as soon as notice of an attachment of a depositor's money was given to the trustees of the Fund, that money immediately become forfeited to the use of the Fund. He cited—***Veerchand Nowla* v. *B. B. & C. I. Railway Co.*** (1).

Mr. B. C. Mitter for the Plaintiff opposed the application. He argued that the application was misconceived and submitted that whatever were the rights

(1) I. L. R. 29 Bom. 259 (1904).

of the trustees of the Fund, they should enforce the same and seek relief by a properly constituted suit. Referred to *Mt. Rambutty Kooer* v. *Kamessur Pershad* (2), *Basavayya* v. *Syed Abbas Saheb* (3). Furthermore, there was nothing to show that the contributions by Gainsford were compulsory to bring it within the operation of sec. 2 of the Provident Fund Act.

Mr. Sinha in reply, cited, *Chidambara Patter* v. *Ramasamy Patter* (4).

The JUDGMENT OF THE COURT was as follows :—

HARINGTON, J.—This is an application made on behalf of the trustees of a Provident Fund, created by the Calcutta Municipal Corporation for an order that it may be declared that a sum of Rs. 6,000 payable to one Gainsford is not liable to attachment.

It appears that an action was brought against Gainsford and another man, in which the Plaintiff obtained an order calling upon Gainsford to show cause why the sum of Rs. 6,000 payable to him out of the Municipal Provident Fund should not be attached. I gather from what has been stated in the arguments that no cause was in fact shown ; the present trustees were not parties to the rule and did not appear and the order was made *ex parte* against Gainsford and the order prohibited the trustees from paying this sum of Rs. 6,000 either to Gainsford or to any other person. On receiving notice of that order the trustees come forward with the present application, the object of which is to remove that prohibitory order, on the ground that the sum in question is not liable to be attached.

Mr. Sinha, who appears for the applicants, rests his contention on two grounds. The first is that by virtue of the Statute Law, deposits in the Calcutta Municipal Provident Fund cannot be attached ; and, secondly, that under the rules under which this Fund is regulated, when a notice of attachment is served on the trustees then the money standing to the credit of the subscriber against whom the attachment is issued, is *ipso facto* forfeited to the use of the Fund.

Mr. Mitter for the Plaintiff first objects that the applicants are not entitled to appear. I confess I do not accede to that argument. The Fund is in the hands of the applicants. There is a Regulation under which the applicants would be entitled, under certain circumstances, to refuse to pay that Fund to Gainsford and to deal with it as provided under Rule 23. I fail to see why the applicants should be debarred from asserting any claim that the trustees may have to this Fund as claimants to a Fund which has been improperly attached to answer the debt of Gainsford.

It is a case in which the present claimants do not assert their claims as trustees for Gainsford but as trustees for other persons who become entitled on service of notice of attachment of the property to which Gainsford might have otherwise been entitled. In my opinion, to these Funds the trustees are as much entitled to assert their claim under the claim sections of the Code, as any other person claiming to be entitled to the Rs. 6,000 Fund in question.

(2) 22 W. R. C. R. 36 (1874).
(3) I. L. R. 24 Mad. 20 (1900).
(4) I. L. R. 27 Mad. 67 (1903).

SETT MUNNA LALL PARRUCK v. FREDERICK GAINSFORD.

Then the other argument, on which Mr. Mitter relies on the merits, is that the Act, on which Mr. Sinha relies, does not apply to the present Fund, because he says, it applies to compulsory deposits, and that there is nothing in the affidavits to show that this was not a voluntary deposit by Gainsford; moreover the Regulations by which the Fund is governed shew there were two kinds of deposits, that is, compulsory and voluntary deposits.

Now, para. 6 of the affidavit sets out that Gainsford used to contribute to the Fund under the Rules and Regulations to which the affidavit refers. These Rules and Regulations in cl. 5 contain a reference to a compulsory contribution of a sum equal to a 5 per cent. on the amount of the salary of the subscriber, they also provide in sub-cl. 2 that any subscriber may contribute by monthly instalments such further sum as he may think proper provided that the total amount thus voluntarily contributed in any one year does not exceed 5 per cent. upon his salary for such year. But both what is called a compulsory subscription under the Rules, and a voluntary subscription, are subject to the Rules and Regulations as to management of the Fund.

The word 'compulsory deposit' is defined in the Provident Funds Act (IX of 1897) and under sec. 2, sub-sec. 4, a 'compulsory deposit means a subscription or deposit which is not repayable on the demand or at the option of the subscriber or depositor and includes any contribution which may have been credited in respect of, and any interest or ncrement which may have accrued on, such subscription or deposit under the rules of the Fund.'

These payments made by Gainsford, whether they are described under the Rules as voluntary or compulsory, or both, come within the definition given in sec. 2, sub-sec. 4 of the Act which I have just read. In my opinion, therefore, they are governed by that Act and by the amending Act, namely, Act IV of 1903.

It should be observed that these Acts do not of their own force apply to the Fund which is now the subject-matter of the present application, but a Notification was made on the 8th July 1902, under sec. 6 of the Provident Funds Act extending the provisions of the Act to the Provident Fund established by the Corporation of Calcutta, that is to say, extending it to the present Fund. That Act having been extended, the amending Act (IV of 1903) applies, and by sec. 2 of that Act the compulsory deposits are made 'not liable to any attachment under any decree or order of a Court in respect of any debt or liability incurred by a subscriber to, or depositor in, any such Fund and neither the Official Assignee nor a Receiver appointed under Chap. XXII of the Civil Procedure Code shall be entitled to, or have any claim on any such compulsory deposit.'

The effect of these Acts is in my opinion to prevent the Fund in the hands of the trustees being subject to attachment in respect of the debt by Gainsford to the person who is the Plaintiff and the result is, therefore, I think, this application must be allowed and the attachment removed.

SETT MUNNA LALL PARRUCK *v.* FREDERICK GAINSFORD.

I desire to add that it has been stated that the notification which extended these Acts to the particular Fund in question was not brought to the notice of the Court when the order for attachment was made. It is stated at the bar that a search was made but, by some accident, the existence of the notification was not discovered, the consequence was that it was not brought to the notice of the Court and I have very little doubt that, if it had been brought to the notice of the Court, the order for attachment would never have been made.

As it is my view that the statutes to which I have referred affect the Fund in question, it becomes unnecessary to discuss the questions raised by Mr. Mitter as to the construction of the Rules. The application for an order directing that the sum is not liable to be attached must be allowed with costs.

Mr. Bhupendrasri Ghosha, Attorney for the Plaintiff.

Mr. Mani Lal Sen, Attorney for the Trustees of the Calcutta Municipal Corporation Provident Fund.

P. R. C. *Application allowed.*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM APPELLATE DECREE No. 155 OF 1906.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard, 10 and 14, January.
Judgment, 17, January.

ICHHARAM SINGH, Defendant, Appellant,
v.
NILMONEY BAHIDA, Plaintiff, Respondent.

Central Provinces Tenancy Act (XI of 1898), secs. 45, 46, 47—Act IX of 1883 as amended by Act XVII of 1889, sec. 43—Transfer of portion of occupancy holding—Unauthorised alienation—Ejectment—Jurisdiction, want of—Question of jurisdiction, when may be raised—Adverse possession of limited interest.

When statutory rights and liabilities have been created, and jurisdiction has been conferred upon a Special Court for the investigation of matters which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court.

BHANDI SINGH *v.* RAMADHIN ROY (1) *followed.*

If, there is an inherent absence of jurisdiction, the objection as to jurisdiction may be taken at any stage of the proceedings and was allowed to be taken in second appeal.

Under the Rent Law of the Central Provinces as contained in Act IX of 1883 as amended by Act XVII of 1889 the Civil Courts had jurisdiction to deal with a suit for ejectment when a tenant having a non-transferable holding made an alienation and parted with the possession of a holding.

The right to institute a Civil suit upon an alienation which took place in 1892, was not taken away by Act XI of 1898 the provisions of which, in this respect, are not retrospective.

Sec. 43 of Act IX of 1883 refers to the transfer of an entire holding and not to a portion thereof.

Adverse possession of a limited interest though a good plea in answer to a suit for ejectment, is good only to the extent of that interest.

ISHAN CHANDRA MITRA *v.* RAMRANJAN (13) *followed.*

(1) 10 C. W. N. 991 : S. C. 3 C. L. J. 359 (1905)
(13) 2 C. L. J. 125 (1905).

ICHHARAM SINGH *v.* NILMONEY BAHIDA.

This was an appeal preferred on the 26th of March 1906, against the decree of Tara Chand, Esq., District Judge of Zillah Sambalpur, dated the 20th of December 1905, reversing that of Babu Nata Behari Ghose, Munsif of Sambalpur, dated the 25th of September 1905.

The facts of the case appear from the judgment.

Babu Bepin Chandra Mullik for the Appellant.

Babus Satish Chandra Ghose and *Anilendra Nath Roy Chowdhury* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The circumstances, which have given rise to the litigation out of which this appeal arises, are not disputed before this Court. One Padman was an occupancy tenant under the Plaintiff-Respondent in respect of an agricultural holding in the district of Sambalpur. On the 17th March 1892, the Defendant-Appellant purchased from Padman the disputed land, which forms a portion of the occupancy holding, entered into occupation and since then has been in possession by cultivation. On the 15th May 1905, the Plaintiff commenced this action for recovery of possession upon the allegation that the transfer did not create any valid right in the Appellant and that he must consequently be treated as a trespasser. The Defendant resisted the claim on the grounds that the transfer had been effected with the consent of the predecessors of the Plaintiff, who was at that time the landlord, that subsequently the transfer had been recognised by continuous acceptance of rent, and that, if the Plaintiff was not prepared to recognise the validity of the transfer, his claim to ejectment was barred by limitation. The Court of first instance found that the transfer had not been effected with the consent of the then landlord but that there had been a subsequent recognition by receipt of rent. In this view of the matter, the Munsif dismissed the suit. Upon appeal the District Judge held that the landlord had not at any time received rent from the transferee and that consequently the Defendant had not acquired the status of a tenant. Accordingly, the District Judge allowed the appeal and made a decree for ejectment in favour of the Plaintiff. The Defendant has now appealed to this Court and, on his behalf, the decision of the District Judge has been assailed, substantially, on two grounds, namely, *first*, that under sec. 45, cl. 3 and sec. 47 of the Central Provinces Tenancy Act of 1898, the Civil Court had no jurisdiction to entertain an action for ejectment on the ground that the transfer had been effected without the consent of the landlord, and, *secondly*, that upon the facts found, the claim for recovery of actual possession was barred by limitation.

In support of the first branch of this contention, the learned vakil for the Appellant has contended that, as sec. 46, sub-sec. 3 prohibits the transfer of an occupancy holding either in whole or in part and makes the transfer voidable at the instance of the landlord, the procedure laid down in sec. 47 for recovery of possession must be followed by the landlord. This contention appears to us to be clearly well-founded and is supported by the provisions of sec. 95, which

ICHHARAM SINGH *v.* NILMONEY BAHIDA.

shows that the jurisdiction of Civil Courts is barred in cases in which Revenue officers are authorized to take cognizance under the Act. This is consistent with the elementary principle that when statutory rights and liabilities have been created and jurisdiction has been conferred upon a Special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts [*Bhandi Singh* v. *Ramadhin Roy* (1)]. The view we take of the effect of sec. 47 is further supported by the decisions of the Court of the Judicial Commissioner of the Central Provinces in the cases of *Dayaram* v. *Saligram* (2), *Chamru* v. *Tulsidin* (3) and *Daji* v. *Morreshwar* (4). In answer to this argument, the learned vakil for the Respondent contended, *first*, that as this question was not raised in the Courts below, the point ought not to be allowed to be taken in this Court, and, *secondly*, that as in the case before us, the transfer in question took place in 1892, the provisions of the Central Provinces Tenancy Act of 1898 have no application. The first branch of this contention is manifestly untenable. The objection taken relates to the jurisdiction of the Court and, if, as the Appellant contends, there was an inherent absence of jurisdiction, the objection may be taken at any stage of the proceedings. The second branch of the contention however must prevail. As already observed, the transfer, the validity of which is impeached, took place in 1892. The Rent Law then in force in the Central Provinces was contained in Act IX of 1883 as amended by Act XVII of 1889. The provisions of sec. 43 of the Tenancy Act of 1883 made a transfer of an occupancy holding void as against the landlord and there was no remedy provided by the Act for recovery of possession through the machinery of the Revenue Courts. It was consequently held in a series of cases decided in the Court of the Judicial Commissioner of the Central Provinces that the Civil Courts had jurisdiction to deal with the matter and to entertain a suit for declaration, if after an attempted invalid alienation the tenant still continued in occupation (as in the case of mortgages without possession) or to entertain a suit for ejectment, if the tenant at the time of or after alienation parted with possession of his holding [*Chatter Singh* v. *Narain* (5) *Kasiram* v. *Behari* (6), *Narain Das* v. *Gulab Chand* (7) and *Chandrabhan* v. *Deo Chand* (8)]. It follows, consequently, that, when the transfer took place in 1892, the Plaintiff-landlord acquired a right to sue the Appellant in the Civil Court. Can it be successfully contended that this right was taken away by the provisions of the Tenancy Act of 1898? In our opinion, the question must be answered in the negative. The change, which was made in the law in this respect in 1898, was not one of procedure only; the privileges of the landlord were materially curtailed and if we

(1) 10 C. W. N. 991: s. c. 3 C. L. J. 359 (1905).
(2) (1903) 16 C. P. L. R. 135.
(3) (1904) 16 C. P. L R. 49.
(4) (1905) 1 Nag. L. R. 112.
(5) (1889) 3 C. P. L. R. 70.
(6) (1884) 4 C. P. L. 49.
(7) (1884) 4 C. P. L. R. 59.
(8) (1890) 4 C. P. L. R. 172.

ICHHARAM SINGH v. NILMONEY BAHIDA.

were to give retrospective operation to the new Act in this respect, the result would be to affect the substantive rights already acquired, when the repealed Act was in force. We must, consequently, hold that the matter in controversy before us must be tested by the provisions of sec. 43 of the Tenancy Act of 1883 and not by those of sec. 47 of the Tenancy Act of 1898. This view is supported by the decision in the case of *Kala Tehari* v. *Narain* (9). This conclusion, however, necessarily raises the question as to the effect of sec. 43 of the Tenancy Act of 1883. That section merely declares that a transfer of an occupancy holding is void as against the landlord, unless it is made with his consent. This refers obviously to transfers of entire holdings. It does not lay down that a transfer of a portion only of an occupancy holding is void or entitles the landlord to exercise his right of re-entry either as regards the entire holding or the portion transferred. As pointed out in the case of *Chatter Singh* v. *Narayan* (5), so long as the original tenancy subsists, the landlord has no right to re-enter and oust the persons who are on the land by license from the tenant; the transfer may not be binding upon the landlord and he may not be obliged to recognize it, but so long as the original tenancy continues, the landlord has clearly no right of re-entry, for so long as the tenancy intervenes, he is not brought into direct relationship with the transferee. The same view was taken in the cases of *Govinda Das* v. *Madho Prasad* (10) and *Tara Chand* v. *Shambha* (11). Reference may also be made to the analogous principle now well-settled as applicable to cases under the Bengal Tenancy Act, namely, that the sale of or parting with a portion of an agricultural holding is not a ground for forfeiture, so that where a tenant has transferred a portion of his holding but continues in possession of the remainder and pays the entire rent, neither he nor the transferee is liable to be ejected [*Kabil Sardar* v. *Chandra Nath* (12)]. It was pointed out, however, on behalf of the Respondent that, in the case before us, since the transfer by the original tenant, the landlord has accepted from him a reduced rent, but, in our opinion, this circumstance is of no assistance to the Respondent. The effect of a mere acceptance of reduced rent by the landlord does not clearly extinguish the original tenancy nor does it amount to the creation of a new tenancy. We must consequently hold that under sec. 43 of the Central Provinces Tenancy Act of 1883 the present Plaintiff has acquired no right to eject the Defendant from that portion of the holding which he purchased in 1892 and of which he has since that date continued in occupation. It follows accordingly that, although the first contention of the Appellant, namely, that under sec. 47 of the Tenancy Act of 1898 the Civil Court has no jurisdiction to entertain the present suit, must be overruled, the Respondent successfully meets the objection only upon a ground which establishes that he has no cause of action

(5) (1889) 3 C. P. L. R. 70
(9) (1900) 13 C. P. L. R. 143.
(10) (1888) 3 C. P. L. R. 9.
(11) (1892) 6 C. P. L. R. 49.
(12) I. L. R. 20 Cal. 590 (1893).

ICHHARAM SINGH v. NILMONEY BAHIDA.

on the basis of which he can claim any relief.

The second point taken on behalf of the Appellant raises the question, whether the suit is barred by limitation. It has been found concurrently by the Courts below that the Appellant entered into occupation in 1892 and has since then been in possession by cultivation of the land. The Courts below have, however, overruled the plea of limitation on the ground that, as the Defendant pleads a tenancy, there can be no adverse possession and that consequently the claim for recovery of actual possession by ejectment of the Defendant is not barred by limitation. This view is, in our opinion, erroneous and cannot be supported. As was pointed out by this Court in the case of *Ishan Chandra Mitra* v. *Ramranjan* (13), possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property; but such adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it; there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted. It is obvious therefore that, although the Defendant has not set up an absolute title for the statutory period and has not consequently acquired by adverse possession such absolute title, he has yet acquired by prescription the limited interest which he has set up, namely, the interest of a tenant. It consequently follows that it is too late for the Plaintiff landlord now to seek to eject the Defendant as a trespasser; his title to recover actual possession is barred, although his title to receive rent has not been extinguished. The second branch of the contention of the Appellant must therefore be supported.

(13) 2 C. L. J. 125 (1905).

The result is that this appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored. The suit will stand dismissed with costs in all the Courts.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 446 OF 1906.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
24, March.
Judgment,
27, March

SYED HABIBUR RASUL ABUL FAIZ, Defendant No. 1, Appellant,

v.

ASHITA MOHAN GHOSH and ors., Plaintiffs, Respondents.

Partition, partial—Co-owners, not members of joint family—Suit, if maintainable.

One of the co-owners of an estate sued the other co-owners for partition of chowkidari chakran lands of one village only of the estate,

Held—*That the reasons against the partial partition of joint family property did not apply to such a case and the suit was maintainable.*

SYED HABIBUR RASUL.ABUL FAIZ v. ASHITA MOHAN GHOSH.

RAM MOHAN LAL v. MULCHAND (1) *followed.*

PARBATI CHARAN v. AINUDDEEN (2) *commented on.*

RADHAKANTA SAHA v. BIPRODAS ROY (3) *relied on.*

This was an appeal preferred on the 12th of November 1906, against an order of A. Grodeve, Esq., District Judge of Zillah Birbhum, dated the 4th of August 1906, reversing that of Babu Mohesh Chandra Sen, Subordinate Judge of that district, dated the 22nd of December 1905.

The facts of the case appear sufficiently from the judgment.

Babu Ram Chandra Majumdar for the Appellant.

Babu Kshetter Mohan Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against the judgment of the District Judge of Birbhum, dated the 4th August 1906, and his order remanding the case that the partition sought for may be carried out.

The parties are co owners of an estate. The Plaintiff seeks for the partition of the chowkidari chakran lands of one village of the estate. Three of the Defendants do not object. The Defendant No. 1, the Appellant before us, does. It is said that the partition is sought for, as the lands in suit are near the residence of the Defendant No. 1 and it is feared that he may disturb the possession of the Plaintiff in these lands. The defence is that there can be no partial partition of some of the chowkidari chakran lands of the estate.

The District Judge has said that, as the partition sought for is partition between co-owners of an estate, and not partition between members of a joint Hindu family of joint family property, the partition may take place.

The Defendant No. 1 appeals. We consider that the District Judge is right. Most of the decisions which prohibit partial partition are passed in cases in which partition of joint family property was desired. There is a good reason for refusing partial partition in such cases, for partition has the effect of breaking up a joint Hindu family. If such a family is disrupted, it stands to reason that the family should break up completely and the whole family property should be divided. But there is no such reason, why the property of co-owners should not be partially divided, as is done in the case of a revenue-paying estate. For the reasons assigned in the case of *Ram Mohan Lal* v. *Mulchand* (1) we think the property in this case may be divided. The only case against this view is that of *Parbati Charan* v. *Ainuddeen* (2). But, as pointed out in *Radhakanta Saha* v. *Biprodas Roy* (3), "there the Plaintiff was the owner of a fractional share of a small piece of land, namely, 2 drones in an estate which consisted of 100 drones. One of the questions raised was whether the Plaintiff was entitled to a partition of 2 drones. The suit was dismissed, namely, on the ground that

(1) I. L. R. 28 All. 39 (1905).
(2) I. L. R. 7 Cal. 577 (1881).
(3) 1 C. L. J. 40 (1904).

(1) I. L. R. 28 All. 39 (1905).
(2) I. L. R. 7 Cal. 577 (1881).
(3) 1 C. L. J. 40 (1904).

SYED HABIBUR RASUL ABUL FAIZ *v.* ASHITA MOHAN GHOSH.

the zemindars were not made parties. . . . . So far, however, as we understand the judgment, the question was one of convenience and inconvenience; and it was not laid down as a matter of law that a partition of a portion of a revenue-paying estate, when that portion is capable of partition without much inconvenience to other sharers, is absolutely barred by law." The case of *Radhakanta Saha* v. *Biprodas* (3) is also an authority for the view taken by the District Judge.

We accordingly affirm the decision of the lower Appellate Court and dismiss the appeal with costs, hearing fee 3 gold mohurs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 22 OF 1907.

MITRA, J.
CASPERSZ, J.
1907.
26, November.

GUNGA PROSAD, Judgment-debtor, Appellant,

BROJO NATH DAS and anr., Decree-holders, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 583—Restitution—Right to apply not confined to parties to appeal—Rights accruing during litigation.

It is not necessary that a person asking for restitution under sec. 583, C. P. C., should have been a party to the successful appeal, if the appeal is in effect and substance in favour of such a party.

Under sec. 583, C. P. C., the parties must be placed in the position they were previously in irrespective of any other rights accruing to any of the parties during the litigation.

(3) 1 C. L. J. 40 (1904).

This was an appeal preferred on the 21st of January 1907, against an order of J. J. Platel, Esq., District Judge of Zillah Cuttack, dated the 8th of December 1906, affirming that of P. C. Mitter, Esq., Subordinate Judge of Sambalpore, dated the 9th of June 1906.

The material facts will appear from the judgment.

The appeal arose out of an application for restitution under sec. 583, C. P. C. The Petitioners, Brojolal and Pitabash, applied on 23rd March 1906 for restoration of certain lands of which Gunga Prosad had taken delivery of possession in execution of a decree obtained in a suit instituted on 24th September 1902. The decree was subsequently set aside on 19th August 1905 on appeal preferred to the Judicial Commissioner of the Central Provinces, and hence this application. The Petitioners also asked for mesne profits. Gunga Prosad opposed the application on the following grounds, amongst others: 1. That Pitabash was no party to the appeal before the Judicial Commissioner and was therefore not entitled to apply. 2. That Brojo Nath Das had applied for restitution in a previous proceeding which was struck off after full satisfaction. 3. That Gunga Prosad held the land sought to be recovered under an assignment dated 7th June 1907 from one Chaman Mistri to whom on 6th January 1907, one Laldhari as guardian of one Kanai Lal alleged to have been a former lessee of the lands had mortgaged with possession for 20 years, and that so long as the mortgage was not redeemed Gunga

GUNGA PROSAD *v.* BROJO NATH DAS.

Prosad was entitled to hold the lands. The Appellant's case in the suit, however, was that Kanai Lal had through his guardian relinquished his lease to his lessors and the Appellant had thereupon obtained a lease from the lessors, on the basis of which he instituted the suit against the Petitioners and Kanai Lal amongst others. Both the lower Courts overruled the Appellant's objections, and he then preferred this second appeal.

Babu Siva Prosanna Bhuttacharya for the Appellant.

Babu Dwarka Nath Chuckerbutty and *Mr. G. Sircar* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal from an order of the District Judge of Cuttack affirming the decision of the Subordinate Judge of Sambalpore.

The case arose out of a proceeding in execution under sec. 583, C. P. C. The Appellant obtained delivery of possession in execution of a decree in his favour. The decree was afterwards set aside by the Judicial Commissioner of the Central Provinces. An application was made by two persons Brojo Nath, who is one of the Respondent before us, and Kanai Lal for restitution under sec. 583 of the Code. Kanai Lal, it appears from the judgment of the lower Appellate Court, applied for delivery of possession and Brojo Nath asked for refund of a certain sum of money. Brojo Nath's application was allowed and Kanai Lal's application was refused on the ground that he was not himself in possession of the land at the time the Appellant executed his decree. The present application was made by Brojo Nath and one Pitabash for restitution of possession. The decree of the Original Court was against both of them and, though Pitabash was not a party to the appeal before the Judicial Commissioner, the decree was in his favour as well as in favour of Brojo Nath and the other Defendants inasmuch as the Judicial Commissioner set aside the decree for possession passed by lower Court. Pitabash was, therefore, entitled to restitution of the property of which he was dispossessed by the execution of the decree appealed from. Sec. 583 of the Code, in our opinion, covers a case like this. It is not necessary that a person asking for restitution should be a party to the appeal, if the appeal is in effect and substance in favour of such a party. He is entitled to the benefits arising out of the decree in appeal and the Court may direct restitution of the property in execution.

Various other objections were raised in the lower Courts against the application for restitution made by Brojo Nath and Pitabash, the present Respondents. They were dealt with by the lower Appellate Court and, in our opinion, they were correctly dealt with.

The first point taken before us is that Brojo Nath was not entitled to restitution inasmuch as his application for the very same property was once rejected. But it appears that Brojo Nath did not ask for re-delivery of possession. That answers the first argument of the Appellant.

The second argument before us is that possession has been delivered of the entire property which was actually not

GUNGA PROSAD v. BROJO NATH DAS.

in possession of Brojo Nath and Pitabash. But the first Court directed delivery of possession of certain properties mentioned in the application for execution except land No. 349. The lower Appellate Court affirmed that finding. It is immaterial so far as the Appellant is concerned, to whom the plots are given back. We find that the delivery of possession of the property was directed by the first Court and the order of the first Court was merely affirmed by the lower Appellate Court.

The third point taken before us is that the Appellant was entitled to the benefit of the usufructuary mortgage in his favour and he could resist the delivery of possession on his rights acquired under the usufructuary mortgage. The delivery of possession, in our opinion, would take effect irrespective of the usufructuary mortgage and the parties to the litigation must be placed in the same position as they were in irrespective of any other right accruing to any of the parties during the litigation. We do not think that the question of usufructuary mortgage arises in this case.

For these reasons, we dismiss the appeal with costs, two gold mohurs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 1082 OF 1906.

RAMPINI, J.	ASKARAN BAID and anr,
SHARFUDDIN, J.	Plaintiffs, Appellants,
1908.	*v.*
Heard, 3, 6 and 7, April.	PIYAR BUX *alias* PIR BUX and another,
Judgment, 9, April	Defendants, Respondents.

Hundi *payable at sight—Negotiable Instruments Act (XXVI of 1881), secs 30, 39, 86—Liability of drawer where holder agrees to an arrangement with acceptor for payment—Notice of dishonour, omission to give—Discharge of drawer.*

Where the acceptor of a hundi *payable at sight at first accepted the* hundi *unconditionally, but subsequently said he would pay in 3 days' time and the holder of the* hundi *agreed to this arrangement of which however he did not give any notice to the drawer, and where the acceptor having failed to pay the amount of the* hundi *within the three days the holder did not give notice of dishonour till after 10 days,*

Held—*That the conduct of the holder discharged the drawer from his liability under the* hundi *according to the terms of secs. 30, 39 and 86 of the Negotiable Instruments Act.*

This was an appeal preferred on the 26th of June 1906, against the decree of J. C. Twidell, Esq., District Judge of Zillah Purnea, dated the 31st of March 1906, affirming that of Babu Surja Narain Das, Subordinate Judge of that district, dated the 5th of June 1905.

The material facts of the case as they appear from the judgments of the lower Courts are as follows:—

The Plaintiffs were traders in cloth and had money-lending business in Kissengunge. The Defendant No. 1, Piyar Bux, was a dealer in hides in the same place. The Defendant No. 2, Abdus Sobhan, was a hide merchant of Calcutta and had an *arut* there. On the 3rd Magh 1311, B. S., the Defendant No. 1 drew a *darsani hundi* for Rs. 4,000 on the Defendant No. 2 payable to the Plaintiff No. 1 at sight or on presenta-

ASKARAN BAID *v.* PIYAR BUX.

tion for consideration received from that Plaintiff. The Plaintiff No. 1 sent the *hundi* by post the same day to his own agent at Calcutta with instructions to present it to Defendant No. 2, the drawer, and receive the amount. The agent accordingly presented the *hundi* without delay and it was accepted by the drawee. The drawer after acceptance did not however pay off the *hundi* but promised to pay within 3 days. Ultimately he failed to pay though demand was made after three days of the presentation. About a month after this the Defendant No. 2 made a part payment, but soon afterwards became an insolvent. The Plaintiffs then brought this suit against the drawer, Defendant No. 1 to recover the balance with interest from him. As no money was at all due to the Defendant No 1 from Defendant No 2, the Defendant No. 1 when he drew the *hundi* upon the Defendant No. 2 made over to the Plaintiff No. 1 two bills of lading for consignments of hides despatched by Railway of the value of Rs. 5,600 which the Plaintiff was to present to the drawer along with the *hundi*, to insure acceptance and payment of the *hundi*. These two bills of lading were made over to the Defendant No. 2 when he accepted the *hundi*.

The Court of first instance dismissed the suit and on appeal the District Judge upheld the decision of the lower Court. The District Judge in dismissing the appeal observed "The facts seem to me to put the Appellant into a dilemma. The *hundi* was payable "at sight," it was therefore at maturity as soon as Abdus Sobhan accepted it. Either then it was forthwith dishonoured by non-payment and notice should have been given under sec. 106 by post on the next day at latest or the Appellant must be held to have acquiesced in a qualified acceptance. In either case the Appellant must fail &c."

Dr. Rash Behary Ghose, and *Babus Hemendra Nath Sen*, *Jogendra Nath Mukerjee* and *Brojendra Nath Chatterjee* for the Appellants.

Babus Umakali Mukerjee and *Joy Gopal Ghosha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

The facts of this case are as follows :— The Plaintiff is the holder of a *hundi* payable at sight drawn by one Piar Baksh of Kishengunge in the Purnea District on Abdus Sobhan, a hide broker in Calcutta. The *hundi* was presented to Abdus Sobhan, along with 2 bills of lading for parcels of hides despatched by Piar Baksh to Calcutta. Abdus Sobhan accepted the *hundi* and promised to pay within 3 days. Subsequently he paid Rs. 1,027 out of Rs. 4,000, the amount of the *hundi*. After about a month, he became bankrupt. The date of the *hundi* was the 19th January. Notice of dishonour was not given to Piar Baksh till the 29th January. Now, the Plaintiff, the holder of the *hundi*, sues Piar Baksh, the drawer, for the balance due to him. Both the lower Courts have dismissed the suit on substantially the same grounds *viz.*, (1) that the notice of dishonour was not given in due time and (2) that the drawer was discharged by the holder of the note giving time to the acceptor to pay the money—an arrangement not notified to the drawer, nor acquiesced in by him.

ASKARAN BAID *v.* PIYAR BUX.

The Plaintiff appeals and, on his behalf, it has been urged (1) the question of the acceptance by Abdus Sobhan having been a qualified one was not raised in the pleadings or issues; (2) that there was no qualified acceptance as such an acceptance must be in writing; (3) that if the question was and could be raised, there was acquiescence on the part of the drawer and (4) that the question of the notice of dishonour not having been given in time was not raised in the issues or pleadings—that the notice was given in time and that the drawer was not prejudiced by the delay.

We consider, however, that the decisions of the lower Courts are correct. It is clear that the acceptor at first accepted the *hundi* unconditionally in consideration of the 2 bills of lading for the parcels of hides attached to the *hundi*. He subsequently said he would pay in 3 days and did not so pay. The holder of the note agreed to receive the money in 3 days' time, and did not give notice to the drawer of this arrangement and did not even give him notice of dishonour till about 10 days subsequently. We consider that this conduct of the Plaintiff according to the terms of secs. 30, 39 and 86 of the Negotiable Instruments Act discharged the drawer and that the Plaintiff cannot now recover from the drawer, the Defendant No. 1.

The pleas that the questions of the acceptance having been qualified and of the notice of dishonour not having been given in due time were not raised in the pleadings as issues are purely technical pleas devoid of all substance. The parties very well understood the matters at issue between them and they were sufficiently raised in the first issue framed by the Subordinate Judge. The parties must have well understood that notice of dishonour should have been given without undue delay and, whether they understood it or not, this is undoubtedly the law. As the District Judge has pointed out, the Plaintiff is on the horns of a dilemma. Either he did not give notice of dishonour in due time or he agreed to payment at a subsequent date, of which notice was not given to the drawer and in which there is nothing to show he ever acquiesced. In either case the Defendant No. 1 is relieved of his liability under the *hundi*.

We dismiss the appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES
NOS. 1393 AND 1683 OF 1906.

MACLEAN, C. J.
DOSS, J.
1908.
2, April.

JOGENDRA MOHAN SEN and ors., Plaintiffs, Appellants,
v.
UMA NATH GUHA and anr., Defendants, Respondents.

Revenue Sale Law (Act XI of 1859), sale under—Setting aside sale—Appropriation of payments by Collector—Contract Act (IX of 1872), secs. 59, 60.

A revenue sale was set aside on the ground that there was no arrear inasmuch as the Collector ought to have appropriated the amount sent by the owner to the payment of the January kist *for which the sale was held and not to the following March* kist.

Whether secs. 59 and 60 of the Contract

JOGENDRA MOHAN SEN *v.* UMA NATH GUHA.

Act apply to the appropriation of land revenue sent to the Collector discussed.

GANGA BISHEN SINGH *v.* MAHOMED JAN (1) *dissented from.*

This was an appeal preferred on the 8th of August 1906, against the decree of W. S. Coutts, Esq., District Judge of Zillah Faridpur, dated the 18th of June 1906, affirming that of Babu Kali Dhone Chatterjee, Subordinate Judge of that district, dated the 14th of June 1901.

The facts of the case appear from the judgment.

Dr. Rash Behary Ghose and *Babu Mohini Mohan Chakravarti* for the Appellants in No. 1393.

Babus Jogesh Chandra Roy, Ratan Chand Boral and *Surendra Nath Guha* for the Appellants in No. 1683.

Babu Nilmadhub Bose and *Dr. Preo Nath Sen* for the Respondents in both appeals.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—The only question in this case is whether there were any arrears of revenue due, which would justify the sale which has taken place. This is a second appeal, and we must accept the facts as found by the lower Appellate Court. The difficulty arose as to the non-payment of the January *kist* for the year 1899:—the last day for the payment of that *kist* was the 12th of January and it was not paid. But on the 27th of February 1899, a notification was issued from the office of the Collector in these terms:—"It is hereby notified under secs. 5 and 13 of Act IX of 1859 that if arrears of revenue mentioned below be not paid on or before the 28th of March, *i.e.*, the next latest day for payment of revenue, the undermentioned Mehals or share or shares thereof lying within District Faridpur shall be sold by auction for the said arrears in the office of the Collector of the said District at 11 A.M. of the next sale day." The Judge in the Court below finds that that notification was issued—the arrear was a very petty sum of Re. 1-6-11 p.—some two or three days before the 28th of March. The present Appellants, the Plaintiffs, who are seeking to set aside the sale, remitted a sum of Rs. 3 7 as. to the Collector, and the Collector received it on the 28th March. He appropriated that sum of Rs. 3 7 as. to the payment of the March *kist*, the last day for the payment of which was also the 28th March, and not to the payment of the small arrear of the January *kist*. The question turns upon whether payment of Rs. 3 7 as. ought to have been appropriated to the January *kist* which was in arrear or to the March *kist*: if to the former, there would have been no arrear to justify the sale. The Plaintiffs when remitting the money did not expressly intimate that the payment was to be applied to the discharge of the January *kist*. Then the question arises whether the circumstances imply that the payment was to be applied to the discharge of the arrears of the January *kist*. I think the circumstances raise such implication. The fact of the above notice having been sent and having been received telling the Plaintiffs that, unless they pay the arrears on or before the 28th of March,

(1) 10 C. W. N. 948: s. c. I. L. R. 33 Cal. 1193 (1906).

JOGENDRA MOHAN SEN *v.* UMA NATH GUHA.

the property would be sold, the fact that they paid it so that it was received on that day, and with the object of its being received on that day, implies that the Plaintiffs intended the payment to be treated as made in respect of the January *kist.* No intention or notice had been given to them about the March *kist* The March *kist* amounted to about Rs. 9 so that the amount sent was substantially below the amount of that *kist* and was a little in excess of the small arrears of the January *kist.* The probabilities appear to be greatly in favour of the view that the payment was made in respect of the January *kist* and it ought to be treated as paid in respect of that *kist.* In that view, the money was in the coffer of the Collector on the 28th March, the last day for payment; and there was consequently no default which would warrant a sale.

We have been referred to a case of *Ganga Bishen Singh* v. *Mahomed Jan* (1), where it was held that secs. 59 and 60 of the Indian Contract Act do not apply to transactions in relation to realisation of land revenue. Speaking with great respect, I am doubtful as to the soundness of that decision. If these sections do not apply, what law does apply? There is nothing specific on the subject in Act XI of 1859. If secs. 59 and 60 of the Contract Act do not apply, we must fall back upon the general law and practically that law is embodied in these sections.

For these reasons, I think the appeal must succeed and the sale must be set aside.

(1) 10 C. W. N. 948 : s. c. I. L. R. 33 Cal. 1193 (1906).

The Plaintiffs are entitled to their costs in all the Courts.

This judgment, it is conceded, will govern App. No. 1683 of 1906, which is accordingly allowed with costs in all the Courts.

Doss, J.—I agree.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 95 OF 1907.

RAMPINI, J. SHARFUDDIN, J. 1908. 19, February	RANI KESHABATI KUMARI, Appellant, *v.* W. O. MACGREGOR, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 503, 588, cl. (24)—Receiver's accounts, orders in passing—Appeal.

The directions which a Court gives in passing a Receiver's accounts are not appealable under cl. (24) of sec. 588 of the Civil Procedure Code.

THIS was an appeal preferred on the 13th of March 1907, against the order of H. W. Scroope, Esq., Deputy Commissioner of Zillah Sontal Parganas, dated the 26th of February 1907.

The facts of the case are as follows:—

The Respondent, W. O. MacGregor was appointed Receiver of the Handwa Estate. An order removing the Receiver was made on the 4th July 1906, against which an appeal was preferred and certain other proceedings were instituted in the Original Court, with the consequence that the estate was not made over by the Respondent till the 24th October 1906. The Appellant, on the

RANI KESHABATI KUMARI v. W. O. MACGREGOR.

31st October 1906, applied to the Court of the Deputy Commissioner of Dumka taking certain objections against the accounts furnished by the Respondent. It was alleged, *inter alia*, that the Respondent should not have charged against the estate his own salary and the salaries of the subordinate staff from 4th July 1906 to 24th October 1906. She also asked that certain amounts which had been entered in the accounts as spent in the due management of the estate should be struck off.

The learned Deputy Commissioner by his order, dated 26th February 1907, dismissed the Appellant's objections and passed the accounts as furnished by the Respondent except as to an item of Rs. 3,495 in regard to which he directed further examination.

Against this order the present appeal was preferred, and an application was also presented under sec. 622, Civil Procedure Code.

Babu Lakshmi Narain Singh for the Appellant.

Babu Joy Gopal Ghosa for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal purports to be against an order of the Deputy Commissioner of Dumka, dated the 26th February 1907, in respect of certain accounts filed before him by a gentleman who had been appointed *ad interim* receiver to a certain estate. This receiver has now been removed from the management and has submitted his accounts to the Deputy Commissioner, who has considered the accounts and given certain instructions with regard to them. Now the Petitioner, Rani Keshabati Kumari, has appealed to this Court saying that she is not satisfied with the order passed by the Deputy Commissioner on the 26th February 1907.

A preliminary objection has been taken by the Respondent to the hearing of the appeal, namely, that no appeal lies. The pleader for the would-be-Appellant maintains that the order of the Deputy Commissioner is appealable, under cl. (24) to sec. 588, C. P. C. Cl. (24) of the section gives an appeal against orders under sec. 503, C. P. C. Now, the orders which appear to be appealable under sec. 503 are of four classes, *first*, orders appointing a receiver; *secondly*, orders removing a person in whose possession or custody the property may be from the possession or custody thereof; *thirdly*, orders committing property to the custody or management of a receiver and; *fourthly*, orders granting to such receiver such fee or commission on the rents and profits of the property by way of commission as the Court thinks fit.

The learned pleader for the Appellant contends that the order which the Deputy Commissioner has passed comes under cl. (*f*) of sec. 503. But cl. (*f*) of sec. 503 occurs in that part of the section which enumerates the receiver's liabilities, and it does not, it seems to us, contemplate the passing of any orders by the Court. This clause says that "every receiver so appointed shall pass his accounts at such periods and in such form as the Court directs. No doubt, in passing the receiver's accounts the Court may have to give certain directions, but it does not appear to us that these

directions are subject to an appeal to this Court under sec. 588, cl. (24), C. P. C.

We, therefore, dismiss this appeal with costs, which we assess at Rs. 250.

The application under sec. 622, C. P. C., filed on the 14th March 1907, is also dismissed.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 49 OF 1907.

MITRA, J.
CASPERSZ, J.
1908.
Heard, 30 and 31, March.
Judgment, 23, April.

PUNDIT LACHMI NARAYAN, Decree-holder, Appellant,

v.

SHEIKH MAZHAR HASSAN, Judgment-debtor, Respondent.

Mesne profits—Assessment—Zerait land—Possession before trespass, character of—Assessment upon produce—Net produce to be considered—Customary and competition rent.

Dispossession of proprietor's zerait *land Principles for assessing mesne profits discussed.*

The character of possession before trespass should be ascertained, because such possession is a fair index of intention as to the mode of occupation if there were no trespass.

The character of the land and its use for a long series of years indicating that the Plaintiff, if he had been in possession, would have used the land for cultivating it himself with ordinary food crops,

Held—*That mesne profits should be assessed on the basis of produce and not rent.*

If the Defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo or if he adopted the more comfortable use of the land by letting it to tenants, and was satisfied with a comparatively small income, the Plaintiff ought not to be loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser.

IJATULLA BHUYAN *v:* CHANDRA MOHAN BANERJEE (1), GOPAL CHANDRA *v.* BHUBAN MOHAN (4), SURJA PERSHAD *v.* REID (2), LALJI SAHAY *v.* WALKER (3) *referred to.*

The difficulties of ascertaining mesne profits on the basis of produce adverted to.

The net and not the gross produce is the true measure of damages.

The resultant net produce after taking into account the costs of production and the risks of the agriculturist differs very little from competition or rack rent. Assuming complete freedom of competition, the rent paid by a tenant at will would practically coincide with the whole net produce of any given piece of land.

Customary rents paid by most of the raiyats *in a village tends to keep down the rent of* zerait *lands.*

This was an appeal preferred on the 7th of February 1907, against an order of Babu Rajendra Nath Dutta, Subordinate Judge, 2nd Court at Chapra, dated the 10th of September 1906.

The facts of the case material to this report will appear from the judgment.

Dr. Rash Behary Ghose and *Babu*

(1) 12 C. W. N. 285: S. C. 7 C. L. J. 187 (1907).
(2) 6 C. W. N. 409 (1902).
(3) 6 C. W. N. 732 (1902).
(4) I. L. R. 30 Cal. 536 (1903).

PUNDIT LACHMI NARAYAN *v.* SHEIKH MAZHAR HASSAN.

Lachmi Narayan Singh for the Appellant.

Moulvi Syed Shamsul Huda and *Moulvi Mahomed Tahir* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff-Appellant obtained, on the 29th July 1902, a decree against the Defendant-Respondent for recovery of possession of 69 bighas and 15 cattahs of land in Mahal Tier as *malik's zerait* or proprietor's private land with mesne profits. The claim for mesne profits covered from the 16th February 1898 to the date of the institution of the suit, *i.e.*, the 30th January, 1901, and from the date of the institution of the suit to the date of delivery of possession, namely, the 31st May 1901. The decree directed that mesne profits should be ascertained in the execution proceedings. The land was not only *malik's zerait* but it was alleged to have been in the *khas* or direct possession of the Defendant himself and the decree directed delivery of *khas* possession by dispossessing the Defendant. The Defendant appealed to this Court from the decree of the lower Court. On the 10th March 1905, this Court affirmed the decree of the lower Court. Possession, however, had, in the meantime, been taken, as we have said, on the 31st May 1904.

There is no dispute as to the amount of mesne profits for the years 1305 to 1307, F. S. The Plaintiff's claim for these years was based on rentals which were realisable from *raiyats* to whom he had let out the land, but he alleged that the leases to the *raiyats* expired with the year 1307 F. S. and he was entitled to *khas* possession from 1308 F. S.; and that, therefore, he was entitled to damages from 1308 to Bysack 1311 F. S., the measure of which should be the actual price of the produce less the necessary costs of cultivation. On the application of the Plaintiff, the lower Court appointed a Commissioner to ascertain the amount of mesne profits by means of an investigation at the spot, and the Commissioner found, after an elaborate investigation, that the total amount of mesne profits calculated on the basis of rent for the earlier period and on the basis of produce for the later period, with interest at 12 per cent. per annum, would be Rs. 1-2805-6 5. The Defendant, however, contended that mesne profits should be assessed on the basis of rental for the entire period. On a rental-basis, the amount with interest was found to be Rs. 3,192-12-6 and that is the amount which lower Court has allowed with costs and subsequent interest at 6 per cent. per annum.

The appeal of the Plaintiff and the cross-appeal of the Defendant have reopened the entire case before us, but it is not necessary to dwell upon the slender argument in support of the cross-appeal. The main contentions raised before us are based on the rival principles of calculation for the years 1308 to 1311 F. S., namely, whether the mesne profits should be calculated on the rental or produce basis?

The dispute as to the facts bearing on the question of principle of assessment relates to the mode of enjoyment by the Defendant during the later period. The Plaintiff attempted to make out by evidence that the Defendant was, throughout the period, in *khas* posses-

sion, cultivating the land, and reaping ordinary country crops; while the Defendant asserted that, during the years 1308 and 1309 F. S., he cultivated the lands with indigo for his Trikalpore factory and that he was a loser by such cultivation as the price of indigo went down owing to a well known cause, and that, during the last two years, he let out the land to *raiyats* on money rent. The lower Court has held that the Defendant and his witnesses have given the facts correctly. It has found that the Defendant did cultivate the lands with indigo in 1308 and 1309 F. S., and was a loser by that cultivation, and that, in the following years, he let out the lands on money rent. The Commissioner, however, had come to a different conclusion. The oral evidence adduced before the Commissioner was highly conflicting because the witnesses of each party supported its own case. The Commissioner himself hesitated as to the weight to be attached to such conflicting testimony but the scales, in his estimate, turned in favour of the Plaintiff on account of a statement, or detailed account of produce, filed by the Defendant himself with his petition of objection. That statement, however, was not a part of the petition and it does not contain any direct or unequivocal admission that the lands were sown with ordinary crops during 1308 and 1309 We therefore are not disposed to place much reliance on this statement. On the other hand, the land had been used for a long series of years for indigo cultivation. It was so used from 1291 to 1297 and again from 1298 to 1304 periods during which the Trikalpore factory held it on lease with the rest of the lands of Mahal Tier. The factory did not stop work during 1308 and 1309. The Defendant sold indigo in those years through the Calcutta indigo-brokers, Messrs. Thomas & Co. The discovery of synthetic indigo dye in Europe could not, in the years previous to 1308, lead to any necessary inference of a permanent decline in the price of Bengal indigo, and it is more probable that the Defendant used the land for indigo cultivation for supplying his factory with materials for manufacturing indigo. The evidence to show that the indigo despatched by the Defendant to the market of Messrs. Thomas & Co., was partly indigo from the land in suit is no doubt not very complete, but the probabilities are in favour of the view that the Defendant did not allow the land to go out of indigo cultivation as long as he had occupation of it and as long as he continued to work for the factory at Trikalpore. The land was, in fact, indigo land for nearly twenty years. The Plaintiff is now in possession of the village and it is easy for him to produce a number of *raiyats* to support his case whereas the Defendant labours under the disadvantage which dispossession always brings with it. Weighing, therefore, the entire evidence, we come to the same conclusion as the lower Court with respect to the years 1308 and 1309. The Defendant was undoubtedly a loser by his indigo cultivation in these years.

The finding of the lower Court as to the next period, *i.e.*, 1310 and 1311, is not equally sound. The evidence is as conflicting as that adduced with regard to the previous period. The Defendant

admittedly had ceased to cultivate and manufacture indigo and a decree for possession had already been passed against him in favour of the Plaintiff. There was no reason why, unlike other indigo planters, he would give up *khas* possession. The probabilities are against his case of letting out the land on money rent. The lower Court has not analysed this evidence on this point and we are disposed to agree with the Commissioner in his estimate of the oral evidence. No leases or *kabuliyat* have been produced to support the Defendant's case of occupation by tenants. The tenants examined do not even produce their rent receipts. In our opinion, therefore, the Defendant was in *khas* possession during the years 1310 and 1311 and himself used the land for the cultivation of ordinary country crops.

But in the view of the law that we are disposed to take, it makes no difference whether the Defendant cultivated the land with indigo in 1308 and 1309 and raised other crops during the last two years, when the land was in *khas* cultivation, or whether money rent was obtained therefrom during the second period. The land is *zerait* or proprietor's private land. It must have been used as such before 1291, F. S., when the Trikalpore factory took a lease of it. We must assume that it was cultivated by the proprietor himself for raising ordinary country crops. From 1291 to 1304, F. S, it was cultivated by the lease-holders themselves and was not treated as *raiyati* land. The cultivation with indigo in 1305 to 1309, F. S., is not inconsistant with the same inference. Moreover, the Plaintiff has been in direct occupation, since he took possession in execution of his decree and he too has been cultivating the land with ordinary crops. The character of the land and its use for a long series of years, including the use since 1311, F. S., can lead to one conclusion only, that the Plaintiff if he had been in possession would have used the land for cultivating it himself with ordinary food crops. He is not an indigo-planter and would not have cultivated indigo. It is undoubtedly more profitable to cultivate ones own land than allow *raiyats* to be in occupation on payment of customary rent. The fact that the Plaintiff gave leases to tenants for three years from 1305 to 1307, F S., during the time of dispossession by the Defendant, cannot weaken the inference that the Plaintiff, if he had been in possession would have used the land as *sir* or *zerait* by cultivating it himself. The intention of the Plaintiff must be presumed. He is the potential cultivator according to the principle expounded in the case of *Ijatullah Bhuyan* v. *Chandra Mohan Banerjee* (1). If the Defendant used the land to suit his own fancy, if he did not use it in the most advantageous way, if he took the risk of cultivating it with indigo on the chance of getting high profits by manufacturing indigo, or if he adopted the more comfortable use of land by letting it to tenants and was satisfied with a comparatively small income, the Plaintiff ought not to be a loser thereby. He must not suffer for the indolent or speculative conduct of a trespasser. *Surja Pershad* v. *Reid*

(1) 12 C. W. N. 285: s. c. 7 C. L. J. 197 (1907).

PUNDIT LACHMI NARAYAN v. SHEIKH MAZHAR HASSAN.

(2) and *Lalji Sahay* v. *Walker* (3) relied on by the lower Court do not lay down a different rule. The character of the possession before trespass by the Defendant should be ascertained to arrive at the true measure of damages, because such possession is a fair index of intention as to the mode of occupation if there were no trespass. *Gopal Chandra* v. *Bhoobun Mohan* (4), lays down the same principle of ascertaining the intention of the true owner and the potential position he occupies. In *Ijatullah* v. *Chandra Mohan* (1), we held that as regards *zerait* land, mesne profits should be assessed on the basis of produce and not on the basis of rent. The present is a parallel case and we see no reason to lay down a different rule. We are, therefore, of opinion, that the principle of assessment of damages adopted by the lower Court is erroneous. It should not have assessed damages on a rental basis.

The next question is one of fact, what is the amount payable by the Defendant to the Plaintiff for the years 1308 to 1311, F. S., damages being calculated on the basis of produce? The judgment of the lower Court has not discussed this question, and we do not get any assistance from it. The parties adduced no evidence in Court, and we have to fall back on the report of the Commissioner and the evidence given before him. We may note that the parties have not expressed any desire to adduce further evidence.

The difficulty of ascertaining mesne profits on the basis of produce is always great. The elements of uncertainty, the unknown quantities, are many. The gross produce must first be ascertained and then its market value. The exact quantity of grain which a piece of land has produced in any particular year is a matter of primary importance but evidence of a precise and reliable character is generally wanting. To discover the average of a number of years is a still more complex problem, specially in India where cultivation is greatly dependent on meteorological phenomena and not so much on science as in other countries. The price of the produce is also a varying factor—the oscillations in this respect being attributable to the law of demand and supply, to the distance from markets or trade centres and to other possible causes, though, as regards any particular locality, the variations may be ascertainable without much difficulty until new means of transit come into existence.

But it is not sufficient to ascertain merely the gross produce or its money value. The net produce is the true measure of damages. From the gross produce all the expenses of cultivation must be deducted to find the net produce. A certain sum must also be deducted on account of the application of capital and labour, and the cost of superintendence must have a certain pecuniary value. The true measure of damages must be net produce obtained by deducting the cost of raising the produce from the market value of the production. We should, also, take into consideration the risks of the agriculturist and his bare means of subsistence.

(1) 12 C. W. N. 285: s. c. 7 C. L. J. 197 (1907)
(2) 6 C. W. N. 409 (1902).
(3) 6 C. W. N. 732 (1902)
(4) I. L. R. 30 Cal. 536 (1903)

PUNDIT LACHMI NARAYAN v. SHEIKH MAZHAR HASSAN.

If all these items are to be matters for calculation in ascertaining mesne profits on produce-basis, the resultant profit differs very little from competition, or rack rent. Assuming complete freedom of competition, the rent paid by a tenant-at-will would practically coincide with the whole net produce of any given piece of land.

If the rent were customary, and not competitive, it would not be a practical test for ascertaining the net produce. In India, custom generally controls rent, and competition rent, defined by writers on political economy, is the exception. In *Thakurani Dosee* v. *Bisheshar Mookerjee* (5), the majority of the Judges accepted the theory of a customary rent as prevailing in India. They held that the customary of pergana rate should be the true basis of ascertainment of rent in India. The theory adopted in India is "all that is not comprehended in the wages of labour and profit of the *raiyats*' stock is not the landholders' rent."

Nevertheless the question arises whether the rent actually paid by a tenant-at-will for occupation of *zerait* land under a recent settlement may not be the best and easiest means of discovering the net produce. In *Thakuranee Dasi* v. *Bisheswar Mukerjee* (5) the Court had to consider the case of occupany *raiyats* who, in the majority of cases, had acquired the status of *khudkasht raiyats* and were entitled to hold land at customary rates. The causes of aberration from true competition rents are many and undefinable, but in modern times, competition must, even in India, influence rent when there are no statutory or customary rights in operation. A *raiyat* holding at fixed rate or an occupancy *raiyat* or even a non-occupancy *raiyat* created by the Bengal Tenancy Act may, in certain sense, become a co-proprietor of the soil, but a tenant at-will or a tenant whose occupation may be terminated at the end of any agricultural year can hardly be said to possess an interest in land. There is nothing to bar a proprietor from letting out his private land at the highest available competition rent, and we may assume that when he does allow a tenant to occupy it, he stipulates for the payment of competition rent (and not customary rent) although that may not strictly be the net produce of land. A margin of profit to the tenant for his subsistence must be conceded in the fixing of his rent, as it is undeniable that the customary rents paid by most of the *raiyats* in a village must keep down the rents of *zerait* lands also.

In the present case, the Plaintiff himself let out the land at Rs. 5 a bigha and this is some evidence as to what the ordinary rate is and it might be taken to be the competition rate of rents practically equivalent to the net produce of land. The Plaintiff, however, was then out of possession. If a proprietor, who has been in direct possession of his private land and knows what average net produce it yields, leases it to a tenant, reserving the right, as he has a right by law, to re enter at the end of the agricultural year, we may fairly assume that the rent is a rack-rent and equivalent as nearly as may be, to net produce. If the proprietor was not in direct possession before such a lease, and had no special

(5) 3 W. R. (Act X) 29 : s. c B. L. R. (F. B.) 202 (1865).

PUNDIT LACHMI NARAYAN *v.* SHEIKH MAZHAR HASSAN.

knowledge of the net produce, an allowance may be made in his favour. An allowance may, also, be made for the re-actionary effect which the prevalence of customary rent has on rent which would otherwise be the full competition rent. That is to say, the pecuniary loss arising from the effect of the prevailing rate paid by *khudkasht raiyats* may be added so as to arrive at true competition rent or net produce. In the present case, we have the fact of letting at Rs. 5 a bigha and the further fact that the Plaintiff valued the land at Rs. 80 a bigha in the plaint thus assuming the profit per bigha at Rs. 4, the ordinary market price being 20 years' purchase.

Although, theoretically, there should be an exact coincidence between competition rent and the value of net produce, the divergence in the present case will be very great, if the conclusions arrived at in the Commissioner's report be correct. There ought not to be such a divergence, if, as we have held, the rent paid was not customary. The figures given by the Commissioner as to quantities of produce and the cost of production appear to us to be inaccurate. They are, respectively, over-estimated and under-estimated. It is in evidence and is an undeniable fact that the *zerait* lands in Tier were assessed in the leases to the Trikalpore Factory at Rs.4 per bigha as rent and the Plaintiff consequently valued each bigha at Rs. 80. We have no doubt, therefore, that the figures showing the net produce as given in the Commissioner's report are highly exaggerated and we cannot accept them.

How then are we to assess the mesne profits? We do not think it desirable to send the case back. The parties already incurred heavy costs in the investigation and the case itself has been long pending. We do not also expect that any further evidence of a reliable character would be available, if we were to remand the case for another enquiry by the lower Court. Materials for determining the net produce, or what would be the true competition rent, must inevitably be meagre or unsatisfactory. We do not therefore think any useful purpose would be served by a remand. We think it desirable to come to our own conclusions on the materials in record.

Thirty-three and a third per cent. appears to us to be a fair margin for the risk and profit reserved to the tenants who took leases from the Plaintiff from 1305 to 1307 at Rs. 5 per bigha. We do not think the Plaintiff settled the *zerait* land by giving up more than $33\frac{1}{3}$ per centum out of the net produce. He might have conceded less, but the Defendant is a wrong-doer and every presumption should be made against him. As it is, the result, we arrive at, is less than one-half of that calculated with so much wealth of detail by the Commissioner, the ratio being $\frac{2}{5}$th.

We are, therefore, of opinion that the basis of the award made by the Court below should be increased by one-third and the decree modified accordingly. The rate of interest at 12 per cent. per mensem will stand.

As regards costs, the Defendants should pay the entire cost of the investigation by the Commissioner and of the trial by the lower Court. We make no order as to costs of this Court.

Decree varied.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, MAY 25, 1908. [No. 28

Contents.

NOTES

The following constitution of Benches takes effect from date.

PRESIDENCY GROUP AND PRIVY COUNCIL DEPARTMENT.—The Acting Chief Justice and Mr. Justice Ryves.

PATNA GROUP.—Mr. Justice Mitra and Mr. Justice Bell.

BURDWAN GROUP.—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

RAJSHAHYE GROUP.—Mr. Justice Coxe and Mr. Justice Doss.

CRIMINAL BUSINESS.—Mr. Justice Stephen and Mr. Justice Holmwood.

CASES BELOW Rs. 1,000.—Mr. Justice Brett.

ORIGINAL SIDE.—As before.

WE INVITE ATTENTION TO THE CASE OF *Baleswar Bagarti* v. *Bhagirathi Das*, reported at p. 657 of this number. The question was whether under sec. 3 of 28 and 29 Vict. C. 15, the Governor-General in Council had the authority to extend the jurisdiction of the Calcutta High Court to the newly added district of Sambulpore which they purported to do by a proclamation dated the 1st of September 1905. Sir Courtenay Ilbert in a note at p. 247 of his book on the Government of India expresses his opinion that the statute only authorises the transfer of territory from the jurisdiction of one chartered High Court to that of another, but not of territory which was not included within the jurisdiction of a chartered High Court to the jurisdiction of a chartered High Court. It appears that the attention of the Government of India was not drawn to this note till after the proclamation. The High Court, has, however, held that Sir Courtenay Ilbert's interpretation of the section is not correct, and that that section plainly contemplates the extension of the jurisdiction of a chartered High Court to such places as were never within the jurisdiction of any of the Chartered High Courts. Their Lordships cite in support of their decision the opinion of Sir Henry Maine.

IN THE CASE OF *Ambika Protap Singh* v. *Dwarka Prasad*, reported at p 95, I L. R. 30 All, a Divisional Bench of the Allahabad High Court (Stanley, C. J., and Burkitt, J.) has extended the doctrine of *lis pendens* in the light of the recent Privy Council decision in the case of *Faiyaz Hussain Khan* v. *Prag Narain*, I. L. R. 29 All. 339: s c. 11 C. W. N. 561, in which their Lordships of the Privy Council held that the doctrine of *lis pendens* becomes applicable even before the issue of summons if the suit filed is contentious in its origin and nature. Their Lordships observed that where a suit is contentious in its nature and origin, it is not necessary that the summons should have been served in the suit in order to make it "contentious" within the meaning of sec. 52 of the Transfer of Property Act.

IN THE PRESENT CASE THE PLAINTIFF APPLIED TO sue in *forma pauperis* making a certain person K one of the Defendants. While that application of the Plaintiff was pending, the Defendant transferred part of the property which would have been the subject matter of the pauper suit. The Allahabad High Court held that this transfer was invalid under the provisions of sec. 52 of the Transfer of Property Act. It was contended on behalf of the transferor that until the application for leave to sue in *forma pauperis* had been granted, there was no suit pending within the meaning of sec. 52, so the doctrine of *lis pendens* did not apply.

THEIR LORDSHIPS HELD "IT APPEARS TO US THAT so soon as the Defendant filed his application for leave to sue, there was a contentious suit or at least a contentious proceeding pending within the meaning of the section and it is clear that that suit or proceeding was at the time being actively prosecuted." Having regard to the principle on which the doctrine of *lis pendens* is based this decision may be open to exception. The principle, on which the doctrine is upheld is stated by Turner, L. J., in *Bellamy* v. *Sabine*, 1 Deg. & J. 566, to be "that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The Plaintiff would be liable to be defeated in every case by the Defendants alienating before judgment or decree, and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceedings."

IF IN THIS CASE THE TRANSFEROR (*i e.*, K WHO WAS made a Defendant in the pauper suit for the institution of which the application was made) did not know of such an application having been made, the principle, as stated above, may not apply. But when we see that in the Privy Council decision their Lordships held that the doctrine of *lis pendens* would apply even before the Defendant, who made the transfer *pendente lite*, got the summons, that is to say, was aware of the institution of the suit, it stands to reason that the doctrine would also be applicable even if K made the transfer before he was aware of the filing of the application for leave to sue in *forma pauperis.*

ONE QUESTION MAY HOWEVER ARISE FOR CONSIDERATION. Suppose after an application for permission to sue in *forma pauperis* has been made the property is transferred and after the transfer the application is rejected and subsequently the applicant institutes a suit on a full court-fee. What will become of this transfer? If the transfer were made during the period intervening between the rejection of the application and the institution of the suit on full court-fee, it would not be obnoxious to the provisions of sec 52. But should the doctrine of *lis pendens* apply to a transfer made *bonâ fide* during the pendency of an abortive application for leave to sue in *forma pauperis*? In the particular case under notice there were ample reasons for holding that the transfer by K was not made *bonâ fide*. But the decision of their Lordships does not seem to be restricted to the particular facts of the case, nor is it in any way qualified by actual or constructive notice or *mala fides* or *bonâ fides* of the parties to the transfer *pendente lite*. With respect to this decision we can only say that in sec. 52 of the Transfer of Property Act there is no provision made for the protection of innocent transferees without notice as is done by the English law. It is therefore not desirable that there should be an undue extension of the doctrine. We think that some provisions ought to be made in our law to relieve the hardship which sometimes results to innocent transferees *pendente lite* similar to those contained in the Victorian Statute of 1859 (2 and 3 Vict., C. 11).

THE CASE OF *Spiers* v. *Hunt* AND THE CASE OF *Wilson* v. *Cornby*, reported respectively at pp. 720 and 729 of (1908) 1 K. B., affords two illustrations of contract opposed to public policy. In the former case a man who was married to a woman older in age and who was suffering from serious illness, promised to marry another woman after the death of his wife. The second woman knew that the man had a wife living. On the death of the wife, the man refused to perform his contract of marriage, on which an action was brought for breach of promise of marriage. The other case was similar with only this difference that the wife was not suffering from any illness. In both the cases it was held that the contracts were illegal being opposed to public policy.

PHILLIMORE, J., OBSERVED "UPON CONSIDERATION I have come to the conclusion that in general such a contract as this is against public policy and morals and not to be enforced. It is, in my opinion, within the language of Sir George Jessel in *Printing and Numerical Registering Co.* v. *Simpson*, L. R. 19 Eq. 462 at p. 465, a contract which will induce one of the parties to do something against the general rules of morality or, as it is expressed by Lawrence, C. J., of Illinois, in the American case of *Paddock* v. *Robinson*, to hold it valid would be to introduce into social life a dangerous and immoral principle, &c. . . . The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to crime."

IN THE CASE OF *Wilson* v. *Cornby* VAUGHAN Williams, L. J., observed :—"It is sufficient to say that this is obviously a contract which a husband in his wife's life-time could not enter into without being disloyal to his wife. When the Plaintiff's counsel, during the argument, in mitigation I think of the husband's conduct, adverted to the fact that at the time when the contract was made, the husband and the Plaintiff both thought that the wife was going to die soon, I could not help feeling that such a contract as this might make the wish the father to the thought. But, however, that may be,

it is a contract against public policy as tending to make the husband disregard the acknowledged rules of morality as to married life and therefore cannot be enforced."

The principles on which these two decisions are based may not be applicable to people among whom polygamy is allowable. But still it might be said that amongst them though a man may marry more than one wife, his contract to marry a second wife during the life-time of the first wife, may be opposed to public policy and therefore cannot be enforced. There can be no doubt that such a contract is not specifically enforceable and it is doubtful whether any damages should be awarded for breach of promise in such cases.

In the case of *General Bill Posting Company Ld.* v. *Atkinson* [(1908) 1 Ch., p. 551] the question arose whether a restrictive covenant by a servant not to engage in any particular business within a particular area during a particular period is of any effect after he was dismissed without notice before the completion of the period of stipulated service but for which he recovered as damages the salary for the full period of notice stipulated for in the contract and costs. The facts of the case are that the contract of service provided that the master would not dismiss the servant without giving 12 months' previous notice, and on the part of the servant that he would not leave the service without giving 12 months' notice and also that so long he would be in the service, or within 2 years after his engagements with his master had ceased, he would not engage himself in a similar business within a radius of fifty miles from the place of business of the master. After a few months' service, the master dismissed the servant without giving him 12 months' notice. The servant then brought a suit against the master for damages for breach of contract and recovered a sum which represented the income that the servant would have derived had he got 12 months' previous notice in conformity with the contract and the costs of the suit. The dismissed servant then commenced a business within fifty miles of his former master's place of business in contravention of his stipulation in the contract of service. The master then brought an action for injunction and damages against the Defendant, the ex-servant. The Court of first instance decreed Plaintiff's suit, but on appeal this judgment was reversed.

The reasons for the judgment (*General Posting Company, Limited* v. *Atkinson* (1908) 1 Ch., p. 537) are stated in these words:—"But when once you get a complete and total repudiation by the employer, not merely a breach of some of the obligations on his part, but a complete and total repudiation of everything that was to be done by him, surely that is a wrongful repudiation of the contract which the servant is entitled to accept, and from thenceforward he is free from every part of the contract whether it be the obligation to obey the master's orders and to do his duty under the contract, or the obligation to observe the covenant in clause 9. On principle, therefore, it seems to me that this is a case in which it is impossible for the Plaintiff either to get any relief of an equitable nature or to maintain a claim for damages, because the contract has been repudiated by one party and the repudiation has been accepted by the other party."

It is to be noted here that the servant had covenanted to pay £250 as liquidated damages in case he would engage in a business in contravention of his stipulation and that £250 was the annual pay of the servant. It admits of no doubt that in case the master had dismissed the servant after giving 12 months' notice or paying him 12 months' wages, then he would have been able to succeed in his suit against the servant when he commenced the business in breach of the contract. But in the case under notice it might be said that the dismissal of the servant by the master was a wrongful one. The master acted in contravention of his stipulation in dismissing the servant, and therefore he could not insist upon the performance of the servant's covenant. But it might be asked as well, did the master make any wrongful gain or the servant suffer any wrongful loss by the dismissal? The master had to pay to the servant in the suit brought by the servant all that the servant would have earned if 12 months' previous notice had been given him before dismissal. How could the servant then retain the sum awarded him as damages for wrongful dismissal (which damages covered all that the servant would have earned had he not been wrongfully dismissed) and then commence the business as if no covenant had been made by him with regard to the business? Damages for breach of contract are awarded on the principle that parties should be as far as practicable in the same position in which they would have been if the contract had been performed. It is on this principle that the servant in his suit against the master for wrongful dismissal recovered as damages that amount which he would have got if the contract were not broken. Consistently with the above principle, should not then the servant be made to observe his part of the covenant?

In the reasons for the judgment it is observed that as the contract had been repudiated by the master and the repudiation had been accepted by the servant, the master had no right to the performance of the covenant on the part of the servant.

But it might be said that the repudiation was not accepted by the servant when he brought a suit against the master for the repudiation and recovered damages. It may further be said that since the contract showed that the salary which was fixed for the servant included in it the consideration for the servant's covenant not to engage in a similar business for a certain time, it stands to reason that when the servant in his suit against the master recovered as damages all that he would have got as his salary if 12 months' previous notice had been given him, the servant was not entitled to carry on the business in breach of his covenant after he had enforced the master's covenant in his suit against the master.

CURRENT INDIAN CASES.

MAHARAJ SINGH *v.* CHITTAR MAL, I. L. R. 30. All. 22. *Civil Procedure Code, sec. 540—Appeal—Interpleader suit.*

When in an interpleader suit there is an adjudication upon the claims of the Defendant, it is a decree appealable under sec 540, C. P. C.

HANSRAJ *v.* MUKHRAJI, I. L. R 30 All. 28. *Execution of decree—Sale of a portion of property.*

Mere sale of a portion of a property does not give the transferee a right to execute a decree obtained for possession of the property by the transferor in absence of express words to that effect.

ABDUL *v.* RIAZ-UD-DIN, I. L. R 30 All. 32. *Right to redeem—Right of suit.*

Where in a decree upon a mortgage the benamdar of a person was given an opportunity to redeem a mortgage, but did not redeem, *held* that the owner could not bring a suit to redeem.

DEBI PROSAD *v.* SHEODAI, I. L. R. 30 All. 41 *Criminal Procedure Code, secs. 107, 145, 437.*

An order under sec 145, Cr. P. C. was passed by instituting a proceeding under that section in the course of proceedings under sec. 107, Cr. P. C. between the same parties, opportunity was given to both the parties of being heard under sec. 145, Cr. P. C., *held* that although the procedure was to a certain extent defective the High Court would not revise the order.

EMPEROR *v.* MAHENDRA, I. L R. 30 All. 47. *Criminal Procedure Code, sec. 110—Transfer.*

Proceedings under sec. 110, Cr. P. C. pending in one district cannot be transferred to another district.

LOHRE *v.* DEO HANS, I. L. R. 30 All. 48. *Appeal—Acquiescence—Dismissal.*

Where in a suit against two Defendants it was dismissed against one and on appeal by the other Defendant the whole suit was dismissed, *held* that in second appeal the Plaintiff cannot ask the Defendant against whom the suit had been originally dismissed to be made liable inasmuch as he had acquiesced in the decree dismissing the suit against him.

EMPEROR *v* TARABUK, I. L. R. 30 All. 51. *Criminal Procedure Code, sec. 195—Penal Code, sec. 211.*

Sec 195 (*b*), Cr. P. C. does not apply to an order of a Magistrate (upon reading a report of the Police) for prosecution of a person who gave false information

---

RUPCHAND *v.* DASADHA, I. L. R 30 All. 55. *Limitation—Addition of party—Appeal.*

An appeal is not time barred if the guardian *ad litem* of a Respondent is appointed after the period of limitation.

EMPEROR *v.* KASHI NATH, I. L. R. 30 All. 60. *Warrant under the Gambling Act, endorsement.*

Warrants under the Gambling Act (III of 1867) may be endorsed by an officer to whom they are originally issued to another officer to whom they could be issued in the first instance.

MEGHAN DUBE *v.* PRAN SINGH, I. L. R. 30 All. 63. *Mortgage on behalf of a Minor.*

A mortgage by persons of full age on behalf of a minor member of a Hindu joint family was considered to be a valid one.

ANANT RAM, IN THE MATTER OF THE PETITION OF I. L R. 30 All. 66. *Criminal Procedure Code, 4 (r) (1)—Mukteur.*

The Magistrate of a district passed the following order. "Mukteers can appear under sec. 4 (*r*) (*1*) only with the Court's permission. Draw all Courts' attention to this section,"

Held, that the Court did not act without jurisdiction.

SHEO NARAIN *v.* NUR MAHAMMAD, I. L. R. 30 All. 72. *Civil Procedure Code, sec. 244.*

A separate suit for recovery of possession by a decree-holder who purchases property in execution sale does not lie; the remedy is by way of an application under sec. 244, C. P. C.

MAHADEI *v.* BALDEO, I. L. R. 30 All. 75. *Compromise by a Hindu female heir.*

A compromise made by a Hindu female heir is not binding on the reversioners and they can only be bound by a decree made after a full contest in a *bonâ fide* litigation.

NAND KISHORE *v.* ANWAR HUSAIN, I. L. R. 30 All 82. *Rent paid in advance.*

Case where it was held that the lessee was not bound to pay rent to the auction purchaser of the lessor's interest which became due after the purchase and which had been paid in advance to the transferor by virtue of a stipulation in the lease

---

Review.

INDIAN EVIDENCE ACT with Commentaries, &c, and appendices *By Janaki Nath Pal, B. L. Sastri and Sarat Chandra Sanyal, M. A, B. L, Vakils, Calcutta High Court, Calcutta. Printed and published by B. Baral at the Law Publishing Press, Nos. 3 to 5 Bow Street. 1908 Price Rs. 3.*

Excluding the text of the Act and the appendices, the book covers about 150 pages. It is not possible to compress within this limit all that has been said by Courts of law and writers of text-books on the Law of Evidence as it obtains in India. The present "commentaries" however do not claim to be exhaustive. Only such authorities, as in the authors' view, help in the elucidation of the sections of the Evidence Act and the principles of law embodied therein are referred to. The Evidence Act is more fortunate than most of the Indian Codes in having had commentaries written upon it which though exhaustive in the matter of citation of case law and other authorities yet are very far from "containing a mass of ill-digested and inconvenient information" which "shackles instead of assisting the capacity of the lawyer." There is certainly room for less elaborate and more easily handled commentaries, and the authors' attempt to supply this want is deserving of encouragement. The work, however, bears evident marks of haste in execution, which we hope to see removed in future editions. The disposition of the subject-matter is somewhat novel. We have first the commentaries, divorced from the text of the Act, then follows the text, then the appendices, which include Parliamentary statutes and other enactments bearing on the Law of Evidence, and lastly an index of cases followed by the general index.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 218 OF 1908 MADHURAM GOHAIN AND ANOTHER, Petitioners *v.* THE KING-EMPEROR on the complaint of DIMBESWAR BARNA, Opposite Party. 29th April 1908.

Indian Penal Code, sec. 352—Matter of a civil nature.

It appears that the Petitioners and the complainant's party both claimed right to a certain plot of land. The complainant alleged that he had purchased the land at a Civil Court auction sale; while the Petitioners' case was that the land was all along in their possession and they were entitled to hold it. On the day of occurrence the complainant's party went to cultivate the land, whereupon the Petitioners drove them out. The Extra Assistant Commissioner of Jorhat tried the case against the Petitioners, convicted them under sec. 352 and sentenced each of them to a fine of Rs 10. The Petitioners obtained this rule to set aside the conviction and sentence.

Their Lordships observed .—

"It appears that there was a dispute between the parties as to the right to cultivate certain land. When the complainant and his party went to cultivate the same the accused chased them off. One of the accused has been convicted of assaulting the complainant and the other has been convicted of abetting the assault. It appears, however, that no great violence was used and only so much force was used as was sufficient to turn the complainant out. We think it is a matter of a civil suit. We therefore set aside the conviction and sentence."

Mr. Khoda Bux (with him *Babu Monmotha Nath Mukherjee*) for the Petitioners.

No one for the Opposite Party.

Rule made absolute and fine, if paid, directed to be refunded.

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 196 OF 1908. KUNDRO MOHAN PANIGRAHI, Petitioner *v.* THE EMPEROR on the complaint of BRINDEY B. DABYA. 29th April 1908.

Trial of two cases together, legality of—Local enquiry, whether warranted by law.

The Petitioner filed a complaint against one B. alleging that under the orders of B. certain persons assault-

ed the Petitioner. B also filed a complaint against the Petitioner in which she stated that some cattle, belonging to the Petitioner which had damaged some plants grown by B, were being taken to the pound, whereupon the Petitioner snatched away the cattle and assaulted B. The Magistrate made over both the complaints to an Honorary Magistrate, who proceeded to try both the cases together. The Honorary Magistrate also made a local inquiry into the matter of the complaints. At the conclusion of the trial, the Honorary Magistrate disposed of both the cases in one judgment by which he acquitted B, but convicted the Petitioner and sentenced him to undergo rigorous imprisonment for one month. The Petitioner moved the Sessions Judge of Balasore, but that officer, while holding that the procedure adopted by the lower Court was absolutely illegal, declined to make any reference to the High Court. The Petitioner then obtained the rule from the High Court on the grounds *inter alia* that the procedure of the trying Magistrate was illegal and that he was wrong in making a local enquiry and relying upon the result of the local inquiry in his judgment.

Their Lordships observed :—

"The Magistrate's procedure seems to have been very irregular. In fact he tried two cases, by one and the same judgment, and at one and the same time disposed of them. Then he seems to have made a local inquiry and examined certain witnesses orally. Their evidence has been referred to in his judgment.

We therefore set aside the conviction and sentence of the Petitioner and direct that he be retried. We think that it would be better if the retrial be held by some Magistrate other than the Magistrate who tried the case before."

Babu Dasarathi Sanyal for the Petitioner.

None for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before SHARFUDDIN and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 1397 OF 1906. SHAM GOLAM LAL AND OTHERS, Plaintiffs, Appellants *v.* SAJINATH MAHTO, Defendant, Respondent. 12th May 1908

Teiskhana paper—Evidence—Public document—Indian Evidence Act (I of 1872) sec. 32 (2).

The appeal arose out of a suit for recovery of rent. The suit was decreed in the first Court. The Court of Appeal differed from the first Court as regards *area* and *jama*. It relied on *teiskhana* paper and gave a modified decree. The Plaintiffs appealed to the High Court,

Held—That although *teiskhana* papers may not be public documents, they may be some evidence under sec. 32 (2) of the Indian Evidence Act.

Moulvis Mahommad Mustafa Khan and *Mahommad Ishfak* for the Appellants.

Babu Surendra Nath Ghosal for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before BRETT, J. APPEALS FROM APPELLATE DECREES NOS. 2320 TO 2327 OF 1906. SARAITULLA SARKAR AND ANOTHER, *Pro forma* Defendants, Appellants, *v.* HAFEZULLA AHMED, Plaintiff and the tenants, Defendants, Respondents. 21st May 1908.

Copies of toujis *made over by arbitrators to the several parties to the arbitration are not copies of copies but originals and as such admissible in evidence.*

Plaintiff brought these suits for rent making his co-sharer a *pro forma* Defendant alleging that the dispute between him and the said *pro forma* Defendant had been settled by an arbitration award or *Roudad* whereby the share of the Plaintiff was fixed at 3 annas and that of the *pro forma* Defendant at 13 annas.

The suits were contested by the *pro forma* Defendant only and the principal contention raised by him was as to whether the lands for which rent had been claimed in these suits was covered by the award.

In determining this question the first Court held that the award did not refer to any specific jotes with boundaries, jamas and names of tenants but it recited that the arbitrators delivered certain *chittas* or *toujis* to the parties to the arbitration in accordance with which they were allowed to realize rents from the tenants and that the first copy of the *touji* remained with one of the arbitrators. The said Court held that under the above circumstances the copies of *toujis* made over to the Plaintiff and filed by him in this suit could not be given effect to being only *copies* of *copies* and then dismissed the suit holding that the disputed holdings were not covered by the award.

On appeal the learned Subordinate Judge held, relying mainly upon the said copies of *toujis* given to the Plaintiff by the arbitrators, that the disputed holdings were covered by the award and decreed the suits.

The special Appellant contended that the finding of the learned Subordinate Judge was erroneous in law in that it was based mainly upon the said *copies of toujis* which were mere *copies* of *copies* and thus inadmissible in evidence

Held, in dismissing the second appeal, that the *toujis* being copies made over by the arbitrators to the respective parties were not copies of copies but originals and therefore admissible in evidence.

Babus Dwarka Nath Chuckerbutty and *Shoshi Sekhar Bose* for the Appellants.

Babus Basanta Kumar Bose and *Mohini Mohan Chackravarti* for the Respondents.

Appeal dismissed.

CIVIL APPELLATE JURISDICTION. Before MACLEAN, C, J., and DOSS, J. CIVIL RULE No. 2514 OF 1907. SHEIKH ABDUL HYE AND OTHERS, Defendants, Petitioners *v.* SHEIKH CHAMU BEPARI, Plaintiff, Opposite Party. 4th May 1908.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 19—Declaratory suit—Suit for recovery of horses and garries—Small Cause Court, jurisdiction.

The opposite party brought a suit for recovery of certain horses and carriages or in the alternative Rs. 500 as the price thereof on declaration of his title thereto, in the Court of Munsif of Dacca. The Defendants-Petitioners in their written statement pleaded *inter alia* that the Munsif had no jurisdiction as the suit was cognizable in the Small Cause Court, and an issue was thereupon raised upon that point. The Munsif was of opinion that as the Plaintiff sought to get his right declared in the garries, &c., and to recover possession of them, the suit was maintainable in his Court.

On appeal the learned District Judge was of opinion that the suit being one for a declaratory decree with further relief was expressly excepted from the cognizance of the Small Cause Court under Art. 19, Sch. II, Act IX of 1887.

The Defendants moved the High Court under sec. 622, C. P. C.

Held—That the suit was one which could be entertained by the Munsif. It was not a suit for a declaratory decree within the meaning of Art. 19, Sch. II, Act IX of 1887. It was simply an action to recover horses and garries and was cognizable by the Small Cause Court.

Babu Harendra Narayan Mitra for the Petitioners.

Babu Upendra Lal Roy for the Opposite Party.

A T. M. *Rule made absolute.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1839 OF 1907. JAGANNATH MARWARI, Plaintiff, Appellant *v* ONDAL COAL COMPANY, LD. AND ORS., Defendants, Respondents. 18th May 1908.

Indian Limitation Act (XV of 1877), Sch. II, Art. 47—Final order—Proceeding under sec. 145, Cr. P. C.—High Court's order on revision.

A suit was brought for a declaration of title and recovery of possession of land. This land was the subject of an order under sec. 145, Criminal Procedure Code, which was passed on the 9th April 1902. The present suit was instituted on the 10th May 1905. The Courts below held that it was barred by limitation. The Plaintiff contended that the order of the District Judge was wrong inasmuch as the date of the final order in the case under Art. 47 of the Indian Limitation Act must be the final order of High Court in the case. A rule was issued by High Court on the 4th June 1902 which was not disposed of until the 24th August 1902. The Plaintiff therefore contended that the suit was within time.

Held—That rules issued under the powers of superintendence under the Charter Act and disposed of by the High Court do not come within the meaning of the words final order in the case in Art. 47, Sch. II of the Indian Limitation Act. The final order has the order of the Magistrate.

Dr. Rash Behary Ghose and *Babu Surendra Nath Ghosal* for the Appellant.

Mr. Sinha and *Babu Digambur Chatterjee* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM ORIGINAL DECREES NOS. 371 AND 372 OF 1905 PRAN NATH ROY, Appellant *v.* KHAGENDRA MAHATA AND OTHERS, Respondents. Heard, 6th, 7th, 8th May 1908. Judgment, 8th May 1908.

Court, mistake of—Fraud—Burden of proof—Combination between decree-holder and auction-purchaser, when illegal.

The litigation giving rise to the present appeal, dated from December 1893, when the Defendant No. 1 brought a suit to recover arrears of rent in respect of certain property against the present Plaintiff, Pran Nath. An *ex parte* decree was passed against Pran Nath on the 22nd January 1894; an attachment process and sale proclamation followed in due course, on the 13th March 1894, and the sale of the property took place on the 19th April 1894. On the 21st January of the following year, the present Plaintiff's application under secs. 311 and 101, C P. C, was dismissed. The suit under appeal was instituted on the 21st June 1895. It was dismissed on the preliminary points on the 4th September 1895. Thereupon, an appeal was preferred to the High Court, and, during the pendency of that appeal, the Defendant No. 1, Soshi Bhuson, having died, his heirs were duly substituted in his stead. The case was remanded to the Subordinate

Judge on the 11th August 1897, and the decision of High Court was confirmed by their Lordships of Judicial Committee on the 1st March 1902.

The Subordinate Judge dismissed the action, but, in the decree prepared, the substituted Defendants found no place. An order amending that decree was passed by the Subordinate Judge on the 18th September 1907. The present appeal, however, was filed on the 27th June 1905.

An preliminary objection was raised that the appeal could not be maintained as regards the heirs of Defendant No 1.

Held—That the objection should be overruled. If any irregularity was to be found in the proceedings, it was the fault not of the party but of the Court.

The Plaintiff's case was one of fraud; the Defend-No. 1 had acted with fraud and in collusion with the Shaha Defendants, purchasers of the property in suit, who were anxious to obtain that property for their own aggrandisement. It was further the case of the Plaintiff that in execution of the *ex parte* decree, all the Defendants had fraudulently and collusively suppressed the processes of attachment and sale and so caused the property to be bought in the name of Defendant No. 5.

It was found as a fact that Pran Nath was aware of the proceedings which had been taken against him. The argument was that Pran Nath was insane at that time.

Held—A person who charges another with fraud must himself prove the fraud and the Plaintiff was not relieved from this obligation because the Defendant had himself told an untrue story.

Mahomed Golab v. *Mahomed Sulliman*, I L R. 21 Cal. 612 at p. 621, followed.

Assuming that there was some combination between the decree holder and the auction-purchasers, it is not every combination which is illegal and the result of which is to be rectified by a Court of Equity. The test in each case is, what was the object of the agreement among the persons conspiring and said to be conspirators. It is the end to be accomplished which determines whether a combination is lawful or otherwise. If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent, if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination can not be said to be fraudulent. Each case must depend upon its own circumstances.

Ambika Prosad Singh v. *R. H Whitwell*, 6 C. L. J. 111, followed

Babus Dwarka Nath Chuckerbutty and *Gunada Churn Sen* for the Appellant

Mr. B. Chuckerbutty and *Babus Mahendra Nath Roy, Hara Kumar Mitra, Shamalal Chunder Dutt* and *Sarat Chunder Bose* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and COXE, JJ. APPEAL FROM ORIGINAL DECREE No. 35 OF 1906 KRISHNENDRA NATH SIRKAR AND OTHERS, Defendants, Appellants v. DEBENDRA NATH SIRKAR, Plaintiff, Respondent. Heard, 11th, 12th and 13th May 1908. Judgment, 13th May 1908.

Agreement not to partition, if binding—Family arrangement—Indian Contract Act (IX of 1872), sec. 28.

The suit was for partition. The Plaintiff was the brother's son of the Defendants. The property was derived from Biswa Nath Sircar, grandfather of the Plaintiff and father of the Defendants The parties to the litigation executed an *ekrarnama* on the 26th Falgoon 1301, B S.

The Court below passed a decree for partition. It held that the *ekrarnama* did not operate to preclude the Plaintiff from suing for partition, relying on the case of *Shimohan Thakur* v. *W. O. Macgregor*, I. L R. 23 Cal 469, and on sec. 28 of the Indian Contract Act. In the opinion of the lower Court, there was not sufficient consideration for the parties to enter into the agreement embodied in the *ekrarnama* which prescribed certain rules for the management of the joint estate.

The Defendants appealed to the High Court.

Held—An agreement between the members of a Hindu family not to come to a partition is binding upon themselves.

Ramdhon Ghose v. *Anund Chunder Ghose*, 2 Hyde 97, followed.

Srimohan Thakur v *W. O. Macgregor*, I. L R. 28 Cal. 769, considered and distinguished.

The *ekrarnama* was executed with consideration on both sides and constituted what is known to the English law as a family arrangement in which the quantum of consideration should not be too nicely scrutinised.

The *ekrarnama* embodying ample consideration for the agreement arrived at, barred the Plaintiff's suit for partition.

An agreement not to partition during the life-time of the parties to it or until they mutually agree to set aside that agreement, is not bad under Hindu law and therefore valid.

Babus Harendra Narayan Mitter and *Preo Sankar Mojumdar* for the Appellants.

Babus Tara Kishore Chowdhury and *Debendra Nath Bagchi* for the Respondent.

A. T. M. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 1375 OF 1907.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard,
21, January.
Judgment,
7, April.

BALESWAR BAGARTI,
Defendant, Appellant,
v.
BHAGARATHI DAS
and another, Plaintiffs,
Respondents.

High Court—Jurisdiction over Sambalpur District—Extension of High Court's jurisdiction to place not within jurisdiction of any High Court, if ultra vires—*Interpretation of Statute—Reference to repealed Statute—28 and 29 Vict., C. 15, sec. 3*

Under sec. 3 of 28 and 29 Vict., C. 15, the Governor-General in Council can extend the jurisdiction of a High Court or any portion of its jurisdiction to a place not originally within the jurisdiction of any High Court.

The proclamation whereby the Calcutta High Court was authorised to exercise jurisdiction over the Sambalpur District when it was transferred from the Central Provinces to Bengal was not ultra vires.

The repealed provisions of sec. 18, 24 and 25 Vict., C. 105, were referred to as throwing light on the construction of sec. 3 of 28 and 29 Vict., C. 15.

Construction of Statute by reference to repealed Statutes when permissible, discussed by MOOKERJEE, J.

This was an appeal preferred against a decision of Babu Purna Chandra Mitra, District Judge of Sambalpur, dated the 24th of June 1907, affirming a decision of Babu S. K. Ghose, Subordinate Judge of Sambalpur, dated the 17th of September 1906.

The Plaintiffs, who had obtained a foreclosure decree in respect of the properties in suit against one Musst. Bhamo sought to recover possession thereof from the Defendant. The Defendant disputed Bhamo's title in the disputed properties and claimed title in himself. The Plaintiffs succeeded in both the lower Courts whereupon the Defendant preferred this second appeal.

At the hearing *Dr. Rash Behary Ghose* (with him *Mr. G. Sircar*) for the Respondents took a preliminary objection that the proclamation extending the High Court's jurisdiction to the Sambalpur District was *ultra vires* of the Governor-General in Council and that consequently the High Court had no jurisdiction to entertain the appeal. The arguments on this point will appear from the judgment.

Babu Satish Chandra Ghose (with him *Babu Amilendra Nath Roy Choudhuri*) for the Appellant, having replied on the preliminary objection, argued on the merits.

Mr. G. Sircar for the Respondents replied on the merits.

Babu Satish Chandra Ghose in reply.

The JUDGMENT OF THE COURT was as follows.—

STEPHEN, J.—This case comes before us in second appeal from a judgment of the Subordinate Judge of Sambalpur and a preliminary objection is raised that we have no jurisdiction to deal with it, because the Governor General in Council acted *ultra vires* in purporting to extend the jurisdiction of this Court over Sambalpur which was till the date of the order hereafter mentioned a district in the Central Provinces.

The matter stands thus. The Statute 28 and 29 Vict., C. 15, sec. 3 enacts that "It shall be lawful for the Governor-

BALESWAR BAGARTI v. BHAGARATHI DAS.

General of India in Council by order from time to time to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established or to be established under the said Act (*i.e.*, the Indian High Courts Act, 1861) and to authorise and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred or to be conferred on it by Her Majesty's Letters Patent establishing the same, or any other Letters Patent issued by Her Majesty under the provisions of the Indian High Courts Act, 1861, within any such portions of Her Majesty's dominions in India, not included within the limits of the presidency or place or places for which such High Court was established as the Governor-General in Council may from time to time determine." The Statute 28 and 29 Vict., C. 17, sec. 1, enacts. "It shall be lawful for the Governor-General of India in Council from time to time to declare and appoint by proclamation that part or parts of the Indian territories for the time being under the dominion of Her Majesty shall be or continue subject to each of the Presidencies and Lieutenant Governorships for the time being subsisting in such territories and to make such distribution and arrangement or new distribution and arrangement of such territories into or among such Presidencies and Lieutenant-Governorships as to the said Governor General in Council may seem expedient."

On the 1st September 1905, the Governor General in Council made a proclamation No. 2833 published in the *India Gazette* on 2nd September 1905, p. 636, by which he transferred Sambalpur to Bengal under 28 and 29 Vict., C. 17. On the same day by a Notification No. 1363, published in the same *Gazette*, p. 637, acting under the above-mentioned section of 28 and 29 Vict, C. 15, he authorised and empowered this Court to exercise "within that portion of His Majesty's dominions in India which is comprised within the limits of the Sambalpur District" (excepting two named zemindaris) "and is not included within the limits of the places for which the said High Court was established, all such jurisdiction and powers as the said High Court may from time to time exercise within the limits of the places for which the said High Court was established."

No objection is taken to this proclamation and notification, but what is said is that the portion of sec. 3 of the 28 and 29 Vict., C. 15, that I have quoted is to be taken as one enactment, that the first part gives the Governor General in Council power to transfer a place from the jurisdiction of one High Court to that of another, and that the rest of the enactment does nothing more than provide means by which jurisdiction may be conferred on the transferee Court when such a transfer is made. Apart from the conclusions to be drawn from the contents of a repealed enactment that I will refer to afterwards, and apart from authority, that is, looking merely at the language of section itself, I am quite unable to see how this can be so. The first part of the section relating to the transfer of a place from the jurisdiction of one High Court to that of another is complete in itself; and if the Governor-General in Council can transfer a place

BALESWAR BAGARTI *v.* BHAGARATHI DAS.

to the jurisdiction of a High Court no more power can be needed to give that Court jurisdiction. This may be seen by a reference to the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887 (Act XVII of 1887, B. C.), sec. 3, where power is given to the Local Government "to fix and alter the local limits of the jurisdiction of any Civil Court," and no other provision exists enabling the Local Government to give jurisdiction to the transferee Court. Also I cannot see that there is anything in the second part of the section referring to the first part. It confers powers on any High Court, not specifically one of the High Courts to which the first part of the section refers in any given case, and it gives the Courts referred to jurisdiction over any portions of Her Majesty's dominions in India with limitations which also contain no specific reference to what goes before. I am strengthened in this view by the fact that the section concludes with a provision for extending the jurisdiction of a High Court over Christian subjects of Her Majesty in Native States, which is plainly a wholly separate provision from what proceeds it. My opinion on the meaning of the section as it stands, therefore, decidedly is that it deals with three distinct matters (*a*) a transfer of a place from the jurisdiction of one High Court to that of another; (*b*) the extension of the jurisdiction of a High Court to a place not originally within jurisdiction of a High Court; (*c*) the extension of the jurisdiction of a High Court to Christian subjects of Her Majesty in Native States. And if the section is so read the only way in which (*b*) can be considered complementary to (*a*) is that it provides for cases not included in (*a*) and it is impossible that it should merely provide machinery for carrying out the provisions of (*a*).

It was sought to found an argument to the contrary effect on the provisions of the Indian High Courts Act, 1861 (24 and 25 Vict., C. 105), sec. 18, repealed by the Act of 1865. This section gave the Crown power to transfer a place from the jurisdiction of one to that of another High Court" and generally to alter and determine the territorial limits of the jurisdiction of the said several High Courts. The chief purpose of the Act of 1865 was to transfer the powers of the Crown to the Governor-General in Council, and it is argued that the repealed section gave the Crown no power to extend the jurisdiction of a High Court to a place not already within the jurisdiction of such a Court, and that sec. 3 of the repealing Act is substantially a re-enactment of the repealed section, substituting the new for the old authority, but giving no wider powers to the Governor-General in Council than were before given to the Crown.

I cannot assent to the effect so attributed to the repealed sec. 18 of the Act of 1861. The Crown could alter the territorial limits of the jurisdiction of this Court, and from the terms of the section this must be taken to have been something different from a transfer of a place from the jurisdiction of one to that of another High Court. It seems to me therefore probable that the Crown could extend the jurisdiction of a High Court to a place not within such a jurisdiction. And if this is so I see no reason for

BALESWAR BAGARTI *v.* BHAGARATHI DAS.

supposing that the legislature in passing the later Act intended to withold from the Governor-General in Council any powers in respect of the present matter that were exercised by the Crown. But it is not necessary to decide this point as the terms of sec. 3 of the Act of 1865 are far fuller than those of sec. 18 of the Act of 1861; and if the earlier section did not give the power in question to the Crown it still seems to me certain that the later section is in terms not a mere re-enactment of the repealed section, but did give such a power to the Governor-General in Council. This is consistent with the repealed preamble of the Act of 1865, which recites the expediency of making "further provision than is in the said Act (*i.e.*, the Act of 1861) contained for empowering the alteration, from time to time, of the local limits of the said High Courts, and for the exercise, in places beyond the limits of the presidencies or places within and for which such High Courts are established of a jurisdiction and powers conferred by Her Most Excellent Majesty's Letters Patent on the said High Courts." The effect of the repealed section thus seems to me to favour the view of the later section that I have suggested.

There then remains to be considered what is perhaps the strongest point made by the Appellant. This is a note by Sir Courtenay Ilbert in his Government of India, 2nd edition, page 217, where after referring to the present section he says, "It would seem that sec. 3 of the Act of 1865 . . . . . only empowered the Governor-General to make an order transferring any territory from the jurisdiction of one Court to the jurisdiction of another, and that the second branch of the section was only to enable the Governor-General to authorize the Court to which such transfer was made to exercise jurisdiction." He then suggests that the Governor-General in Council could not extend the local and personal jurisdiction of the High Court at Allahabad over the province of Oudh, a supposition which seems to be on all fours with this case.' For the reasons I have given I cannot agree with this suggestion, high though its authority is. I dissent from it with the less hesitation because I find that I am supported by the authority of Sir Henry Maine who in a minute written on the 29th May 1866 (minutes by Sir Henry Maine, 1862—1869, No. 15) seems to express exactly a contrary opinion to that of Sir Courtenay Ilbert. The construction of sec. 3 is apparently not immediately relevant to the point discussed in the minute, but, in describing the effect of that section, the writer divides it into three paragraphs marked by (*a*), (*b*) and (*c*) respectively, an arrangement I have copied above. He then proceeds: "under cl. (*a*) the plainest case is an actual transfer of territory, as for example, the transfer of Behar to the jurisdiction of the High Court of the North-West; under cl. (*b*) the western part of the Central Provinces might be wholly brought within the jurisdiction of the High Court of Bombay," a supposititious case which resembles that put by Sir Courtenay Ilbert only in being on all fours with the present. This difference between two of the highest possible non judicial authorities at least leaves me free to follow my own opinion as stated above

BALESWAR BAGARTI v. BHAGARATHI DAS.

In conclusion, I have only to add that it seems that the Governor-General has at least twice acted on the assumption that he has the power that is now called in question as will be seen on a reference to Notification 1203, dated the 23rd September 1874, and published in the *India Gazette* of 26th September 1874, giving the High Court of Allahabad jurisdiction over a part of the East India Railway and its appurtenances that lie partly in Central India and partly in the Central Provinces; and to Notification No. 335, dated the 18th February 1901, and published in the *India Gazette* of the 23rd February 1901, giving this Court jurisdiction in parts of Sibsagar in Assam.

I therefore hold that the notification of the Secretary of State giving this Court jurisdiction over Sambalpur was not *ultra vires*, that this Court can therefore exercise the same jurisdiction over Sambalpur that it can exercise over the rest of Bengal, and that we therefore have jurisdiction to hear this appeal.

On the merits of the case the Plaintiff sues for recovery of possession of a certain mouzah on the strength of a foreclosed mortgage granted by one Mussamat Bhamo. It is found that the Plaintiff obtained a foreclosure decree in respect of the mortgage in a suit in which the Defendant was a party. But it was suggested in the first place that it had not been proved that Bhamo was sole owner of the mouzah. The lower Appellate Court held that she was such owner because Bhamo had sued Satyabadi, the Defendant's deceased brother, and it was found that Bhamo was the owner of the entire village. To that suit the Defendant was not made a party being a minor, but it was said that Satyabadi was then joint with him, and the lower Appellate Court accordingly held that the Defendant was bound by the decree. This finding may in terms be open to objection in the circumstances of the case, but the suit at least shows an assertion of title by Bhamo, and the Judge holds that a khewat of a settlement and copies of certain chowoalas clearly prove that Bhamo was the sole owner of the village. Under these circumstances the findings of fact in the Court below are too strong for the Defendant to succeed on this point.

It is further argued that the foreclosure decree is not binding on the Defendant, but he was a party to the suit and the validity of the mortgage was determined in his presence, though no decree was made against him on the ground that he had no interest in the property. Under the present circumstances it is impossible to hold that he is not bound by the decree.

The result is that this appeal is dismissed with costs.

A rule was issued in this case on the Plaintiff to show cause why the delivery of possession should not be stayed pending the hearing of this appeal on certain terms, and pending the hearing of the rule delivery of possession was stayed. This rule is now discharged.

MOOKERJEE, J.—This is an appeal from a decision of the District Judge of Sambalpur in an action for recovery of possession of land commenced by the Plaintiffs-Respondents in the Court of the Subordinate Judge of Sambalpur. A decree has been made in favour of the

BALESWAR BAGARTI *v.* BHAGARATHI DAS.

Plaintiffs by both the Courts below, the validity of which is questioned on behalf of the Defendant, substantially, on the ground that the District Judge has misunderstood the legal effect of the decrees in two previous litigations. A preliminary objection is taken to the hearing of the appeal, on behalf of the Respondents. It is argued that the District of Sambalpur is outside the territorial limits of the jurisdiction of this Court, inasmuch as Proclamation No. 2853 issued by the Governor-General in Council on the 1st of September 1905, which declared and appointed that the District of Sambalpur shall cease to form part of the Central Provinces and shall be subject to and included within the limits of the Bengal Division of the Presidency of Fort William, is *ultra vires* (*Gazette of India*, 2nd September 1905, Part I, page 636). The question raised is one of some novelty and of considerable importance, and requires careful consideration. As it goes to the root of our jurisdiction, it must be decided before we can take cognizance of the appeal.

It is argued by the learned vakil for the Respondents that the Governor General in Council had no authority under Statute 28 and 29 Vict., Ch. 15 to issue this proclamation so as to transfer a portion of the territory originally comprised within the jurisdiction of the Court of the Judicial Commissioner of the Central Provinces and place it within the jurisdiction of the High Court, and, in support of this position, reliance is placed upon a passage from a treatise on the Government of India by Sir Courtenay Ilbert (First edition, 250, second edition, 246). The validity of this contention must be tested primarily by reference to the language of the Statute to which I have just referred.

The preamble to Statute 28 and 29 Vict., Ch. 15, explains, among other things, that the object of the statute was to make further provision than is contained in the Indian High Courts Act of 1861, (Stat. 24 and 25 Vict., Ch. 104) for empowering the alteration from time to time of the local limits of the High Courts and for the exercise, in places beyond the limits of the Presidencies or places within and for which such High Courts are established, of jurisdiction and powers conferred by Her Majesty's Letters Patent on the High Courts. Sec. 2 of the Statute next repeals secs. 10 and 18 of the High Courts Act, the former of which provided that the High Courts were to exercise the same jurisdiction as the Supreme Courts, and the latter provided that the territorial limits of the jurisdiction of a High Court might be altered by an order in Council. Sec. 3 of the Statute then authorizes the Governor-General in Council to alter the local limits of the jurisdiction of the High Courts. It provides that it shall be lawful for the Governor-General in Council, *first*, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established or to be established under the High Courts Act; *secondly*, to authorise and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred or to be conferred on it by Her Majesty's Letters Patent within any such portions of Her Majesty's dominions not included within the limits of the Presidency, place

BALESWAR BAGARTI *v.* BHAGARATHI DAS.

or places for which such High Court was established, as the Governor-General in Council may from time to time determine and, *thirdly*, to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the Princes and States of India in alliance with Her Majesty as the Governor-General in Council may from time to time determine. The plain reading of the third section of the statute seems to be that it consists of three independent clauses. We were invited, however, by the learned vakil for the Respondents to treat the first of these clauses alone, as embracing the essence of the section, and the remainder as merely consequential. In my opinion, there is no foundation whatever for this argument. The first clause clearly contemplates the transfer of any territory comprised within the jurisdiction of one High Court to the jurisdiction of any other High Court. As soon as such a transfer has been effected by an appropriate order made in terms of the section the transfer would be operative in the sense that the High Court, within the jurisdiction of which the new territory has been brought, would have power and authority to exercise jurisdiction thereover. It would be entirely superfluous to add a second clause for this purpose. In fact, upon a close examination of the second clause, it is obvious that it is in no sense subordinate or subservient to the first clause, and that its scope is entirely different. The second clause enables the Governor-General in Council by an appropriate order to bring within the jurisdiction of any High Court, entirely or partially, a territory not originally comprised therein, because such territory is not included within the limits of the Presidency, place or places for which the High Court has already been established. Clearly, by no stretch of language, can this be regarded as a provision consequential to that contained in the first clause. This view is considerably strengthened, if we examine for a moment the scope of the third clause, which empowers the Governor General in Council to authorise a High Court to exercise its jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of allied princes and states. Surely this clause can in no event be treated as consequential to the first clause. It may well be asked then, what is the foundation for the suggestion that the second clause is not independent of the first, but nearly subordinate to it? Upon an examination then of all the provisions of the third section of the statute, there does not appear to be any room for reasonable doubt that the Governor-General in Council has authority, not only to transfer any territory from the jurisdiction of one High Court to that of another, but also to place within the jurisdiction of any High Court entirely or partially, territory not originally included therein even though, in the latter event, such place was not part of the Presidency, place or places for which the High Court had already been established. I am fortified in this view of the object and scope of sec. 3 by an examination of the repealed provisions of the Indian High Courts Act of 1861. I may point out that this mode of interpretation is perfectly legitimate and is supported by high au-

BALESWAR BAGARTI *v.* BHAGARATHI DAS.

thority, *Heydon's case* (1) It is well settled that, although a repealed statute has to be considered as if it had never existed, this does not prevent the Court from looking at a repealed Act in *pari materia* on a question of construction [*Ex p. Copeland* (2)]; nor can it be disputed that when the provisions of a statute, as to the scope of which there is room for reasonable doubt, have to be construed, reference may legitimately be made to the previous history of the law on the subject, as was done by the Judicial Committee in *Ishuree Prosad* v *Chutterput* (3), and *Brown* v. *Mclachlan* (4). I am not unmindful that it is only when the statute or its phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible [*Queen* v. *Most* (5), *United States* v. *Chase* (6)]; and that, in any case, as observed by Lord Watson in *Bradlaugh* v. *Clarke* (7), it is an extremely hazardous proceeding to refer to provisions, which have been absolutely repealed, in order to ascertain what the legislature intended to enact in their room and stead. With those observations in view, if we turn for a moment to the provisions of secs. 10 and 18 of the Indian High Courts Act of 1861, what is the position? Sec. 10 defined the jurisdiction of the High Courts to be identical with that of the Supreme Courts. Sec. 18 then provided that it shall be lawful for Her Majesty from time to time, by order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under the Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts, as to Her Majesty with the advice of Her Privy Council may seem meet. The reasonable construction of this provision of the law seems to me to be that the territorial limits of the jurisdiction of any High Court might be altered by an order in Council. What, then, was the object which the Legislature had in view, when sec. 18 was replaced by secs. 3 and 4 of Statute 28 and 29 Vict. Ch. 15? There is nothing to indicate that the intention of the Legislature was to restrict the exercise of the powers of alteration of territorial limits of the jurisdiction of High Courts, only to cases of transfer of territory from one High Court to another. The intention, on the other hand, seems to have been of an entirely different character namely, to make an alteration of jurisdiction possible without the previous sanction of the Crown. Under sec. 18 of the Statute of 1861, the authority was vested in the Crown alone. Under the Statute of 1865, the authority is vested in the Governor-General in Council, subject to the authority of the Crown to disallow any order made by the Governor General in this behalf. If we accede to the contention of the Respondents, the result would be that neither the Governor-General nor the Crown would have any authority to alter the jurisdiction of any High Court by inclusion of territory not comprised within the jurisdiction of a High Court.

(1) [illegible] Rep. 7a
(2) 2 De G. M. and G. 914 (1852).
(3) 3 M[illegible] 199 (1[illegible]) (1812).
(4) L. R. 4 P. C. [illegible] (750) (1872).
(5) 7 Q. B. D. 244 (1881).
(6) 115 U. S. 261.
(7) 8 App. Cas. 354 (350) (1883).

BALESWAR BAGARTI v. BHAGIRATHI DAS.

Such intention is undoubtedly not manifested by the language of sec 3 of the Statute of 1865, and in the absence of clear indication to the contrary, I would hesitate to support the inference that the object and effect of the Statute of 1865 was to deprive the Crown of the authority which it possessed under the Statute of 1861. I have not been able by an examination of the history of the working of the Statute of 1861 or of the history of the legislation of 1865 to lay any solid basis for the theory that mischief had resulted, because the Crown possessed practically unlimited powers of alteration of territorial limits of jurisdiction of High Courts and that it became consequently necessary to restrict those powers. I have tried to place myself in the place of the Legislature at the time of the enactment of the Statute of 1865 and I have not been able to ascertain any historical facts which would justify me in the conclusion that the object of the legislation of 1865 was to restrict the authority of the Crown. [*People* v. *Supervision* (8), *U. S.* v. *Union* (9)] It follows consequently that an examination of the language of the repealed sections of the Statute of 1861 confirms the interpretation at which we arrive on an examination of the plain language of sec. 3 of the Statute of 1865. Some stress must also be laid upon the circumstance that the construction which I place upon the section has hitherto been accepted as the true interpretation of the section, which has been on at least two occasions similarly interpreted and applied by the Governor-General in Council. It is a well settled principle of interpretation that Courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it I do not suggest for a moment that such interpretation has by any means controlling effect upon the Courts, *Stuart* v. *Laird* (10), *United States* v. *Dickson* (11). Such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons, and, in a clear case of error, a Court would without hesitation refuse to follow such construction, *Evanturel* v. *Evanturel* (12), *U. S.* v. *Tanner* (13), *Greely* v. *Thompson* (14). In the present case, however, the language of sec. 3 of the Statute, whether interpreted by itself or in the light of the provisions of the repealed sections of the Statute of 1861, or in view of the construction which has been placed upon it for a long series of years does not lend any support to the contention of the Respondents.

Much reliance was placed on behalf of the Respondents upon the opinion of Sir Courtenay Ilbert, who observes in sec. 104 of his treatise on the Government of India that sec. 3 of the Statute of 1865 only empowers the Governor-General in Council to make an order transferring any territory from the jurisdiction of one Court to the jurisdiction of another and that the effect of the second branch of the section is only to enable the Governor-General to authorise

(8) 43 N. Y. 130.
(9) 91 U. S. 72.

(10) 1 Cranch 299.
(11) 15 Peter 161.
(12) L. R. 2 P. C. 462 (1869).
(13) 147 U. S. 661.
(14) 10 Howard 225.

BALESWAR BAGARTI v. BHAGARATHI DAS.

the Court to which such transfer has been made, to exercise its jurisdiction. With all deference to the opinion of so learned an author, I am unable in the present instance to adopt it as well founded, and I observe that Sir Courtenay Ilbert puts forward his view with some apparent hesitation. On the other hand, it must not be overlooked that the authority of Sir Henry Maine is directly opposed to the view indicated by Sir Courtenay Ilbert. Sir Henry Maine points out that the Statute of 1865 must be interpreted by reference to the two sections of the Statute of 1861 which it repeals and observes that it was plainly intended to enable the Governor-General in Council subject to the veto of the Secretary of State, to do certain things by notification, which under the repealed sections could only be done by the Crown. After reference to secs. 10 and 18 of the Statute of 1861, he next proceeds to analyse sec. 3 of the Statute of 1865 as follows :—

"Sec. 3 empowers the Governor-General in Council,

(*a*) to transfer any territory or place from the jurisdiction of one to the jurisdiction of another High Court,

(*b*) to authorise any High Court to exercise all or any portion of its jurisdiction and power within any such portions of Her Majesty's dominions in India not included within the Presidency or place for which such High Court was established, as the Governor-General in Council shall from time to time determine,

(*c*) to authorise any High Court to exercise any such (that is, all or any part of its) jurisdiction, in respect of Christian subjects of Her Majesty resident in such Native States, as the Governor-General in Council shall determine.

Under cl. (*a*) the plainest case is an actual transfer of territory, as for example the transfer of Behar to the jurisdiction of the High Court of the North-West.

Under cl. (*b*), the western part of the Central Provinces might be wholly brought within the jurisdiction of the High Court of Bombay, or again, the High Court of Bombay might be empowered to exercise part of its jurisdiction over all or part of the Central Provinces, for example, its jurisdiction over European British subjects criminally charged or such matrimonial or testamentary jurisdiction as it now exercises over European British subjects in the Bombay Presidency beyond the limits of its ordinary original jurisdiction.

Cl. (*c*) is very large. Taking literally, it would allow us to give the High Court appellate civil jurisdiction over Christians in Native States, but the use of the phrase "Christian subjects" indicates what, no doubt, was the real intention, namely, that the portion of jurisdiction meant to be exercised was that usually exercised extra territorially, *i.e.*, matrimonial, testamentary and criminal jurisdictions." (Minutes by Sir Henry Maine No. 46 pages 82 to 86 of the edition of 1889, and No. 45, pages 83 to 85 of the edition of 1892).

It is interesting to observe that one of the hypothetical cases mentioned by Sir Henry Maine is substantially identical with the case now before us, and, in view of this exposition of the section from such an eminent jurist as Sir Henry Maine, I feel no doubt that the con-

BALESWAR BAGARTI v. BHAGARATHI DAS.

tention advanced by the Respondents is not based on any solid foundation and must be overruled. The appeal, therefore, must be considered on the merits.

As regards the merits of the case, the decision of the District Judge is attacked on two grounds, namely, *first*, that the decree in a previous litigation to which the present Appellant was not a party ought not to have been treated as binding upon him; and *secondly*, that a decree in another litigation to which the Appellant was a party but in which no relief was awarded as against him ought not to have been treated as binding upon him. To test the accuracy of these contentions, it is necessary to explain that the property in dispute is a village which the Plaintiffs allege belonged to a lady named Bhamo from whom they claim to have derived title under a foreclosure decree. The Defendant, on the other hand, claims title to the property on the basis that it was owned by Samo, the second husband of Bhamo. The question, therefore, to whom the property belonged, ultimately reduces itself to one of fact. The District Judge, however, it is said, has based his conclusion upon the question of title partially on a decree in a previous suit between the brother of the Appellant and Bhamo, in which Bhamo successfully asserted her title. That decree is obviously not binding upon the Defendant who was not a party to that litigation, nor can it be suggested with any show of reason that his brother was a party to that suit in a representative capacity. If the decision of the District Judge had been based on this decree, it would consequently have been necessary to remand the case. The judgment shows, however, that his conclusion was based upon evidence, independent of this decree, *viz.* :—evidence of possession and settlement papers. Under these circumstances, it is unnecessary to remand the case. [*Womes Chunder Chatterjee* v. *Chundee Charan Roy* (15)]. The present case in fact is in one sense much stronger, because there can be no doubt that, although the decree is not binding upon the Defendant, it is admissible in evidence as against him, as an instance of a litigation in which the right now in controversy was successfully asserted by the predecessor of the Plaintiffs against a member of the family to which the Defendant belonged, *Ram Ranjan* v. *Ram Narain* (16), *Bitto* v. *Kesho* (17), *Dinomoni* v. *Brojomohini* (18). I must hold, therefore, that the finding of the District Judge upon the question of title to the village cannot be successfully challenged.

The second ground upon which the judgment of the Court below is attacked is that the decree in the foreclosure suit obtained by the Plaintiffs against Bhamo is not binding upon the Defendant. It is to be observed, however, that the Defendant was a party to that litigation; the genuineness of the mortgage was established in his presence, but no relief was awarded as against him, because it was alleged that he had no interest in the equity of redemption. Under these circumstances, it is difficult to say that the decree is not binding upon him. If

(15) I. L. R. 7 Cal. 293 (1881).
(16) L. R. 22 I. A. 60 (1894).
(17) L. R. 24 I. A. 10 (1897).
(18) L R. 29 I. A 24 (1901).

BALESWAR BAGARTI v. BHAGARATHI DAS.

he had contended in that litigation that he was interested in the equity of redemption a liability could have been imposed upon him under the decree. He escaped liability on the ground that he had no interest in the equity of redemption. He now seeks to make out that it was he who was interested in the property and not the mortgagor, Bhamo. In this state of facts, it is impossible for him to avoid the effect of the decree, which was passed in his presence against the mortgagor [*Nilakant Banerjee* v. *Suresh Chandra Mullick* (19), *Bhija* v. *Chuni Lal* (20)] In any event, if the finding upon the question of the title of Bhamo to the village cannot be successfully challenged on this appeal, the foreclosure decree obtained in the presence of the Defendant in the mortgage suit, is a sufficient foundation for the title of the Plaintiffs to entitle them to a decree for ejectment as against the Appellant. Neither of the grounds, therefore, upon which the judgment is sought to be assailed can be successfully maintained.

The appeal consequently fails and must be dismissed with costs.

The rule for a stay of proceedings pending appeal is discharged; but no order is made as to costs.

N. G. *Appeal dismissed.*

(19) I. L. R. 12 Cal. 414 at p. 423 (1886).

(20) 5 C. L. J. 95, 105 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 520 OF 1905.

RAMPINI, J. SHARFUDDIN, J. 1907. Heard, 23 and 26, June. Judgment, 2, July.

SURENDRA NATH GHOSE and anr., Plaintiffs, Appellants, *v.* KALA CHAND BANERJEE and ors., Defendants, Respondents.

Adoption—Will—Adopted son to take after widow, if of good character—Contingent interest—Uncertainty—Implied contract on adoption not to make Will.

A Hindu by his Will gave his widow a life-interest in a house and provided that on her death their adopted son should have the house provided he was of good character and obedient to the widow,

Held—*That the condition, viz, that the adopted son should be of good character and be obedient to the adoptive mother and should survive her, was a condition precedent to the adopted son taking under the Will and was not void for vagueness.*

The adopted son had a contingent reversionary interest in the house during the widow's life-time and this was inalienable.

TATERSAL v. HOWELL (1) *followed.*

In Hindu adoption there is no implied contract with the natural father that in consideration of the gift of his son the adopter will not make a Will.

SURYA MAHIPATI RAM v. COURT OF WARDS (2) *followed.*

This was an appeal preferred on the 6th of April 1905, against the decree of H. Holmwood, Esq., District Judge of Zillah

(1) Merival's Reports, 26 (1816)

(2) 3 C. W. N. 415: s. c. L. R. 26 I. A. 83 (1899).

SURENDRA NATH GHOSE v. KALA CHAND BANERJEE.

24-Pergunnahs, dated the 19th of December 1904, reversing that of Babu Jadu Nath Ghosh, Subordinate Judge of Alipur, dated the 30th of June 1903.

The facts of the case material to this report will appear from the judgment.

Babus Nil Madhub Bose, Nalini Ranjan Chatterjee and *Norendra Nath Sen* for the Appellants.

Mr. Hill, Babus Jogesh Chandra Roy, Lal Mohun Das, Dwarka Nath Chuckerbutty and *Ratan Chand Bural* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by the Plaintiffs to establish the right they claim to a house in the Barrackpur Cantonments.

The facts of the case are set out in the judgments of the Courts below. It is sufficient to say here that one Srikanto Chatterjee died, leaving a widow Tripura Sundari and an adopted son Bipro Das surviving him. Srikanto Chatterjee before his death executed a Will giving his widow a life-interest in the house and providing that on Tripura Sundari's death, Bipro Das should have a right to the house provided he was of good character and was obedient to Tripura Sundari. Bipro Das mortgaged the house in the sixties with the consent of Tripura Sundari. Then one Kali Prasanno Bose sold the house in execution of a money decree obtained against Bipro Das and the house was purchased by the mortgagee, Gobinda Ghose. Tripura Sundari sued to set aside the sale and obtained a decree in the High Court to the effect that the sale was set aside "as regards Tripura Sundari's life interest in the property—but it was declared that this could not affect any contingent or reversionary rights of Bipro Das after the widow's death, which the mortgagee had purchased, and which he might possibly be in a position to enforce."

The Plaintiffs are the heirs of Gobinda Chandra, the purchaser of the house, and now endeavour to establish their rights as against the Defendants, who derive their title from Tripura Sundari.

The District Judge, though he speaks in one passage in his judgment of Bipro Das having "a vested interest in the property," has come to the conclusion that Bipro Das had under Srikanto Chatterjee's Will only a contingent right to it, the reversionary right being subject to his being of good character and obedient to Tripura Sundari, that his right could not be alienated, and that therefore the Plaintiff's predecessor got nothing by his purchase, seeing that Bipro Das predeceased his mother and never succeeded to the property. The Plaintiffs appeal. On their behalf it is argued (1) that the right of Bipro Das was alienable during the widow's life-time : (2) that the Judge has misconstrued the Will : (3) that the condition in the Will does not refer to any specified event and is void for vagueness and uncertainty : (4) that the statement of Tripura Sundari in the Kobala, Exhibit A8, as to the misconduct of Bipro Das is inadmissible and (5) that the testator had no authority to make a Will so as to defeat the rights of his adopted son and consequently it is void.

We consider, however, that the District Judge is right and that Bipro Das had only a contingent interest in the

SURENDRA NATH GHOSE *v.* KALA CHAND BANERJEE.

property—that his rights were subject to the condition precedent that he should be of good character and obedient to his adoptive mother and should survive her. There is no dispute between the parties as to this condition being in the Will, which has been lost, but of which there is secondary evidence in the Kobala. Both parties admit that there was this condition. The Plaintiffs themselves produce the Kobala in which it is recited and before us it has not been denied that there was such a condition in the Will. There, therefore, appears to be no ground for supposing that the Judge has misconstrued the Will and taken a wrong view of Bipro Das's rights, which, being merely contingent, could not be sold. The condition in question does not seem to us to be void for vagueness. The condition is indeed very similar to that referred to in the case of *Tatersall* v. *Howell* (1).

It is immaterial whether the statements of Tripura Sundari in the Kobala as to Bipro Das's misconduct are inadmissible or not, because he did not survive Tripura Sundari. The question whether he had a right to succeed to the house after the death of Tripura Sundari therefore does not arise. If, while Tripura Sundari was alive, Bipro Das had only a contingent reversionary interest, which could not be sold, as we consider was all that he had, the Plaintiffs have no title to the house. The Appellants' last contention is that the testator could not by Will convey his property away from his adopted son. This argument is set at rest by the judgment of their Lordships of the Privy Council in the *Pittapur* case, *Surya Mahipati Ram* v. *Court of Wards* (2), in which it was held that "In Hindu adoption there is no implied contract with the natural father that in consideration of the gift of his son, the adopter will not make a Will."

For these reasons, we dismiss the appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 268 OF 1906.

MITRA, J.
CASPERSZ, J.
1908.
Heard, 7 and 8, January.
Judgment, 21, January.

UPENDRA CHANDRA SINGHA ROY, Defendant No. 1, Appellant,

v.

MUHOMED FAIZ CHOWDHURY and others, Respondents.

Partition suit—Parties.—Talukdars and dar-talukdars—Allowing persons not made parties to watch proceedings—Practice.

In a suit for partition persons holding interests of an inferior degree are not necessary parties.

A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition as against persons who hold interests of a superior grade.

A putnidar may bring a suit for partition against his co-putnidars or against dar-putnidars under his co-putnidars; in the latter case the co-putnidars must be made parties

The question as to who are necessary and who are proper parties in a partition suit discussed.

(1) 2 Merivale's Reports p. 26 (1816)

(2) 3 C. W. N. 415: s. c. L. R. 26 I. A. 83 (1899).

UPENDRA CHANDRA SINGHA ROY *v.* MUHOMED FAIZ CHOWDHURY.

In the present suit, held, *that the dar-talukdars should not be made parties as the suit would become highly complicated thereby.*

The course adopted in the lower Court, namely, of allowing the dar-talukdars to watch the partition proceedings though not made parties, approved.

This was an appeal preferred on the 25th of July 1906, against the decree of Babu Hari Lal Mukerjee, Subordinate Judge of Zillah Tipperah, dated the 17th of April 1905.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Akshoy Coomar Banerjee* for the Appellant.

Moulvi Zahadur Rahim Zahid for *Moulvi Sayed Shamsul Huda, Babus Harendra Narain Mitra, Dhirendra Lal Kastgir* and *Girija Prosanna Roy Chowdhury* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

Taluk Chak Basta, which at one time belonged to Dewan Durga Churn, consists of 48 villages. Some of these villages are held by talukdars without the intermediate holders, some of the villages, however, are held, either wholly or in part, by dar-talukdars.

The Plaintiff claims a share of 3 annas, 6 gundas, 2 karas, 2 krants, the Defendants No. 1, 2 and 3 who may shortly be described as the Sinha Roy Defendants, have a 4 annas share, and the remaining Defendants hold the remaining share. Defendants Nos. 15, 16, 17, 18, 19, 20, 21 and 22 are described in the plaint as having a share of 2 annas, 4 gundas, 2 karas, 1 krants, but it was conceded in the lower Court that their share was 2 annas, 5 gundas. The shares of the different parties are specified in Sch. A of the plaint; but that schedule must be read with the modification that the Plaintiff has a share of 3 annas, 6 gundas, 2 karas, 2 krants, and the Defendants Nos 15 to 22 a share of 2 annas, 5 gundas. There was no dispute in the lower Court as regards the shares of the other co-talukdars, and now there is no dispute as to the different shares of the parties. The decree of the lower Court directed a partition and, though the decree did not specifically mention the shares of the parties which it should have done, no difficulty arises from such failure to insert the respective shares of the parties In the decree which will be drawn up in this Court, the shares of the parties should be specified as given in the plaint with the amendments we have herein stated.

As regards the villages which are held either wholly or in part by dar-talukdars, the shares are different and the dar-talukdars are also different. One of the mouzahs is said to be held entirely by the dar-talukdars, *i.e.*, Mouzah Gajnarra It is also said that, in 4 of the mouzahs, the dar-talukdars have a $7\frac{1}{2}$ gundas share; in 7 others, they have a 5 annas, 6 gundas, 2 karas, 2 krants share; in 9 mouzahs, they have a 4 annas share; in one mouzah, they have a 6 annas and odd gundas share; in another, they have a 1 anna odd gundas share; and in another they have a 3 annas and odd gundas share.

UPENDRA CHANDRA SINGHA ROY *v.* MUHOMED FAIZ CHOWDHURY.

In the lower Court, a question was raised as to the necessity of making these dar-talukdars parties to the suit All the talukdars were arrayed either as Plaintiffs or as Defendants. The dar talukdars have an interest of the second grade or degree under the talukdars. That they have a right to see that the partition is completed in a proper manner, and that their interests are not unjustly dealt with, is undeniable, and, in fact, the lower Court has directed that they should have a right to watch the partition proceedings though that Court did not direct them to be made parties to the suit. After the preliminary decree was passed by the lower Court, a petition was presented by the dar-talukdars asking that they might be made parties to the suit. The first Petitioner was Tafazzal Ahmed Chowdhury, son of Muhomed Faiz Chowdhury. During the pendency of the appeal, Muhomed Faiz Chowdhury who was the Plaintiff died, and Tafazzal Ahmed Chowdhury is now the Plaintiff, being his legal representative. Though the present Plaintiff had asked in the lower Court, that he, with the other dar-talukdars, might be made parties, he does not press the point in this Court. He has, apparently, taken the same position as his father took during the course of the suit. Most of the talukdars did not contest the preliminary decree of the lower Court, and do not ask this Court to add the dar-talukdars as parties. The only Defendant who has preferred this appeal and asked this Court to direct that the dar talukdars be made parties is the Defendant No. 1, Upendra Chandra Singha Roy, who is now the common manager of the estate. It would not affect his present interest, if the taluk continued to be joint as before.

But apart from any considerations as to the personal interest of one or other of the parties, the question of law that we have to decide is whether, in a suit for partition, the persons representing interests of an inferior grade or degree should be made parties along with the co-owners of a superior rank The lower Court came to the conclusion that persons in an inferior situation, whether they had permanent interests or not, were not necessary parties in a partition suit. The learned vakil for the Appellant has not denied the correctness of the proposition as a proposition of law, namely, that they are not necessary parties and that no suit should fail on account of the absence of such persons as parties to the suit. But what he has pressed upon us is this—that notwithstanding that they are not necessary parties, they are proper parties and that, in view of the facts of the present case, they should be made parties to the suit, and that the case should be sent back to the lower Court for that purpose.

There can be no doubt upon the authorities that, in a suit for partition, persons holding interests of an inferior degree are not necessary parties. It can, also, be stated that the authorities are clear that a person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade. In *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1), the learned Judges came to this conclu-

(1) I. L. R. 24 Cal. 583 (1897).

sion, and the decisions of this Court in *Radha Kanta Saha* v. *Biprodas Roy* (2), and *Nawab Dildar Ali Khan* v. *Bhowani Sahai Singh* (3), also support the same view. So that if a putnidar who has a dar-putnidar under him declines to bring a suit for partition against his co-putnidars, the dar-putnidar, as representing the interest of such putnidar may bring a suit for partition against the co putnidars of his own putnidar. Similarly, a putnidar may bring a suit for partition against his co-putnidars, and he may also bring a suit for partition against dar-putnidars under his co-putnidars. But, in the latter case, the co-putnidars must be made parties. We are not, however, prepared to lay down, as a broad rule of law, that in each case a dar-putnidar is a necessary Defendant in a suit for partition, if his putnidar is made a party and if such putnidar does not wish to avoid the responsibility which attaches to a party in a partition suit; that is, to see that the partition is carried out in a fair and equitable manner. We are, accordingly, of opinion that the view of law taken by the lower Court is correct.

In the present case if we were to direct the dar-talukdars to be made parties, the suit would become highly complicated and a large number of persons would be brought in as parties who might not be usefully or conveniently placed on the record as Defendants.

Their interests are not co ordinate with the interests of the present Plaintiff and Defendants, and they may and ought to be fully represented in the suit by the persons under whom they claim subordinate or dar-taluk interests. We do not apprehend any difficulty in future from the partition being effected as directed by the lower Court. The presence of the dar-talukdars in the partition proceedings which will enable them to watch their own interests, will prevent any fraud from being practised, so far as their interests are concerned. If the dar-talukdars are made parties they may claim partition of their own shares *inter se* in each dar-taluk, and thus introduce almost interminable complications in the partition proceedings [see the observations at p. 111 of the judgment in *Jajneswar Dutt* v. *Bhuban Mohan Mitra* (4)].

It is, however, desirable that, where an entire village is held by dar-talukdars that village should not be allotted to any particular shareholder but should, in accordance with the rule under the Bengal Estates Partition Act, be held by all the co sharers jointly. As regards the villages in which the dar-talukdars hold a share, or shares, the partition should, if possible, be effected in such a way as to give to the dar-talukdars their proportionate shares of the land in accordance with the shares held by them as dar talukdars. This will obviate any difficulty as regards the distribution of assets. As regards the villages in which there are no dar-talukdars, they should be partitioned in the ordinary way and the shares should be as compact as practicable, and if possible, each set of shares should get entire villages. But as regards the villages held by dar-talukdars,

(2) 1 C. L. J. 40 (1904).

(3) I. L. R 34 Cal. 878 : s. c 5 C. L. J. 643 (1907).

(4) I. L. R. 33 Cal. 425 : s. c. 3 C. L. J. 205 (1906).

a different rule must be adopted as we have indicated. The decree of this Court will specify the shares of the parties, direct that the dar-talukdars may be allowed to watch the proceedings, and it should further direct that the partition of the villages in which there are no dar-talukdars should be effected in the manner indicated above, whereas the partition of the villages in which there are dar-talukdars should be effected in a different way, each village being taken as a distinct property subject to partition amongst all the co-sharers. With these modifications, we affirm the decree of the lower Court, and dismiss this appeal with costs to the Plaintiffs Respondents. We assess the hearing fee at Rs. 300.

Let the record be sent down at once.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 421 OF 1906.

MACLEAN, C. J. Doss, J. 1908. Heard, 24, March. Judgment, 10, April.

R. BELCHAMBERS, Administrator *pendente lite* to the estate of Gopal Lal Seal, Plaintiff, Appellant,

v.

SARAT CHANDRA GHOSE and others, Defendants, Respondents.

Civil Procedure Code (Act XIV of 1882) sec. 257A—Rent decree—Instalment bond executed by some of the judgment-debtors in decree-holder's favour in respect of decretal amount—Enforcement by suit—Agreement to give time.

Where two of the judgment-debtors executed a kistibundi *bond in favour of the decree-holder hypothecating certain property in order to secure the decretal amount, and the bond further provided that on failure of payment of the instalments, the decree-holder would be competent to execute the decree,*

Held—*That it was more than a mere agreement to give time within the meaning of sec. 257A, Civil Procedure Code; and although the agreement to give time not having had the sanction of the Court was incapable of enforcement, there was nothing to taint the rest of the agreement with illegality or prevent the decree-holder from suing upon it.*

This was an appeal preferred against the decision of Babu Sripati Chatterjee, Subordinate Judge of Hooghly, dated the 20th June 1906.

The facts of the case are as follows:—

This was a suit on a simple mortgage bond given by the Defendants Nos. 1 and 2, as executors to the Will of the late Muktakeshi Dasi to the late Babu Gopal Lal Seal on the 12th of Assin 1305, which corresponded with the 27th September 1898. The suit was instituted by Mr. R. Belchambers as administrator *pendente lite* to the estate of Babu Gopal Lal Seal.

Babu Gopal Lal had two decrees No. 13 of 1895 and No. 27 of 1897, against the Defendants Nos. 1 and 2 and three minor brothers of theirs, for his $9\frac{1}{20}$ annas share of the arrears of rent of a putni taluk known as "Lot Palpara." Gopal Lal had been executing the decrees in execution cases Nos. 33 and 1 of 1898, when he took the *kistibundi* mortgage bond in suit from the Defendants Nos. 1 and 2. It was stated in the bond that though the putni taluk "Lot Palpara"

R. BELCHAMBERS v. SARAT CHANDRA GHOSE.

did originally belong to the late Paran Chandra Ghosh, the father of the judgment-debtors, it was sold off in execution of some money decree against Paran Chandra in execution case No. 421 of 1888 of the Uluberia Munsif's Court, and was purchased by Muktakeshi Dasi, that Muktakeshi had never got her name registered in Gopal Lal's Sherista; that it was on that account that Gopal Lal had sued Paran Chandra's sons and obtained decrees against them for the arrears of rent of the putni: that Muktakeshi had died leaving a Will by which the executants of the bond (the Defendants Nos. 1 and 2 of the present suit) were appointed executors to her estate: that they had given a fresh kabuliyat for the putni to Gopal Lal, as executors to Muktakeshi's estate: and that as they were not then in a position to pay off the decretal debts they gave that bond mortgaging the putni and other properties left by Muktakeshi. The debt due to Gopal Lal under the decrees then amounted to Rs. 11,549-4-9. It was stipulated in the bond that the Defendants Nos. 1 and 2 would pay Rs. 8,000 in twenty instalments of Rs. 400 each, in Poush and Chaitra 1306 to 1315 B. S., and Rs. 550 in Poush 1316 and Rs. 565-4-9 in Chaitra that year, and Gopal Lal would allow them a remission of Rs. 2,434. If they made default in paying the instalments then only would the decree-holder be entitled to realise the money by executing the decrees, and if they made default in paying any two consecutive instalments Gopal Lal would be entitled to recover the remitted amount also by executing the decrees. It was further provided that the decree was to be kept alive by causing satisfaction of the decree to the extent of the instalment paid before the expiration of every three years.

After executing this bond the Defendants Nos. 1 and 2 paid Rs. 800 only in Poush and Chaitra 1306, but did not make any payment after that year. This suit was therefore brought on the 10th of June 1905 for Rs. 4,000 that was due for the years 1307 to 1311, and also for the remitted amount of Rs. 2,434. An amount of Rs. 1,060 also was claimed as interest, though there was no stipulation for payment of interest in the bond.

The Defendant No. 3 a sister of Defendants Nos. 1 and 2 was made a party to the suit on the allegation that she had purchased the mortgaged putni taluk at a sale in execution of a money decree.

The Defendants all entered appearance in the suit, and contended *inter alia* that the bond in suit was void under sec. 257A of the Code of Civil Procedure, and that there was no cause of action for the suit.

The Subordinate Judge held that there was no cause of action, that there was no provision in the bond which would entitle the Plaintiffs to enforce the terms of the bond by a regular suit, that the bond itself was "absolutely without consideration as it was not the intention of the parties to extinguish the decrees by this new contract between them." (Vide *Gopal Sahu* v. *Brij Kishore Pershad* (13).

Babus Krishna Prosad Sarbadhikari, Chandra Sekhar Banerjee and *Ratan Chand Boral* for the Appellant.

Babu Mohendra Nath Roy, Satish Chandra Ghose and *Mohini Mohan Chatterjee* for the Respondents.

(13) I. L. R. 32 Cal. 917 (1905).

R. BELCHAMBERS v. SARAT CHANDRA GHOSE.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a suit by an administrator *pendente lite* to the estate of one Babu Gopal Lal Seal deceased, upon a *kistibundi* or instalment bond. It appears that Babu Gopal Lal Seal had obtained two decrees in this Court against the Defendants in certain rent suits, on account of arrears of certain putni mohal; that the property was proclaimed for sale for a sum of Rs. 11,549 odd, and the sale was fixed for the 16th of July 1898. By the bond in question dated the 11th of Aswin 1305, after reciting that the sum of Rs. 11,549 odd was due under the decrees and that they were unable to pay the money at once, and that Babu Gopal Lal Seal had agreed to take the sum of Rs. 9,115 odd by instalments, after allowing remission of Rs. 2,434 from the aforesaid amount, the Defendants executed the bond and as security hypothecated certain properties mentioned in the schedule. It was in fact a mortgage bond. Then there was a provision that if there were default in payment of the instalments, it should be competent to Babu Gopal Lal Seal to realise the money in execution of the decrees, and in default of payment of two consecutive instalments the entire amount including the amount remitted, should be realisable in execution of the decrees. The Defendants have only paid about Rs. 800 under the bond, and the execution of the decree has become barred by limitation. A substantial sum is due under the bond. The Plaintiff as representative of Babu Gopal Lal Seal sues for that amount, and for the realisation of the sum out of the hypothecated property. The only defence that has been submitted to us is that the mortgage bond is void under sec. 257A of the Code of Civil Procedure. The Court below took this view and dismissed the suit: and, the only question argued before us on this appeal was whether that view was correct. Sec. 257A, so far as it is material, runs as follows: 'Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable." It is urged that the bond was a mere agreement to give time for the satisfaction of the debt, and as it was made without the sanction of the Court it is absolutely void. In the absence of authority upon the point I should have been disposed to think that what is meant by an agreement to give time in that section, is a mere agreement between the decree-holder and the judgment-debtor to give time for the satisfaction of the debt, and that one object of the section was to obviate discussion, as to whether or not there had been such an extension of time given, as to which there might be a 'considerable conflict of oral evidence: and also, as some Judges think, to protect the debtor and, to avoid this, the Legislature determined that any such agreement should be void, unless made with the sanction of the Court. It is noticeable here that the bond was given not by the judgment-debtors but by two of them only, as executors of the deceased tenant. The question therefore is, is this bond as agreement to give time within

R. BELCHAMBERS v. SARAT CHANDRA GHOSE.

the meaning of the section. *Primâ facie* it is an ordinary instalment bond hypothecating certain property for the payment of those instalments. But it is said that the provision at the end of the deed for keeping alive the right to execute the decree makes it an agreement to give time within the meaning of sec. 257A. On the face of it, it is more than that: it is a contract between the parties that, for the consideration set forth, the Defendants hypothecated certain property to secure the balance of a certain debt. There is a great diversity of judicial opinions upon the point. In the Calcutta and Madras High Courts (subject to a recent decision in the latter Court) the view taken is, that such a bond is not void under sec. 257A and that it can be enforced in a separate suit: whilst, the High Courts of Bombay and Allahabad appear to have entertained an opposite view. In the case of *Jhabar Mahomed* v. *Modan Sonahar* (1), it was distinctly held that an instalment bond of the present nature was not an agreement to give time for the satisfaction of a judgment-debt within the meaning of sec. 257A of the Code of Civil Procedure, and, reference was made to an earlier judgment of this Court in the case of *Gunamani Dasi* v. *Pran Kishori* (2). This view was further emphasized in the case of *Hukum Chand Oswal* v. *Taharunnessa Bibi* (3), where reliance was placed upon the cases I have previously cited, and upon a decision of the Madras High Court in the case of *Sellamayyar* v. *Muthan* (4), and a decision of the Allahabad High Court in the case of *Ramghulam* v. *Janki Rai* (5). The same principle was applied in the case of *Hurkissen Das Serowgee* v. *Nibaran Chandra Banerjee* (6), and again in the case of *Juji Kamti* v. *Annai Bhatta* (7), where it was held that the intention of the section was to render such agreement void, only so far as it affects the right to execute the decrees. In the case of *Bank of Bengal* v. *Vyabhoy Gangji* (8), it was held that, where such an agreement to give time, not sanctioned by the Court as required by sec. 257A formed part of the consideration for the bond, and has actually been enjoyed by the obligee of the bond, such consideration not being in its nature illegal and not having as a fact failed, there is no reason why the obligor should not enforce the terms of the bond. In the case of *Kesu Shivaram* v. *Genu Babaji* (9), it was held that the provisions of sec. 257A do not include, within their scope, an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby the latter, in consideration of the postponement of the execution of the decree against the judgment debtor, undertakes to pay to the judgment-creditor a certain sum of money. Here, as I have pointed out, the obligees of the bond were not the judgment-debtors. In the case of *Tukaram* v. *Anantbath* (10), it was held that the true test was whether the mortgage bond suspended the right to

(1) I. L. R. 11 Cal. 671 (1885).
(2) 5 B. L. R. 223 (1870).
(3) I. L. R. 16 Cal. 504 (1889)
(4) I. L. R. 12 Mad. 61 (1888).
(5) I. L. R. 7 All. 124 (1884).
(6) 6 C. W. N. 27 (1901).
(7) I. L. R. 17 Mad. 382 (1893).
(8) I. L. R. 16 Bom. 618 (1891).
(9) I. L. R. 23 Bom. 502 (1898).
(10) I. L. R. 25 Bom. 252 (1900).

execute the decree, or whether it put an end to the remedy on the decree, and substituted the mortgage bond. If it amounted to an actual and present satisfaction of the judgment, it is not an agreement to give time for the satisfaction of a judgment-debt, and does not fall within sec. 257A of the Code of Civil procedure. In that case all the authorities were carefully reviewed by the Court. This view was adopted by the Madras High Court in the case of *Venkata Subramania* v. *Koran Kannan* (11). All the cases were reviewed in a Full Bench case of the Allahabad High Court, *Lalji Singh* v. *Gaya Singh* (12), where it was held that an agreement whereby a decree is adjusted, and so rendered unenforceable is not within the purview of sec. 257A of the Code of Civil Procedure.

These are substantially all the authorities on the point, and as the result of these authorities, and looking at the language of the section, I think the Plaintiff is entitled to maintain the suit. The provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement, as the agreement was not made with the sanction of the Court, *Bank of Bengal* v. *Vyabhoy Gangji* (8). In point of fact, however, the Plaintiff has performed that part of agreement, and although that part of the agreement may not be capable of enforcement, there is nothing to taint the rest of the agreement with illegality, or to prevent the Plaintiff from suing upon it.

(11) I. L. R. 26 Mad. 19 (1902).
(12) I. L. R. 25 All. 317 (1903).
(8) I. L. R. 16 Bom. 618, 625 (1891).

The appeal must be allowed with costs.

DOSS, J.—I agree.

N. G. *Appeal allowed.*

CRIMINAL REVISIONAL JURISDICTION.

RULE No. 153 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
7, April.

LEKHRAJ RAM, Petitioner,
v.
DEBI PERSHAD, Opposite Party.

Superintendence, High Court's power of—Sec. 15 of the Charter Act—Interfering with order of Presidency Magistrate—Criminal Procedure Code (Act V of 1898), sec. 203, order under—Dismissal of complaint—Rule issued by High Court—Magistrate's duty to show cause.

Independently of the Code of Criminal Procedure the High Court has jurisdiction under sec. 15 of the Charter Act to interfere with the order of a Presidency Magistrate dismissing a complaint under sec. 203, Cr. P. C., and direct a further enquiry.

There is no form of judicial injustice which the High Court, if need be, cannot reach under the Charter Act.

KEDAR NATH SANYAL v. KHETTER NATH MITTER (6) *doubted.*

Sec. 15 of the Charter Act should be interpreted in an extended sense so as to give the High Court power of superintendence, that is to say, powers of revision over proceedings of the Subordinate Courts.

This was a rule granted on the 3rd of February 1908, against an order of Mr. D. H. Kingsford, Chief Presidency Magistrate of Calcutta, dated the 6th of January 1908, dismissing the complaint

(6) 6 C. L. J. 905 (1907).

LEKHRAJ RAM v. DEBI PERSHAD.

of the Petitioner under sec. 203, Cr. P. C., against the opposite party.

The facts material to the report were riefly these :—

The Petitioner was the manager of the firm of Ajodhya Prosad Bindesri Prosad which carried on business as shellac merchants and *aratdars* (commission agents) at No. 150, Cotton Street, in Calcutta.

The accused was a broker in the piece-goods department of the said firm.

The accused asked the manager (the Petitioner) for the loan of Rs. 6,000 alleging that they would be returned to him in a few hours, and sent a servant and then a cousin, one after the other, for the money. The manager refused to give him the money stating that he required the same for his own business.

Thereafter the accused himself came to the manager and pressed him to accommodate him (the accused) with Rs. 6,000 for three or four hours only. On his refusal to give him the money, the accused represented that he had entered into a contract for the purchase of certain bars of silver and that as that day 27th November 1907 was the due date for tendering the amount to the Bank, he wanted the accommodation for a few hours only. The accused also represented that on the Bank's accepting the tender, he would take delivery of the bars and either bring the same to the manager or raise money on them and repay the sum of Rs. 6,000 on that very day. The accused further stated that if the Bank did not accept the tender, he would at once return the sum to him.

The Petitioner, believing the above to be true, was induced to pay the accused Rs. 6,000 for a few hours only. The Petitioner wanted to see or hear from the accused the same evening but the accused did not turn up or return the Rs. 6,000 or any part thereof or give any silver bars.

The Petitioner sent a servant to the accused who promised to pay on the next morning. Since then the Petitioner was put off from day to day on some pretext or other till the 19th December 1907, when the accused absconded, and the Petitioner filed a petition of complaint in the Chief Presidency Magistrate's Court at Calcutta on 2nd January 1908, charging the accused with criminal breach of trust and cheating in respect of the said sum and prayed for a warrant for his arrest.

The Magistrate dismissed the complaint under sec. 203, Cr. P. C., recording the following order "says (*i.e*, the complainant says) he did not understand he was being cheated until the accused ran away on the 19th December. This shows that there was only a vague understanding as regards repayment. Civil matter—dismissed—sec. 203."

Against this order the present rule was obtained by the Petitioner.

Mr. S. P. Sinha and *Babu Ramani Mohan Chatterjee* for the Petitioner.

Mr. Jackson for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This is a rule calling upon the Chief Presidency Magistrate of Calcutta and upon the opposite party to show cause why the order of dismissal of the complaint should not be set aside and a further enquiry directed to be made.

LEKHRAJ RAM *v.* DEBI PERSHAD.

It is argued in the first place, on behalf of the opposite party, that we have no jurisdiction to interfere with the order of the Presidency Magistrate. The question of jurisdiction has been considered both with reference to the provisions of the Criminal Procedure Code and of the Charter Act. I need not discuss the question whether we have the necessary power under the Criminal Procedure Code. That question has been the subject of conflict of decisions as appears from the cases reported in *Colville* v. *Kristo Kishore* (1) and *Emperor* v. *Varjivandas* (2) deciding the question in the affirmative [see also as regards the position of the Presidency Magistrate *Liakat Hossein* v. *The Emperor* (3)] and from the cases reported in *Charoobala* v. *Barendra* (4), *Debi Bux* v. *Jutmal* (5) and *Kedar Nath Sanyal* v. *Khetter Nath Mitter* (6) deciding the question in the negative. I say it is unnecessary to consider whether we have power under the Criminal Procedure Code, because, without deciding one way or other and assuming for the purpose of argument that the Code does not give us power, I am clearly of opinion that we have jurisdiction under the provisions of the Charter Act. This, however, has been contested and reliance has been placed upon the following observations of Mitra, J, in the case reported in *Kedar Nath Sanyal* v. *Khetter Nath Mitter* (6)—"Sec. 15 of the Charter Act, however, gives us a limited jurisdiction. We can exercise that power only in cases of non-exercise or illegal exercise of jurisdiction. We cannot set aside the order of discharge made by the Presidency Magistrate, merely on a consideration of the evidence in the case. We are, therefore, of opinion that this is not a case in which we may exercise our powers under sec. 15 of the Charter Act and direct a further enquiry. The rule is accordingly discharged." It is possible that my learned brother did not use the word "can" in its strict sense and did not, by these observations, mean to absolutely exclude the Court's power of interference in any but the cases mentioned. But, if he did, and the language appears to bear this meaning, I must, with all respect, express my dissent. Other Judges have, on other occasions, repeatedly refused to make any declaration limiting their powers under the Charter. It is one thing to say that the Court will not ordinarily interfere except in the cases stated and it is another thing to say that it can never interfere but in those cases. For my part, I am of opinion that there is no form of judicial injustice which this Court, if need be, cannot reach. It would be unfortunate if it were otherwise. I may add that injustice may equally be done where persons, in fact guilty, are improperly acquitted or discharged as well as where innocent persons are convicted. In the decision reported in *Charoobala* v. *Barendra* (4) it is stated with reference to our power under the Charter that "that section (sec. 15) has always been interpreted in a very extended meaning so as to give us ample power of superintendence, that is to say,

(1) I. L. R. 26 Cal. 746 (1899).
(2) I. L. R. 27 Bom. 84 (1902).
(3) 12 C. W. N. 246 (1907)
(4) I. L. R. 27 Cal. 126 (1899).
(5) I. L. R. 33 Cal 1282 (1906)
(6) 6 C. L. J. 705 (1907).

(4) I. L. R. 27 Cal. 126 (1899).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JUNE 1, 1908. [No. 29

Contents.

NOTES

THE REPORT OF THE BAR COUNCIL, WHICH WE noticed in our columns lately and which contained some very wholesome rules of professional conduct, was adopted at the annual meeting of the Bar Council, held under the presidency of the Attorney-General on the 5th of May last at the Old Hall of the Lincoln's Inn. At this meeting the only question that was referred back to the Council was whether a barrister does not offend against professional etiquette by contributing answers to legal questions in the columns of newspapers for ordinary literary remuneration. Whatever doubt may be entertained as to professional propriety with regard to this matter there is none whatever that when a barrister allows his names to be published in connection with such answers he offends against the wholesome rule that a barrister should do nothing which may amount to self-advertisement or a solicitation of professional business.

THE JUDICIAL STATISTICS FOR ENGLAND AND WALES for the year of 1906 have been published with the usual masterly review of such statistics in an admirable introduction by Sir John Macdonell. We have suggested in these columns before and would suggest again that an annual review of the Judicial Statistics by the Government of India and the provincial governments will be both useful and instructive. The summary and the explanatory notes ordinarily appended to the judicial statistics published by the Government of India are much too meagre and mechanical to convey any idea of the significance of the figures past and present or to indicate the probable causes of normal fluctuations or abnormal variations that are frequently noticable in such figures. The Report of the Administration of Civil and Criminal justice in Bengal and Eastern Bengal as published by the High Court since the Partition of Bengal has become even more enigmatical than before and it is difficult to gather from the undigested mass of information sought to be conveyed the true significance of the figures. This publication should be thoroughly over-hauled and rationalised.

IT APPEARS FROM SIR JOHN MACDONELL'S INTRODUCTION to the Judicial Statistics that in 1906 civil proceedings begun in all Courts of first instance, including the County Courts which chiefly go to swell the figures, show a decline, the figures for 1906 being 1,451,529 against 1,472,633 for 1905. The County Court figures for the corresponding years are 1,338,269 against 1,356,603 and this decline in the County Court proceedings have been noticeable for the last two years running. Further the decline in litigation for 1906 is noticeable not only in Courts of first instance but also in the Courts of Appeal. The only exception in this decline is in respect of some minor appeals from inferior Courts. It is noticed at the same time that the maximum in respect of civil proceedings, was reached in 1904, the figure for that year being 1,518,527. It must be regarded as a curious coincidence that criminal proceedings, that is, persons tried of indictable offences, also declined to 59,079 after steadily increasing from 1900 and reaching a maximum in 1905 of 61,463.

THE BUSINESS IN THE KING'S BENCH DIVISION ALSO declined during 1906. The total number of actions tried, including actions before the official referees, only amounted to 1,914 being the smallest recently recorded. The actions tried in the Chancery Division during 1906 also showed a remarkable decrease and amounted in all to 475. This decline must not be supposed to be spasmodic but has been steady during the last ten years. Ten years before over 4,000 actions were set down for trial annually in the King's Bench Division, and over 1,000 in the Chancery Division. This decline is no doubt partially accounted for by the widening of the County Court jurisdiction and an increase in the number of actions tried by such Courts. But since the increase in the number of suits for £50 to £100 filed in the County Courts during the last five years has only been from 1,536 to 2,493, the decline above-mentioned must be attributed to other causes. That the decline has been general is also evident from the list of commercial causes, which in 1900 amounted to 205 and in *1906* to only 114.

WHIPPING IN ENGLISH LAW.

By R. W. Rippon, B.C.L., *Bar-at-Law.*

Torture is illegal by the Law of England either as a means of proof or as a punishment: but by the Common Law of England whipping was a mode of punishment in the case of "misdemeanours," for instance, we read of the notorious Judge Jeffreys sentencing a woman in the following words: "Hangman, I charge you to pay particular attention to this lady. Scourge her soundly, man, scourge her till her blood runs down. It is Christmas, a cold time for madam to strip. See that you warm her shoulders thoroughly."

The famous Bill of Rights 1689, contains a declaration of the subject's right as against the Crown to the effect "that cruel punishments ought not to be inflicted;" nevertheless whipping continued.

The flogging of women was abolished in 1820 (by 1 George IV, C. 59). The flogging of men, although never formally abolished, is now never imposed as a sentence, except in those cases where some Statute expressly authorises this mode of punishment.

In English Criminal Law there are two forms of inflicting bodily blows.

i. *By the Cat* (or cat of nine tails) this is a whip of which the handle is made of wood or rope about 1 foot and ½ long, to which there are affixed 9 thongs or tails

ii. *By a Birch-rod*, or stick.

The cat cannot be used upon persons under the age of 16 years, it is infinitely more cruel than the birch-rod.

I. The Cat.

The following are the statutes under which whipping *with the cat* can by sentence of a competent Court, be inflicted.

i. *5 Geo. IV, C. 83, sec. 10*, where the accused is convicted of being an "incorrigible rogue" *e.g.* habitual beggars, &c.

The Courts of Quarter Sessions have, under this Act, ordered whipping as follows:—

	A. D. 1902,	1903,	1904,	1905,	1906.
Total convictions of incorrigible rogues ...	314,	240,	314	363,	433.
Sentences of Whipping	1,	0,	6,	0,	1.

ii. *5 & 6 Vict., C. 51, sec. 2*, for assaults on the King "by discharging fire arms at, or throwing or using any offensive matter or weapon with intent to injure or alarm the King" or striking at him, &c.

(A. D. 1932—1908 convictions, &c. 0).

iii. *The Garrotting Act 1863* (26 and 27 Vict. C. 44). This Act attaches the punishment of whipping (in addition to the punishment of penal servitude &c.) to the crimes defined in

(*a*) Sec. 41 of the Larceny Act 1861 and

(*b*) Sec. 21 of the Offences against the Person Act 1861,

Sec.. 41 of the *Larceny Act 1861* enacts:—

"Whoever,

"(1) shall, being armed with any offensive weapon or instrument, rob, or

"(2) Assault with intent to rob any person, or

"(3) Shall, together with one or more other person or persons rob, or assault with intent to rob any person or

"(4) Shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike or use any other personal violence to any person, shall be guilty of felony."

Sec. 21 of the *Offences against the Person Act 1861* enacts:—

"Whosoever shall by any means attempt to choke, suffocate or strangle any person or by any means calculated to choke, suffocate or strangle, attempt to render any person insensible, unconscious or incapable of resistance, with intent in any such cases to assist any other person in committing any indictable offence, shall be guilty of felony, &c"

By the Garrotting Act of 1863 the prisoner convicted of any of these crimes may be (if a male) once, twice or thrice whipped subject to these conditions:—

1 If his age does not exceed 16 years, the instrument of whipping must be the birch-rod and not more than 25 strokes can be inflicted.

2. If above 16 years not more than 50 strokes can be given to him at each such whipping.

3. The Court must, in the sentence, specify the number of strokes, and the instrument to be employed.

The Garrotting Act 1863 recites that the then existing punishment (*i.e.* penal servitude) was insufficient to deter from these crimes of violence, but the present Prime Minister, Mr. Asquith when Secretary of State for Home Affairs said in the House of Commons: "As to garrotting, that crime had been brought to an end as a serious danger, *before* the House in a fit of panic, due to one of its own members having been garrotted; resorted to legislation. Garrotting was put down, without resort to the last, by a fearless administration of the existing law" and the late Lord Ridley an ex-Home Secretary also said: "Reference has been made to the Garrotting Act. He agreed with the history of that Act at all events as far as London was concerned, given by the Right Hon. gentleman (Mr. Asquith) and that the rapid and severe action which put down garrotting took place before the passing of the Act of 1863."

		A. D. 1902,	1903,	1904,	1905,	1906
Robbery	Total convicted	194,	160,	158,	135,	143.
	Whipping sentences	18,	15,	10,	6,	5.

(*iv*). *The Prisons Act 1898.* By this Act a convict cannot be whipped for any prison offence except in two instances

(*a*) Mutiny and

(*b*) gross personal violence to an officer or servant of the prison,

(Formerly a prisoner could be flogged for over a dozen offences).

Some 3 or 4 years ago the Visiting Justices of one convict prison sent a petition to the Prison Commissioners for increased flogging, but on enquiry the Prison Commissioners ascertained that whereas the common offences of prison punishable with No. 1 diet or loss of marks had greatly diminished in number, the two offences that were still punishable with the Cat, had greatly increased.

No Governor of a prison can order a flogging, but only the Board of Visitors confirmed by the Secretary of State (where the offender is over 28 years).

(v). *By the Naval Discipline Act*, 29 and 30 Vict., C. 109, secs. 52, 53 and 55. Flogging is (under restrictions) allowed in the Navy; but flogging in the Army was wholly abolished by the Army Act 1881 (except when on active service or in military prisons), yet according to the Report on Military Prisons and Detention Barracks for 1907, the conduct of the British soldier is steadily improving and the new system of "detention" instead of "prison" is working well.

The above-mentioned 5 Statutes, *viz.*:

1. Vagrancy Act, 5 Geo. IV,
2. 5 and 6 Vict., C. 51,
3. Garrotting Act 1863,
4. Prisons Act 1898 and
5. Naval Discipline Act 1866

are the only ones under which flogging in its cruel form with the cat is authorised and the history of flogging proves that it is useless as a deterrent and the late Lord Brampton (Justice Hawkins) came to the conclusion "you make a perfect devil of the man you flog," and the present sentences of flogging are due rather to the idiosyncrasies of particular judges than to any prevalent belief among the public, the press, the Bar or Bench, as to the efficacy of flogging in its severer form.

II Birching.

I. When the accused is a boy under 16 years of age a birching can be administered in respect of many crimes for the commission of which an adult could not be flogged, *viz.*, larceny or stealing, malicious damage to property, and under sec. 4 of the Criminal Law Amendment Act 1885 for unlawfully defiling girls under 13 years of age. The following figures

		1902,	1903,	1904,	1905,	1906.
Defilement of girls under 13	Convicted...	62,	71,	68,	76,	2
	Whipped ...	2,	4,	5,	4,	3.

show an increase again in the crime.

II. Boys under 14 years when convicted summarily of any indictable offence may be whipped. (They cannot be tried summarily for homicide). The instrument must be a birch-rod and not more than 12 strokes allowed.

COURTS OF SUMMARY JURISDICTION.

(Summary Jurisdiction Acts 1879 and 1899).

Indictable offences tried summarily,

	Total convicted.	Birchings
In A. D. 1906		
Simple larceny ...	30,739	1,777
Larceny from the person	1,128	61
Do. by a servant ...	2,439	9
Embezzlement ...	1,134	10
False pretences ...	1,313	13
Receiving stolen goods ...	619	13
Endangering Ry. passengers	74	36
Destroying Railways ...	10	2
Setting fire to Commons &c.	36	1
Other crimes ...	510	221
	38,002	2143
In A. D. 1903	38,572	2,785
Do. 1904	39,649	2,378

Reviews.

CRIMINAL APPEALS under the Criminal Appeals Act of 1907 with Rules of Court and forms. *By A. C. Forester, Esq., M. P., Bar-at-Law. Published by Butterworth & Co., London, Law Publishers.*

The author and the publishers have with commendable promptitude issued this book before the Court of Appeal first commenced its sitting in London. The introduction of appeals in criminal cases is the most important change that has been made in English law within recent times. Formerly the Home Office used to dispose of representations made to His Majesty through the Home Secretary in hard cases. But the exercise of the prerogative of mercy by the Crown could not properly take the place of a Court of Criminal Appeal; and public opinion in England continued to grow in volume and strength for allowing appeals in regular form to properly constituted tribunals which existed in every civilized country excepting England. Sir Henry Campbell Bannerman's Government, in which the lawyer influence was particularly strong, removed this blot in the criminal procedure of England by passing the Act of 1907. The provisions of this Act which are fully set out in this little book is worthy of careful study and we may safely predict that cases under this statute are bound to influence the decisions of the Courts of Criminal Appeals in India which have been in existence here for a considerable time. The English Act recognises that in criminal appeals it is impossible to draw any line between questions of law and questions of fact. Notwithstanding casual observations, one occasionally hears from the Bench, we all know that ordinarily questions of law and fact are so closely interwoven in criminal cases that it is impossible

to show any sharp line of demarcation between the two. The English Act shows considerable solicitude for securing justice to the Appellants. For instance it provides that three judges are ordinarily to constitute the Criminal Appellate Bench and the Chief Justice is to be one of them and that the view of the majority is to prevail. Under the English Act appeals may also be preferred to the House of Lords from the decision of the Court of Appeal on the Attorney-General certifying that the question of law involved is one of exceptional public importance. The author's explanatory notes appended to each section of the Act are of considerable assistance in comprehending the proper scope of the provisions.

THE LAW OF TORTS, a compendium. *By Hugh Fraser M.A. LL.D. Seventh Edition 1908. Publisher, Sweet and Maxwell Ld., London.*

The new edition of this work which is before us would hardly be recognised as the students' manual which has been so deservedly popular as to run through seven editions in rapid succession. The learned author has done well to adhere to the plan and arrangement of the original work and incorporate in this edition only the changes that have taken place in the law since the last edition. We were curious to find out from this work how the true import of such important decisions as that of *Allen* v. *Flood* and *Quinn* v. *Leathem* has been summarised in this work. We find that the gist of these decisions has been summarised in the form of definite propositions of law, though having regard to the difficulty one has in reconciling them, such a result might seem to many to be unattainable. Although this work is intended for students, lawyers will find it handy in giving them a quick insight into complex questions of law.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before RAMPINI, C.J. and RYVES, J. APPEAL FROM APPELLATE DECREE No. 1031 OF 1906. BIBI ASMATUNNESSA KHATUN SAHEBA AND OTHERS, Defendants Nos. 6 to 11, Appellants *v.* HARENDRA LAL BISWAS AND OTHERS, Plaintiffs and Defendants Nos. 1 to 5, Respondents. Heard, 22nd May 1908. Judgment, 27th May 1908.

Evidence Act (I of 1872), sec. 115—Non-transferable occupancy holding, mortgage of—Purchase by landlord in execution of money decree, whether subject to mortgage—Estoppel.

The appeal arose out of a suit brought by a mortgagee to realise his debt by the sale of the mortgaged property. The mortgaged property consisted of 4 non-transferable occupancy jotes.

The facts were that in 1894 the Defendants Nos. 6 to 11 sold the 4 jotes in execution of a money decree. The jotes were purchased by one Bunwari Lal, who, however, did not take possession. He re-sold the jotes to the former tenants who obtained the money to buy them back from the father of the Plaintiff, to whom they mortgaged the jotes on the 21st September 1898. Subsequently, the Defendants Nos. 6 to 11 again sold the jotes in execution of a money decree, obtained by one M, who had a money decree against the tenants. The Defendants Nos. 6 to 11 attached that decree, executed it and themselves became the purchaser.

The lower Appellate Court held that the Defendants Nos. 6 to 11, who were the purchasers of the jotes at a sale held in execution of a money decree and who were also the landlords of the jotes, were estopped from pleading that the jotes were not transferable. It therefore gave the Plaintiff a decree.

The District Judge observed: "In this case they were appearing not in the character of landlord, but as ordinary purchasers and in order to realize their dues they sold up the jotes. By doing so, they raised the presumption that the holding was transferable. Having done so and got their relief, I do not think they can now come forward in another capacity and say that the holding is not transferable."

The Defendants Nos. 6 to 11 appealed to the High Court and contended (1) that they never represented that the jotes were transferable without their consent and (2) that their conduct in no way amounted to an estoppel. It was urged in reply that sec. 115 of the Evidence Act was not exhaustive, and what the landlords bought was the equity of redemption only.

Held—That the English law of mortgage was not applicable to the case, and the landlords did not purchase subject to the mortgage. Also that the law of estoppel in force in India is contained in sec. 115 of the Evidence Act. The Appellants were not estopped from pleading and proving that the jotes were not transferable without their consent.

Ayenuddin Nashya v. *Srish Chunder Banerjee* (11 C. W. N. 767 distinguished.

Babus Mahendra Nath Roy and *Girja Prosanna Roy Chowdhury*) for the Appellants.

Dr. Rash Behary Ghose and *Babu Hari Charan Sarkel* for the Respondents.

A. T. M. *Appeal allowed.*

LEKHRAJ RAM *v.* DEBI PERSHAD.

powers of revision over proceedings of the subordinate courts." I may also refer to an unreported decision—which I remember and which was referred to at the bar—*R.* v. *Rye Charan Pal* (7) in which Banerjee and Handley, JJ., after consideration of the evidence directed the Presidency Magistrate to make further enquiry into a case which was subsequently committed to the Sessions held by this Court. These decisions do not appear to have been brought to the notice of the learned Judges who decided the case in *Kedar Nath Sanyal* v. *Khetter Nath Mitter* (6). I am therefore of opinion that we have jurisdiction to interfere in this case. The next question is—should we do so. What the Magistrate appears to have done is this—he put a few question to the complainant and then, without further examination of the prosecutor and without allowing him an opportunity of proving his case, passed the following order: "Says (*i.e.*, prosecutor says) he did not understand he was being cheated until accused ran away on 19th December. This shows that there was only a vague understanding as regards repayment. Civil matter—dismissed—sec. 203." In my opinion the Magistrate has disposed of the complaint too hastily and has given reasons which are neither conclusive nor even good. A complainant does well to avoid the making of hasty charges. But subsequent facts may disclose to him the criminal character of past actions. I do not wish to be undeartood as deciding any thing one way or other as to the truth of the facts of this case. But for the limited purpose of this application, the facts alleged must be assumed to be true. It may well be that at the time that the alleged promise was broken the complainant did not understand that he had been cheated. The subsequent conduct, however, of the accused may have convinced him that there was an intention to cheat when the money was obtained. It is alleged that it was falsely stated that no silver had been taken from the bank. It is also alleged that silver bars were in fact afterwards taken from the bank and that the accused, instead of making them over to the complainant, dealt with them himself by raising money on the security of these bars with another party. It is further stated that the accused set up various false pretexts from time to time and ultimately absconded from Calcutta. Now, whatever the effect of these various allegations (if proved) may be, it is obvious that they and the other circumstances alleged are facts which should be enquired into and considered upon the charge which had been made by the complainant. I am of opinion that on the facts disclosed there has not been a proper adjudication and that there should be further enquiry.

There is one other matter to which I wish to draw attention. I observe in this as in all other cases which have come before me that the Presidency Magistrate says that he has no cause to show. A Magistrate by so stating may either mean that there is nothing to be said against the rule being made absolute or that he has in his judgment said all that he wished to say and that he has nothing to add to it. But the making of such a reply to a Rule in all

(6) 6 C. L. J. 705 (1907).
(7) Unreported.

LEKHRAJ RAM v. DEBI PERSHAD.

cases appears to me, (except upon the assumption that the orders complained of are always wrong), to be not the proper manner of dealing with this Court's orders. If there is cause to show, this Court is entitled to require that that cause be shown by the officer to whom the rule is directed in order that he may thus assist the Court in its determination.

I would therefore make the rule absolute.

GEIDT, J.—I agree. I only wish to add that when the Magistrate said that he had no cause to show I understand he meant to say that he has no further reason to give than what is stated in his order.

B. C. *Rule made absolute.*

[FULL BENCH REFERENCE.]

IN

APPEALS FROM ORIGINAL DECREES

Nos. 68 AND 147 OF 1906.

In No. 68.

SATYENDRA NATH ROY CHOWDHURI, Appellant,

SRIMATI THAKURANI KASTURA KUMARI GHATWALIN and anr., Respondents.

In No. 147.

LALA BRIJ BEHARI SAHAI, Appellant,

v.

SRIMATI THAKURANI KASTURA KUMARI GHATWALIN, Respondent.

MACLEAN, C. J.
RAMPINI, J.
BRETT, J.
MITRA, J.
DOSS, J.
1908.
5, May.

Civil Procedure Code (Act XIV of 1882), sec. 199—Judgment, written after Judge was transferred—Validity—Judgment reserved too long.

A judge who heard the evidence in the case is entitled under sec. 199 of the Code of Civil Procedure to write his judgment and send it to his successor for delivery, although the judgment was written by him after he left the judicial post which he was occupying when he heard the case.

SUNDAR KUAR v. CHANDRESHUR PRASAD NARAIN SINGH (1) *approved.*

These were appeals preferred against the decision of W. H. Thomson, Esq., Subordinate Judge, Deoghur, District Sonthal Parganas, dated the 21st of November 1905.

The facts of the case are set out in the ORDER OF REFERENCE which was as follows:—

RAMPINI and SHARFUDDIN, JJ.—These are two appeals against one decision, dated the 21st November 1905, of Mr. W. H. Thomson who describes himself as "late Subordinate Judge of Deoghur, now Subordinate Judge of Dumka."

The facts are these. The Plaintiff Srimati Thakurani Kastura Kumari Ghatwalin, through the manager appointed by the Court of Wards to manage the estate of her deceased husband, sued to eject certain Defendants from lands in the Sub-division of Deoghur. The principal Defendant was the Defendant No. 1, Lala Brij Behari Sahai. There were other Defendants, who were sub-lessees under Lala Brij Behari. The learned Subordinate Judge speaks of them as "sub-Defendants." The Plaintiff obtained a decree. Some of the Defendants

(1) 11 C. W. N. 501 : s. c. I. L. R. 3 Cal. 293 (1907).

compromised the case with her. The only Defendants who are dissatisfied with the decree of the Subordinate Judge are the Defendants Nos. 1 and 9; and they have preferred these two appeals to us, the Appellant in appeal No. 68, being the Defendant No. 9, and the Appellant in appeal No. 147 being the Defendant No. 1.

The grounds of appeal taken in this Court are, *first*, that the Subordinate Judge is wrong in holding that the land in dispute is not held upon a permanent tenure, and *secondly*, that the judgment of the Subordinate Judge is not legal, because it was pronounced after he had ceased to be Subordinate Judge of Deoghur or to exercise powers in that Subdivision, having been appointed Subordinate Judge in another Sub-division of the Sonthal Parganas, namely, the Sadar Sub-division, Dumka.

It is unnecessary for us to deal with the first of these two grounds of appeal, because we consider that the second ground should prevail and that the suit should be remanded to be disposed of in a legal manner by the Subordinate Judge of Deoghur.

The suit was instituted before, and tried by Mr. Thomson when he was Subordinate Judge of Deoghur, but by an order of the Local Government (to be found in the *Calcutta Gazette* of the 4th January 1905, page 7, and dated the 31st December 1904) Mr. Thomson was transferred to Dumka and ceased to be Subordinate Judge of Deoghur on the 17th January 1905. On this date he recorded the following order: " Defendants refuse to argue or to file written arguments. I am making over charge to-day and all the parties want me to write the judgment, so the record must be sent to Dumka, to which place I am going on transfer."

Then on the 21st November 1905, that is after a lapse of 10 months, he wrote his judgment and sent it with the following order to the then Subordinate Judge of Deoghur: "Judgment written and signed. Let the record be returned to the present Subordinate Judge of Deoghur for favour of delivery of judgment." It is to be presumed that the present Subordinate Judge of Deoghur, Mr. McGavin delivered the judgment, but it is noticeable that the decrees were signed by Mr. Thomson. The legality of the proceedings is impugned by the Appellants before us; and we have no doubt that they are illegal. The provisions of sec. 199 of the Code of Civil Procedure allow a judge to pronounce a judgment written by his predecessor, but not pronounced. But this must mean, we think, a judgment written by a Judge when he is holding office, in which he is succeeded by another officer, and who, simply because he has not time to pronounce the judgment which he has already written, has to leave the task to his successor. The section cannot, in our opinion, cover a case, such as the present, in which Mr. Thomson ceased to be Subordinate Judge of Deoghur on the 17th January 1905 and was then succeeded in office by another gentleman when he proceeded to the Sadar Sub-division of the Sonthal Parganas, namely, Dumka, where, after a lapse of about 10 months, he wrote his judgment.

We may note that we find from the *Calcutta Gazette* of the 11th May 1904

(page 667) that by an order of the Local Government, dated the 9th May 1904, Mr. Thomson was vested with the powers of the Subordinate Judge within the local limits of the Deoghur Sub-division. He had, therefore, no powers of a Subordinate Judge in the whole district and by the subsequent order of 31st December 1904, it is clear that when he made over charge of his office to the Subordinate Judge of Deoghur he entirely ceased to have any powers in that Subdivision.

We therefore consider that we should set aside the judgment and decrees of the Subordinate Judge, so far as the Defendants Nos. 1 and 9 are concerned, and remand the suits to the Subordinate Judge of Deoghur, to proceed with them as provided in sec. 191, Civil Procedure Code.

We are, however, met with the judgment of a Division Bench of this Court, in *Sundar Kuar* v. *Chandreshur Prasad Narain Singh* (1) in which it has been held that the Judge, who has heard the evidence in a case, is entitled under sec. 199 of the Civil Procedure Code to write his judgment and send it to his successor for delivery although the judgment was written by him after he had taken leave or left the post which he was occupying when he heard the case. Two other cases have been cited to us, *viz*, *Mutty Lal Sen* v. *Deshkar Roy* (4) and *Parbutty* v. *Higgin* (3). The former, which is the decision of a Full Bench, is in favour of the view we take. The latter is in favour of the view taken by the learned Judges who decided the case of *Sundar Kuar* v. *Chandreshur Prasad Narain Singh* (1). But there is this distinction between the case of *Parbutty* v. *Higgin* (3) and the present case, that in *Parbutty* v. *Higgin* (3) the Subordinate Judge who tried the case had made up his mind about it before making over charge to his successor. In the present case, Mr. Thomson had not done so, and apparently took 10 months to come to a decision in the case. But we do not rest our decision on this ground. We think it is clear that under sec. 199, a judgment which can be pronounced by a Judge's successor, must be one written by the Judge, while he holds office and not one written after he has ceased to exercise jurisdiction owing to his transfer, his taking leave, or his retirement. To hold otherwise may be convenient, but in our opinion is contrary to the meaning of sec. 199 and may lead to gross irregularities and abuses.

We must therefore refer this question to a Full Bench and we accordingly do so and invite them to decide—"whether the judgment referred to in sec. 199, Civil Procedure Code, which can be pronounced by a Judge's successor is one which must be written by the Judge, while holding office as Judge, or whether it may be one written after he has ceased to exercise jurisdiction in the place where the cause of action in the suit to which the judgment relates arose, owing to his transfer or proceeding on leave."

(1) 11 C. W. N. 501 : s. c. I. L. R. 34 Cal. 293 (1907).
(3) 17 W. R. 475 (1875).
(4) 9 W. R. 1 (1867).

SATYENDRA NATH ROY CHOWDHURI *v.* SM. THAKURANI KASTURA KUMARI GHATWALIN.

Babu Dwarka Nath Chuckerbutty (with him *Babus Tarak Chandra Chuckerbutty* and *Girija Prosunno Roy Chowdhury*) for the Appellants, reads sec. 199, Civil Procedure Code. There will be great practical inconvenience from allowing such a procedure. Suppose an acting Sub Judge reserves judgment and then reverts to his office of Munsif and then writes and sends the judgment; can this judgment be said to be a judgment of the Court and be delivered by his successor?

Refers to *Mutty Lal Sen* v *Deshkar Roy* (4) and *Parbutty* v. *Higgin* (3).

[MITRA, J.—The law has been changed since those decisions. Sec. 199 was introduced in 1893]

The judgment ought to be written when the Judge is in the office. Refers to the unreported judgments in S. A. No. 2261 and S. A. No 2239 of 1905.

The object of delivering a judgment in open Court will be frustrated if the judgment is delivered by a successor. The parties or their pleaders cannot suggest emmendations and clear up doubts.

[DOSS, J.—Referred to *Girja Shankar* v. *Gopalji* (2)].

Babu Ram Churn Mitter for the Respondent was not called upon.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The question submitted to the Full Bench is whether the judgment referred to in sec. 199, C. P. C., which can be pronounced by a Judge's successor is one which must be written by the Judge, while holding office as Judge, or whether it may be one written after he has ceased to exercise jurisdiction in the place where the cause of action in the suit to which the judgment relates arose, owing to his transfer or proceeding on leave I think the language of the question is a little involved, and the real question which is raised by this reference, is whether the decision in the case of *Sundar Kuar* v. *Chandreshur Prasad Narain Singh* (1), which held that the Judge who has heard the evidence in the case is entitled under sec. 199 of the Civil Procedure Code to write his judgment and to send it to his successor for delivery, although the judgment was written by him after he had taken leave or left the post which he was occupying when he heard the case, is correct. The question seems to me to depend entirely upon the construction of sec. 199 of the Code of Civil Procedure. It is a very short section, and, in my judgment, its construction is not susceptible of any real difficulty. The section runs as follows, "A Judge may pronounce a judgment written by his predecessor but not pronounced." In this case, the suit was heard by Mr. Thomson when he was Subordinate Judge of Deoghur, and, he was subsequently transferred to Dumka and ceased to be Subordinate Judge of Deoghur on the 17th January 1905. On that date he recorded the following order : "Defendants refuse to argue or to file written argument. I am making over charge to-day and all the parties want me to write the judgment; so the record must be sent to Dumka,

(1) 11 C. W. N. 501 s. c. I. L. R. 34 Cal. 293 (1907).

(2) 7 Bom. L. R. 951 (1905).
(3) 17 W. R. 175 (1875).
(4) 9 W. R. 1 (1867).

to which place I am going on transfer." I regret Mr. Thomson took ten months to write his judgment. He, however, did write it and sent it to his successor at Deoghur to deliver and he did deliver it. It is urged that this is illegal and that sec. 199 does not justify such a procedure. In my opinion, it does. There is nothing in that section which indicates directly or indirectly that the judgment of the Judge who is leaving the Court must be written by him before he has left. That is the point urged by the learned vakil for the Appellant. Apart from authority, and had it not been for the respect I feel for the view of the referring Bench, I personally should entertain no doubt upon the question of the construction of the section: and, it seems to me that the authorities are in favour of the view I have expressed. I have already referred to the case of *Sundar Kuar* v. *Chandreshur Prasad Narain Singh* (1), which is the last authority upon the point. There is a similar decision in the case of *Girja Shankar* v. *Gopalji* (2) in which the Court held that sec. 199 was a clear answer to a similar objection. As regards the older cases, the case of *Parbutty* v. *Higgin* (3) is an authority against the present Appellant; and, the earlier case *Mutty Lal Sen* v. *Deshkar Roy* (4) has no application to the question now under discussion; for sec. 199 was not in existence when that case was decided,—besides, the facts of that case are obviously different—all that was then held was that the opinions (reduced to writing) of Judges who heard the case but who had ceased to be Judges of the High Court before judgment was pronounced could not be treated as judgments but must be regarded as mere memoranda. Two of the Judges had retired and the third had died before judgment was delivered. That is not the present case.

Before I part with the case, I desire to express strongly that the Judge when transferred ought not to have allowed such an inordinately long period as ten months to elapse before sending his judgment to his successor. He ought to have done so as quickly as he reasonably could, and I hope this will be done in future.

I therefore answer the question by saying that the Judge who heard the evidence in the case is entitled under sec. 199 of the Code of Civil Procedure to write his judgment and send it to his successor for delivery, although the judgment was written by him after he had left the judicial post which he was occupying when he heard the case.

The result is that the appeal is sent back to the Division Bench which made the reference with this intimation of our opinion.

The Appellant must pay the costs of this reference—hearing fee 3 hundred rupees.

RAMPINI, J.—I do not wish to press the view I expressed in the reference: and I agree with the learned Chief Justice.

BRETT, J.—I agree with the learned Chief Justice.

MITRA, J.—I agree with the learned Chief Justice. Babu Dwarka Nath Chuc-

(1) 11 C. W. N. 591: s. c. I. L. R. 31 Cal. 293 (1907).
(2) 7 Bom. L. R. 951 (1905)
(3) 17 W. R. 475 (1874)
(4) 3 W. R. 1 (1865)

kerbutty in the course of his argument referred to two cases (Appeals from Appellate Decrees No. 2261 and 2233 of 1905) decided by me in the beginning of the year 1905. The facts of those cases are clearly distinguishable from those of the present case: and it appears to me that the question which has now been argued was not argued then before me.

DOSS, J.—I agree in the judgment of the learned Chief Justice.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 171 OF 1905.

MITRA, J. CASPERSZ, J. 1908. Heard, 12, 13, 16 and 17, March. Judgment, 27, March.

RAI GAJINDAR NARAIN v. RAI HARIHAR NARAIN.

Mitakshara—Hindu joint family—Separation—Partition—Re-union—Jointness without re-union—Tenants in common—Act of father binding on sons.

The fact of living together and eating together on the same floor with food taken from the same cook-room or even the superintendence and control by the eldest and the most intelligent of the members cannot alone suffice to constitute either a joint or a re united family as contemplated by Vijnaneswara and his followers, if there be satisfactory proof of previous ascertainment of the shares of individual members.

The constitution of a joint Hindu family consisting of the father and his sons is such that the father represents the sons without express written authority and is considered to be the accredited agent of the joint family. He may sue and be sued and may bind the family by the result of the litigation. In a family arrangement settling disputed rights and liabilities his action as representative of the family is binding on the dependent members.

STAPILTON v. STAPILTON (2) *applied.*

PITAM SINGH v. UJAGAR SINGH (5) and UJAGAR SINGH v. PITAM SINGH (6) *relied on.*

This was an appeal preferred on the 28th of April 1905, against the decree of Babu Purna Chandar Dey, Subordinate Judge of Zillah Tirhut, dated the 18th of January 1905.

The facts of the case appear from the judgment.

Babus Umakali Mukerjee, Joy Gopal Ghosh and *Satish Chandra Mukerjee* for the Appellant.

Babus Golap Chandra Sirkar, Jogesh Chandra Roy and *Baldeo Narayan Singh* for the Respondent.

The JUDGMENT OF THE COURT was as follows.—

Sheo Narayan, a Hindu governed by the Mithila School of Law, died many years ago. He had four sons two of whom died without issue. The other two sons, Bhup Narayan and Sarup Narayan, separated after their father's death and each obtained a half share of the family property consisting of, amongst other properties, an eight annas share of an estate (No. 2296) known as

(2) 2 W. and T. 839 (1739).
(5) I. L. R. 1 All. 651 (1878).
(6) L. R. 8 I. A. 190; s. c. I. L. R. All. 120 (1881).

Bishnupursad *alias* Bagnirpur, another entire estate (No. 2338) known as Barui-pur, an eight annas of a third (No. 14056) known as Bishnupur Balabhuddar and the same share of a fourth estate (No. 2831) known as Bikrampur. The shares, however, of Sheo Narayan in the last two estates, *i.e.*, Bishnupur Balabhuddar and Bikrampur had been assigned to Gandarp Sahi and others by Sheo Narayan himself by a deed of conditional sale or by *balwafa* in the year 1820 with a stipulation for redemption in five years. Sheo Narayan died before be could exercise his right of redemption.

Sarup Narayan died before the year 1843: the precise date does not appear from the record. He had two wives; by the first he had a son Sukhan Lal and by the second he had four sons, Jaipal Narayan, Jogdeo Narayan, Basdeo Narayan and Baldeo Narayan. Basdeo Narayan died in the year 1846-7 childless leaving a widow Lakho Koer. Next died Jaipal Narayan in the year 1849 leaving him surviving a widow and a minor son Bishnu Doyal. Sukhan Lal died in the year 1863 leaving three sons, Raj Narayan, Rudra Narayan and Saligram Narayan. Raj Narayan died childless shortly after his father's death in the year 1864, and Jogdeo Narayan died in the year 1868 leaving a widow Bechan Koer, and in the following year Bishnu Doyal died without leaving any issue or widow him surviving. Lakho Koer and Bechan Koer died, it is said, in the year 1883.

Then Sukhan Lal died in the year 1863, his sons Raj Narayan and Rudra Narayan were adults and Saligram Narayan was an infant. Rudra Narayan had, however, left the family-house and was living at his father-in-law's and took very little interest in the family property of which much was not left and what little was left was burdened with Sukhan Lal's debts. He died in the year 1891 leaving a son Nathuni Persad who died childless soon after his father's death.

Saligram Narayan is the Defendant 2nd party in the present suit and the Plaintiffs are his sons. The second Plaintiff is still a minor.

Baldeo Narayan, the youngest of the sons of Sarup Narayan, died on the 24th January 1896, and his three sons are the Defendants 1st party in the suit.

On the death of Jogdeo Narayan in 1868, Baldeo became the eldest male member of Sarup Narayan's branch of the family and he was undoubtedly the recognised head until his death. Whether the sons of Sarup Narayan had separated or not the position of Baldeo Narayan could not be ignored by the female members and the junior male members of Sarup Narayan's branch. He kept control over them and his death was the signal for litigation in the family. Saligram Narayan, his wife and children were admittedly living in the family dwelling-house at Bagnirpur though, it is said, the rooms they were occupying belonged to and were repaired from time to time by Baldeo Narayan with his own money. There can also be no doubt that Baldeo Narayan, though he was residing generally at Mozufferpur with his wife and children and was thus practically separate in mess from Saligram Narayan, was materially assisting the latter in the maintenance of his family. The story that Saligram

RAI GAJINDAR NARAIN *v.* RAI HARIHAR NARAIN.

Narayan lived entirely by begging alms from stranger is too absurd to be believed. The pecuniary relations and pecuniary help to Saligram Narayan ceased in 1896 with Baldeo Narayan's death.

On the 22nd September 1899, Saligram Narayan instituted in the Court of the Second Subordinate Judge of Mozufferpur a suit against the present Defendants (1st party), the sons of Baldeo Narayan, for partition, and possession of a half share of all the properties which at one time formed part of Sarup Narayan's estate but which, at the date of suit, were in the possession of the Defendant. The allegations made by Saligram Narayan were that Sarup Narayan's sons had never separated, that they and their sons and grandsons were always joint as contemplated by Hindu law, that since Jogdeo Narayan's death, Baldeo Narayan had been the managing member or *karta* of the joint undivided family and that the two branches, the Plaintiffs and the Defendants were each entitled to a half share on partition. The allegations made in the plaint and the geneological table attached to it, showing that the Plaintiff had then two sons living, indicate that the Plaintiff demanded a half share as representative of his branch of the family. The half share claimed included the shares of his sons. The Defendants denied the averments in the plaint and claimed the properties in their entirety as their father's self-acquired and inherited properties, alleging a separation of the sons of Sarup Narayan shortly after his death. The friends of the parties intervened; good sense prevailed: and the suit was amicably settled out of Court. A petition of compromise was put in on the 14th November 1900. The Plaintiff was allowed possession of four villages in Bishnupur Balabhuddar, and one village in Bishnupursad *alias* Bagnirpur with the *zerait* lands in them as also the *zerait* lands in Bagnirpur itself, and Bikrampur, and the land occupied as homestead with the rooms in his occupation in Bagnirpur. A decree was passed in terms of the petition of compromise.

The present Plaintiffs, the sons of Saligram Narayan, were not satisfied with the consent decree and they instituted the present suit on the 13th November 1903, evidently with the pecuniary help of one Palat Narayan Singh who is maintaining the litigation. The plaint contains substantially the same allegations as those in the plaint in the suit of Saligram Narayan, and the Defendants in their written statement have denied the allegations in the plaint in the same way as they did before. They have also set up the consent decree passed in Saligram Narayan's suit as a bar in law to the suit of his sons.

The questions of fact involved in the suit are difficult to answer, chiefly on account of the complexity and the apparently conflicting nature of the documentary evidence on the record. The oral evidence is also highly conflicting. Some of the documents would lead us to infer that the narrative of the state of the family, as given by the witnesses of the Plaintiff, specially, Rai Barma Dat, a man respectable to all appearance, is correct and that the descendants of Sarup Narayan had never separated before the date of the consent decree in Saligram Narayan's suit; while some of the other

documents support the case of the Defendants and lend considerable weight to the oral evidence adduced on their behalf. The lower Court, however, has carefully analysed both the oral and documentary evidence on the record and, as regards some of the important facts found by it, no case has been made out for a contrary opinion.

It would seem that a separation had taken place between the sons of the two wives of Sarup Narayan before they executed the *zurpeshgi pottah* of the 7th Aghran 1250 F. S. (1842). This *pottah* was executed evidently within a few years of the death of Sarup Narayan and we find Sukhan Lal executing the document for himself only, while Jaipal Narayan, as the eldest son by the second wife, acted for himself and his minor uterine brothers. If the family had then been joint, Sukhan Lal would have represented his minor half-brothers. This conduct of the parties is consistent only with the theory of separation and re-union amongst Jagdeo and his uterine brothers. Such a state of things is quite natural. The next document, however, throws considerable doubt on the hypothesis of an earlier separation and re-union of some of the members of the family. On the 1st October 1853, Sukhan Lal, Jagdeo Narayan and Baldeo Narayan, executed along with the members of Bhup Narayan's branch of the family a deed of sale of certain shares for the family properties including Bishnupur Balabuddar. Sukhan Lal, Jagdeo Narayan and Baldeo Narayan sold 1 anna and 10 gundas describing the share of each to be 10 gundas. They also said that they were the heirs of Basdeo Narayan, thus ignoring the rights of Lakho Koer, widow of Basdeo Narayan. If separation had taken place, Lakho Koer's right by inheritance ought not to have been ignored. If Sukhan Lal had separated, and there had been re-union amongst Jagdeo and his uterine brothers, Sukhan Lal's share would have been 8 gundas only. If again, the family, had been joint without a previous separation the shares of each could not have been specified and each would not have received a proportionate share of the purchase money as mentioned in the deed. Neither could the share of Bishnu Doyal—the then minor son of Jaipal Narayan—be kept separate nor could the shares of the other members be sold as defined shares separated from the share of Bishnu Doyal. The document discloses a state of the family inconsistent with either jointness or separation. It is consistent with the hypothesis of a previous ascertainment of shares of the co parceners which, according to the decision in *Appovier* v. *Ram Subba Aiyan* (1), constitutes partition and a conspiracy not to recognise Lakho Koer's interest as an heiress of her husband. It would appear then Sukhan Lal was there, in 1853, not only the eldest and the most intelligent of the members of Sarup Narayan's branch of the family but he was an earning member, as Rai Barma Dat says, and he had things done in his own way. Lakho Koer was ignored and Sukhan's share was increased. The learned Counsel for the Appellants has laid great stress on this document as supporting a case of continued jointness, but we think it has no such effect.

(1) 11 M. I. A. 75 (1866).

RAI GAJINDAR NARAIN *v.* RAI HARIHAR NARAIN.

On the 2nd January 1855, a four annas share of Bishnupershad was sold in execution of a decree against Sukhan Lal and others and was purchased by Abdul Ali and Abdul Aziz. On the 3rd September 1857 the auction-purchasers sold to Raj Narayan, son of Sukhan Lal a two annas out of the four annas' share purchased by them. This was evidently a purchase by Sukhan Lal in the name of his eldest son, and if the family had separated before, it could not be a purchase by Sukhan Lal for himself and his co-parceners. The case set up by the Defendant is that Raj Narayan was a *benamdar* of Baldeo Narayan and not of his father Sukhan Lal. Oral evidence has been adduced to show that Baldeo Narayan paid the purchase money but the Lower Court disbelieved such evidence and discarded the story of purchase by Baldeo Narayan and we agree with that Court. The purchase was evidently made by Sukhan Lal himself and as a separated co-parcener. He was earning money independently of the family property and got back from the auction-purchasers a part of the family estate, but having debts he had recourse to a *benami* transaction. It is alleged that this share of two annas of Bishnupershad passed to Saligram Narayan by virtue of a deed of gift made by Raj Narayan and such a gift was set up as early as 1864 in a suit instituted by Bishnu Doyal in that year. In that suit Bishnu Doyal had put forth claim to a 16 gundas share of Bishnupershad on the allegation that his father Jaipal Narayan and his uncle Basdeo Narayan had re-united after separation from their brothers. The Courts, however, held that the co-parceners, sons of Sarup Narayan, had always been joint and that the story of separation was false. If the judgments had been *inter partes*, it would have been difficult to avoid the conclusion that the sons of Sarup Narayan had continued to be joint up to at least the year 1863, but there are reasons to suppose that Bishnu Doyal and his uncles and cousins were acting in concert to defeat the purchasers, the principal Defendants in that case. We cannot, at all events, place much reliance on the judgments in the suit of 1864 and hold therefrom that the family had continued to be joint. This litigation was terminated by the final judgment of this Court pronounced on the 1st May 1867 and Bishnu Doyal died two years later. Jugdeo Narayan also died in 1868 and the subsequent documents indicate a different state of the family.

A separation of the family was alleged in the suit of 1861 and, notwithstanding the adverse judgments of the Courts, the conduct of the parties during these and subsequent years' indicates unmistakeably a condition of separation. On the 13th December 1861 Rudra Narayan and Mukund Kuar, as mother and guardian of Saligram Narayan, took out a certificate to collect the debts due to the estate of Sukhan Lal—a fact indicating separation between Sukhan Lal's sons. On the 22nd January 1865 Bishnu Doyal gave a lease of his ½ anna share of Bishnupur Balbhuddar to Abdul Ali as if it were an ascertained share. On the 1st January 1869 the members of all the branches of the family including Lakho Koer and Bichan Koer executed an instrument of sale of the equity of redemption which the family even then possessed in

RAI GAJINDAR NARAIN v. RAI HARIHAR NARAIN.

Bishnupur Balbhuddar and Bikrampur properties conveyed in 1820 by the instrument of conditional sale executed by Sheo Narayan. The purchaser was Baldeo Narayan and the consideration money was apportioned in the deed according to the different shares which would have come to the vendors if the family had divided a long time and certainly before the death of Baldeo Narayan. There can be no question that the deed was executed, though it is doubtful whether any consideration actually passed from the purchaser to the vendors. There might be some ulterior object in the execution of a formal instrument of sale of the equity of redemption, but the deed affords unmistakeable indication of a previous division of Sarup Narayan's branch. Baldeo Narayan was then the eldest and the earning member, his brothers having all died before 1869. He had undoubtedly great influence over the junior male members and female members of all the branches of Sheo Narayan's family, but that is no reason why we should assume that, the state of things disclosed by the deed was contrary to the true state and contrary to what would be the reasonable inference from the previous conduct of the parties.

Notwithstanding the apparent occasional inconsistencies of conduct which must be ascribed to human weakness and aberration, the main thread is visible throughout showing a state of separation of Sarup Narayan's sons and grandsons from a period shortly after his death or at least from before 1812. It may also be safely asserted that there was no subsequent re-union amongst all the coparceners. The coparceners became to all intents and purposes separated with ascertained shares, and if they or some of them lived and messed together in the same way as the members of a family governed by the Bengal School may be members of a joint family with ascertained shares, they ceased to be a joint family with rights of survivorship. With the advance of time there has been a tendency, specially in families in which some of the members are capable of acquiring and do acquire money independently of the ancestral estate, to sever the strict joint family or archaic patriarchal system, and to bring Mitakshara families to the level of Bengal families. The fact of living together and eating together on the same floor with food taken from the same cook-room as deposed to by the witnesses of the Plaintiffs or even the superintendence and control by the eldest and the most intelligent of the members, cannot alone suffice to constitute either a joint or a re-united family as contemplated by Vijnaneswara and his followers, if there be satisfactory proof of previous ascertainment of the shares of individual members. As long as Sukhan Lal was alive he was the manager but with an ascertained share of each member. He was followed by Jagdeo Narayan for a few years and then came the management of Baldeo Narayan which lasted till September 1896. He, however, had his own ascertained share and he acquired property himself. He might have acted in a way that may be called fraudulent with respect to the shares, or property of the junior and dependent members. He might have been unscrupulous in his dealings and guilty of misappropriation. He undoubtedly took advantage

RAI GAJINDAR NARAIN v. RAI HARIHAR NARAIN.

of his position and of his residence at Mozaffurpore, but he behaved in such a way as to give no occasion for an open attack on him. After Bishnu Doyal's death Baldeo Narayan took out (as his heir) a certificate to collect debts, and, in the view we take of the facts, he was entitled to do so, but he was not entitled to get his name registered as proprietor of a 2 annas share of Bishnu Pershad which Sukhan Lal had purchased in Raj Narayan's name and which had passed without objection to Saligram Narayan to the exclusion of Rudra Narayan. He also had not the right to appropriate the whole of the 10 gundas of Bikrampur which belonged to the family and which his sons now claim by right of adverse possession.

From the year 1870 commenced a course of conduct on the part of Baldeo Narayan which would indicate either that Saligram Narayan was joint with him or that he was trying to appropriate property which undoubtedly belonged to Saligram Narayan, though he stood in a fiduciary relation towards him He, Baldeo Narayan, got his name registered in the Collectorate as proprietor of the properties—the subject-matter of the present suit, paid revenue in his own name took *kabuliyats* from tenants, endowed a portion of land of Bishnupershad as *debutter* and got shares separated in the Collectorate as if he had been the sole proprietor. He entirely ignored Saligram Narayan's right to portions of such properties, whether he did so as the *karta* of a joint or re-united family does not appear. At all events, there is no allegation, far less evidence of re-union between Baldeo Narayan and Saligram Narayan. But still he was undoubtedly looked upon as the manager. It does not also appear that he ever openly and to the knowledge of Saligram Narayan set up an adverse title to property which belonged to Saligram Narayan. The evidence does not disclose facts which would induce us to hold that Baldeo Narayan intended to cheat his nephews, to act fraudulently, or to misappropriate property. There is no evidence of express adverse possession except such as may be inferred from the proceedings in Revenue offices and acceptance of *kabuliyats* and other acts consistent with the managership of family property. Saligram Narayan was a man of weak intellect, perhaps of vicious habits also, and he and his wife and children were entirely dependent on Baldeo Narayan. They were living in the family dwelling house at Baguirpur and were evidently quite ignorant of the acts of Baldeo Narayan done at Mozaffurpur.

In this state of affairs, we would be very reluctant to apply the rule of limitation based on adverse possession to the claim of the Plaintiffs to such parts of the properties in dispute as to which Saligram Narayan had a clear title. The lower Court has held that the right of the Plaintiffs to a two annas share of Bishnupershad is barred by limitation. We do not think it is so or that the possession of Baldeo Narayan was ever strictly adverse. The possession of Baldeo Narayan's sons was adverse but not that of their father. We might also have applied the rule of Hindu law—as to lost family property re-acquired by a member of it—to such properties as were re-acquired by Baldeo Narayan. It

RAI GAJINDAR NARAIN *v.* RAI HARIHAR NARAIN.

would, in such a case, be necessary to enquire whether the deed of the 1st January 1869 was genuine in the sense that consideration really passed to the vendors. Such enquiries, however, appear to us to be unnecessary, because we are of opinion that the consent decree in the suit of Saligram Narayan is binding on his sons. If they had succeeded in showing that the family was joint and that they with their father were entitled to a half share of the properties in dispute, we might be induced to consider this question of the validity of the consent decree on the grounds set forth in the plaint and attempted to be made out by evidence but they have failed to prove their main allegations of fact.

We have already shown that the suit of partition instituted by Saligram Narayan, the father of the Plaintiffs, was in substance a suit in his representative capacity. It was compromised and the consent decree is the most cogent evidence of a family arrangement settling disputed claims. No ground has been established for setting it aside. No attempt has been made, to show that the compromise was unfair to the Plaintiffs assuming that the separation of the sons of Sarup Narayan was an accomplished fact. The only question is:—Are the Plaintiffs bound by the consent decree? It is true that the rule of *res judicata* as enunciated in sec. 13 of the Code of Civil Procedure does not strictly apply to the present case, but there are other well-established principles of estoppel which apply. The constitution of a joint Hindu family consisting of the father and his sons is such that the father represents the sons without express written authority and is considered to be the accredited agent of the joint family. He may sue and be sued and may bind the family by the result of the litigation. In a family arrangement settling disputed rights and liabilities, his action as representative of the family is binding on the dependent members. If the compromise of doubtful claims was *bonâ fide* entered into, the principle laid down in *Stapilton* v. *Stapilton* (2) and often followed in India [*Ram Nirunjun Singh* v. *Prayag Singh* (3) and *Rameshur Persad* v. *Lachmi Persad* (4)] would apply, as if the sons who were represented by the father were parties to the transaction. *Pitam Singh* v. *Ujagar Singh* (5) and *Ujagar Singh* v. *Pitam Singh* (6) may be cited as affirming the rule applicable to the present case.

We are, therefore, of opinion that the decree made by the lower Court dismissing the suit is correct and we dismiss this appeal with costs.

S. C. S. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 675 OF 1908.

STEPHEN, J.
HOLMWOOD, J.
1908.
21, April.

MULUK PATOONI,
Plaintiff, Petitioner,

v.

BHARAT CHANDRA DAS
and ors., Defendants,
Opposite Party.

Specific Relief Act (I of 1877), sec. 9—Dispossession in due course of law—Suit by tenant of judgment-debtor against auction-

(2) 2 W. and T. 839 (1739).
(3) I. L. R. 8 Cal. 138 (1881).
(4) 7 C. W. N. 688: s. c. I. L. R. 31 Cal. 111 (1903).
(5) I. L. R. 1 All. 651 (1878).
(6) L. R. 8 I. A. 190: s. c. I. L. R. 4 All. 120 (1881).

MULUK PATOONI v. BHARAT CHANDRA DAS.

purchaser—Delivery of possession—Civil Procedure Code (Act XIV of 1882), secs. 318, 319.

When on obtaining delivery of possession of immoveable property under sec. 318 of the Code of Civil Procedure the auction-purchaser dispossessed a tenant of the judgment-debtor,

Held—*That the auction-purchaser not having proceeded under sec. 319 of the Code, the dispossession was not in due course of law and a suit under sec. 9, Specific Relief Act was maintainable.*

This was a rule granted on the 17th of February 1908, against an order of Babu S. P. Dutta, Munsif of Sylhet, dated the 10th of December 1907, dismissing the suit brought by the Plaintiff for recovery of possession of certain land, holding that the same is not maintainable.

The suit was for recovery of possession of 2 kadirs of land on the allegation that the Plaintiff had been in possession of the same as tenant in 1313 and also in previous years and had been dispossessed in Bysack 1314 by the Defendants.

The Defendants contended that the Plaintiff never had been in possession of the same; that one Mona Ram Das had been in possession of the same in Bhagjote since a long time; and that the Defendants having purchased the land in auction sale had taken possession through Court under sec. 318, Civil Procedure Code.

The Munsif held as follows:—

"From the evidence adduced on the Plaintiff's side I believe that the Plaintiff possessed the land in suit in 1313. It is very likely that he was dispossessed by the Defendants after they had taken possession of the same together with other lands under sec. 318, C. P. C. If such be the case the Plaintiff has been evicted in due course of law and he cannot bring a sec. 9 case for recovery of possession. His only remedy is to bring a title suit against the Defendants. The Defendants produce some papers which show delivery of possession under sec. 318, C. P. C.

"Under the circumstances I hold that though the Plaintiff had possession in the disputed land within 6 months previous to the institution of the suit, still this is not maintainable. The suit is dismissed."

Plaintiff moved the High Court and obtained this rule.

Babu Khettra Mohan Sen for *Babu Digambar Chatterjee* for the Petitioner.

Babu Surendra Nath Ghoshal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this matter a suit under sec. 9 of the Specific Relief Act has been brought for possession under the following circumstances: The decree-holder in a mortgage suit proceeded to execute his judgment against the property of his judgment-debtor, and obtaining an order under sec. 318, C. P. C. he was put into possession of the property now in question. The present suit has accordingly been brought by a person who alleges that he is the tenant of the judgment-debtor in respect of this property. The matter coming on for hearing before the Munsif he has decided that the suit is not maintainable on the ground that because possession was given to the

MULUK PATOONI v. BHARAT CHANDRA DAS

decree-holder under sec. 318, C. P. C., the Plaintiff in the present case has been dispossessed in due course of law.

We granted this rule to show cause why this order of the Munsif should not be set aside. The delivery was given to the Defendants in the present case on the 12th February 1907, and it appears that the Plaintiff remained in possession until the 7th of May of the same year, when he was dispossessed by the Defendants. The question is whether that dispossession was in due course of law. Now, on considering the facts of the case, it appears that if the Plaintiff was the tenant of the judgment debtor the proper method of asserting the rights of the decree-holder against him was under sec. 319, C. P. C., rather than under sec. 318 as he does not appear to come under the description of any of the persons mentioned in that section. What the effect of the execution of an order under sec. 318 on the Plaintiff's position was, we need not decide, because we are of opinion that the due course of law was not followed, the order being passed under sec. 318, when it ought to have been passed under sec. 319. The result is that the Plaintiff was not dispossessed in due course of law and that the present suit is maintainable.

The rule must accordingly be made absolute with costs. The Munsif's order is set aside and it will be his duty to proceed to deal with the case on the merits. We assess the costs at 2 gold mohurs.

N. C. *Case remanded.*

CIVIL REVISIONAL JURISDICTION.

RULE NO. 3679 OF 1907.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard,
14, January.
Judgment,
17, January.

L. MOORE, Defendant, Petitioner,
v.
MONORANJAN GUHA, Plaintiff, Opposite Party.

Specific Relief Act (I of 1877), sec. 9—Criminal Procedure Code (Act V of 1898), sec. 145—Dispossession due to order of Criminal Court—Possessory suit—Maintainability.

It is not open to an unsuccessful party in a proceeding under sec. 145, C. Cr. P. to institute a suit under sec. 9 of the Specific Relief Act for recovery of possession upon the allegation that he has been dispossessed as a result of the order of the Criminal Court.

NAGAPPA v. SAYAD BADRUDIN (1) and IN THE MATTER OF CHYTUN CHUNDER ROY (2) *distinguished.*

This was a rule granted on the 19th of December 1907, against the decree passed by Dr. V. Rai, Munsif of Giridih, dated the 4th of October 1907, decreeing the suit brought by the Plaintiff, Opposite Party, under sec. 9 of the Specific Relief Act.

The facts of the case appear from the judgment. They are shortly as follows:—There were disputes between the Petitioner and the Opposite Party regarding the possession of a mica mine, which culminated in the beginning of November 1906 in a proceeding under sec. 145, Cr. P. C., with the result that on the 9th November 1906 the property was attached and on the 11th February 1907

(1) I. L. R. 26 Bom. 353 (1901).
(2) 20 W. R. 12 (1873).

L. MOORE v. MONOHAN LAL GUHA.

an order was made declaring the Defendant to be in possession and entitled to retain possession of the disputed property.

The Plaintiff instituted the present suit under sec. 9 of the Specific Relief Act on 18th April 1907 on the allegation that he was dispossessed on the 13th February 1907.

Babu Baranasibasi Mukherjee in support of the rule.—The Plaintiff himself says that his cause of action arose on the 13th February 1907, when the Defendant took possession of the property agreeably to the order of the Criminal Court declaring his possession after it had been in attachment under sec. 145, Cr. P. C. A suit under sec. 9 of the Specific Relief Act is not maintainable as the Plaintiff's own case is that he was "dispossessed in due course of law" within the meaning of sec. 9. The question before the Criminal Court under sec. 145 is the same as that before the Civil Court under sec. 9 of the Specific Relief Act, and it is not proper that two Courts should come to different conclusions upon the same question. The case relied on by the learned Munsif is clearly distinguishable, first because that case [*Nagappa* v. *Sayad Badrudin* (1)] was not a case under the Specific Relief Act, but under the Bombay Mamlatdar Court's Act, and secondly because there the Civil Court was not asked to come to a determination on the question of possession such as would be inconsistent with the determination of the same question by the Criminal Court, the alleged act of dispossession in that case relating to a period previous to that to which the order of the Criminal Court related. The case *In the matter of Chytun Chunder Roy* (2) was a peculiar one. There the Defendant in a possessory suit took advantage of the Plaintiff's allegation as regards his dispossession to institute a proceeding in the Criminal Court and succeeded there. The question of possession in that case being already before the Civil Court, the Criminal Court certainly would have no jurisdiction to try it and it was found that the judgment of that Court did not in any way oust the jurisdiction of the Civil Court. Further the Criminal Court had in this case found that the Defendant was in possession for the last two years. That Court has power to determine which party was in possession two months before the date of the order, see sec. 145, Cr. P. C., cl. (4) proviso. So that even if the adjudication of the Criminal Court on the question of possession be held to have force and effect only from two months previous to the date of the order, the suit would be barred by limitation, the Defendant having been in possession for more than six months before suit.

Babu Gunada Charan Sen for the Opposite Party contended that the Civil Court had jurisdiction as the Criminal Court did not and could not, under sec. 145, Cr. P. C., give possession to any party, but only determined and declared which party was in possession at the date of the order. The taking of possession after the Criminal Court has made its order, is the act of the party and not of the Court. The Criminal Court cannot give or take away possession in execution or in furtherance of its order under sec. 145, C. Cr. P. There

(1) I. L. R. 26 Bom. 353 (1901).

(2) 20 W. R. 12 (1873).

L. MOORE v. MONORANJAN GUHA.

is nothing to prevent a Civil Court from finding, as it did in this case, that the finding of the Magistrate as to the Defendant's possession was erroneous. If the Defendant dispossessed the Plaintiff under cover of the erroneous order, he cannot be said to have done so in due course of law. The Plaintiff might have misapprehended his position in stating in the plaint that he was dispossessed "agreeably to the order under sec. 145," but that order by itself could not have any such operation. It was followed up by an act of dispossession on the part of the Defendant for which he cannot make the law responsible. Cites *Nagappa* v. *Sayed Badrudin* (1) and *In the matter of Chytan Chunder Roy* (2).

Babu Biraj Mohan Mukherjee in reply. The criminal Court under sec. 145, Cr. P. C., declares the possession of a party and forbids the other party from disturbing that possession. So that the effect of the order is dispossession of the unsuccessful party although the order does not expressly dispossess him. The act of dispossession need not be under the present law an act of the Court. It is sufficient if it is the natural consequence of the Court's order. The previous law in Act XIV of 1859 enacted in sec. 15 that the dispossession must have been otherwise than "by due course of law." The wording in sec. 9 is "in due course of law." So that the change in wording implies that the dispossession need not be by legal process, it is sufficient if it occurs in course of a judicial proceeding.

The order of the Criminal Court is final under sec. 145 on the question of possession. The only remedy open to the unsuccessful party is a suit for possession on establishment of title, *vide* the observations of the Judicial Committee in *Kadir Bukhsh* v. *Fusseeh-oon nissa* (6), *Barada Kant* v. *Chunder Coomar* (7) and *Dinomoni* v. *Brojo Mohini* (5). It could not have been the intention of the legislature that an unsuccessful party in a sec. 145 case should institute a suit under sec. 9, Act I of 1877, when we see that the legislature has provided a special period of limitation for a suit for recovery of the property by him in art. 47, Sch II of the Limitation Act.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—This is a rule to show cause why a decree passed by the Munsif of Giridih in a suit brought under sec. 9 of the Specific Relief Act should not be set aside on the ground that the dispossession complained of being the result of a proceeding under sec. 145, Cr. P. C., no action under any section of the Specific Relief Act would lie. The facts of the case are as follows. The land in dispute is a mica mine the title to which is disputed by the parties. The mine cannot be worked during the rains. from the 5th to the 26th October 1906 it was in the possession of the Plaintiff. On the 26th he was dispossessed by the Defendant. On the 3rd November a breach of the peace led to proceedings under sec. 145, Cr. P. C. When the order under sec. 145 (1) was made does not

(1) I. L. R. 26 Bom. 353 (1901).
(2) 20 W. R. 12 (1873).

(5) 6 C. W. N 386 : s. c. I. L. R. 29 Cal. 187 at p. 199 (1901).
(6) 5 M. I. A. 413 at pp. 423-4 (1853).
(7) 12 M. I. A. 145 at p. 155 (1868).

L. MOORE v. MONORANJAN GUHA.

appear, but it must have been between 3rd November and the 10th November when the property was attached by the Court under sec. 145 (4). The proceedings terminated on 2nd February 1907, when the Magistrate found that the present Defendant "is in possession of the mine,", and we must suppose that an order was consequently drawn up in accordance with Form No. 23 of Sch. V of the Cr. P. C. declaring that the Defendant was in possession and entitled to retain such possession until ousted in due course of law. Could the Munsif hear the case before him which was instituted after the order had been made? The Plaintiff's right under the Specific Relief Act, sec 9, arises if he was dispossessed otherwise than in due course of law. The dispossession on which he based his suit was that which took place on the 13th February 1907 in consequence of the order under sec 145 I find it impossible to suppose that if the Plaintiff was dispossessed on the 13th February which seems to me doubtful, as the property was then attached by the Court, the Defendant's dispossession was otherwise than in due course of law. It is true that sec. 145 contains no provision that a party in whose favour an order is made under the Section is to be put into possession, but if he is declared entitled to possession and disturbance of his possession is forbidden, no one has a right to interfere with his taking possession and he is therefore entitled to take it.

We have been referred to the case of *Nagappa* v. *Sayad Badrudin* (1) as an authority to show that the Munsif had jurisdiction in this case, in spite of the order under sec 145. In that case a Mamlatdar acting under Act III of 1876, Bombay Acts, secs. 3, 10, refused to exercise a jurisdiction similar to that conferred by sec 9 of the Specific Relief Act, and it was held that he was wrong. In that case, however, the date of the alleged act of dispossession was anterior to proceedings under sec. 145 or at all events to the date mentioned in the order under sec. 145 (1), so that a decision of the question that it was sought to raise in issue could not run counter to the effect of the order under sec. 145 (6) and the decision cannot be taken as showing that a dispossession under such an order is a dispossession otherwise than in due course of law under sec. 9, Specific Relief Act. The decision in *In the matter of Chytun Chunder Roy* (2) is to a similar effect and is not relevant to the present case for the same reasons.

The result is that the rule must be made absolute and the decree of the Munsif set aside. The Petitioner is entitled to his costs in this Court, which we assess at 2 gold mohurs and his costs in the Court below.

MOOKERJEE, J. The order, which we are invited to set aside in the exercise of our revisional jurisdiction, was made by the Court below in favour of the Plaintiff, Opposite party, in a possessory suit commenced by him under sec. 9 of the Specific Relief Act against the Defendant, Petitioner, for the recovery of a mica mine. The facts so far as they can be gathered from the record appear to be as follows. The parties to the present proceeding have had for some time past

(1) I. L. R. 25 Bom. 356 (1901)

(2) 20 W. R. 12 (1873)

L. MOORE v. MONORANJAN GUHA.

a dispute as regards the title and possession of the mine in question. Some time in November 1906 proceedings were taken by the Magistrate of Giridih under sec. 145 of the Code of Criminal Procedure and on the 9th of November 1906, the mine was attached under the second proviso to sub-sec. 4 of that section. On the 11th of February 1907, the Magistrate held that the present Petitioner, Moore, was in possession at the date of the initial order under sec. 145 and made the final order in his favour, namely, that he must be maintained in possession until evicted therefrom in due course of law. On the 18th of April 1907, the Plaintiff who had been defeated in the proceedings under sec. 145 of the Code of Criminal Procedure instituted the present action for recovery of possession under sec. 9 of the Specific Relief Act upon the allegation that he had been unlawfully dispossessed by Moore on the 13th of February 1907. The claim was resisted not only on the merits but also on the ground that the Court had no jurisdiction to entertain the suit under sec. 9 of the Specific Relief Act, inasmuch as the Plaintiff, if ever in possession, had not been dispossessed otherwise than in due course of law. The Munsif overruled this objection, found on the merits in favour of the Plaintiff, and made a decree in his favour. It is this decree which we are now invited to set aside.

It has been contended by the learned vakil for the Petitioner that, if the Plaintiff was at any time in possession, he was dispossessed in due course of law inasmuch as he lost possession as a necessary result of the proceedings under sec. 145 of the Code of Criminal Procedure which terminated in favour of the Petitioner. It has been argued on the other hand by the learned vakil for the opposite party that it was quite competent to the Civil Court to entertain the suit under sec. 9 of the Specific Relief Act, inasmuch as sec. 145 of the Code of Criminal Procedure does not entitle the successful party to be placed in possession by the Court and consequently the Plaintiff has lost possession otherwise than in due course of law. In support of this view, reliance has been placed upon the decision of the Bombay High Court in *Nagappa* v. *Sayad Badrudin* (1). After careful consideration of the arguments which have been addressed to us on both sides, I am of opinion that the decision upon which reliance is placed is clearly distinguishable and that in the events which have happened, the Plaintiff cannot be said to have been dispossessed otherwise than in due course of law, and is consequently, not entitled to maintain an action under sec. 9 of the Specific Relief Act.

It was pointed out by the learned Judge of the Bombay High Court in *Rudrappa* v. *Narsing Rao* (3), that in order to enable the phrase "in due course of law" to be predicated of any matter, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law, and "due course of law" means the regular normal process and effect of the law operating on a matter which has been brought before it for adjudication. No doubt, in a later passage, the learned Judges observe that the words must

(1) I. L. R. 26 Bom. 353 (1901).
(3) I. L. R. 29 Bom. 213 (1904).

L. MOORE v. MONORANJAN GUHA.

be read in their primary sense as referring to the process and operation of the law invoked by the ordinary method of a civil suit An examination of the judgment as a whole shows, however, that the learned Judges did not intend to use "civil suit" in contradistinction to a "criminal proceeding", and, in my opinion, a matter may be said to have happened in due course of law, if it is the result and operation of the law invoked, by the ordinary method of any judicial proceeding. Judged from this point of view, it seems to be reasonably plain that the dispossession of the Plaintiff cannot be said to have happened otherwise than in due course of law. It is perfectly true that sec. 145 of the Code of Criminal Procedure does not expressly authorise the Court to place the successful party in possession, but its practical result is the same As was pointed out by Mr. Justice Phear in *Kalee Chunder* v. *Adoo Sheikh* (4), the section provides a special remedy for a particular kind of grievance inasmuch as its effect is to replace in possession a person who has been evicted otherwise than in due course of law from landed property of, which he had been in undisturbed possession and thus to prevent a powerful person from shifting the burden of proof from himself to another less able to support it. That this must be so, is obvious from the circumstance that a disobedience of the order made by a Magistrate under sec. 145 of the Code of Criminal Procedure is punishable under sec. 188 of the Indian Penal Code; there is consequently an effective sanction provided by law and the result of an order favourable to one party is that his unsuccessful opponent is practically deprived of possession. This is undoubtedly what happened in this particular case. On the 9th November 1906, the property was attached, with the consequence that whoever might have been in possession at the moment, was dispossessed. On the 11th of February 1907, the Magistrate made an order in favour of the present Petitioner. The result was that the attachment forthwith ceased to be operative and under the authority of the order of the Magistrate the Petitioner entered into possession Even, if, therefore, it be conceded that the Plaintiff was in possession when the land was attached by the Magistrate, it must be held that the Defendant dispossessed him in due course of law, as the dispossession was the natural result of the favourable order which he obtained from the Magistrate. Under these circumstances, it can hardly be contended that it is open to the unsuccessful party in the Criminal Court to institute a proceeding before the Civil Court for recovery of possession, upon the allegation that he has been dispossessed as a result of the order of the Criminal Court This view is perfectly consistent with the observations of their Lordships of the Judicial Committee in *Dinamoni Chaudhrani* v. *Brojo Mohini Chaudhrain* (5), where Lord Lindley pointed out that although possession under an order of a Magistrate (under sec. 145, Cr. P. C.) confers no title the effect of possession remains and the person in possession can only be evicted by a person who can prove a better right

(4) 9 W. R. 602 (1868).

(5) 6 C. W. N. 386: s. c. I. L R. 29 Cal. 187 at p. 199 (1901).

L. MOORE *v.* MONORANJAN GUHA.

to the possession himself. The case of *Nagappa* v. *Sayad Badrudin* (1) is clearly distinguishable and is in no way inconsistent with the view indicated above. In that case, a Mamlatdar who had jurisdiction to try possessory suits under sec. 3 of the Bombay Act III of 1876 was called upon to try a suit for recovery of possession which was commenced on the 6th of March 1905, upon the allegation that the Defendant had wrongfully dispossessed the Plaintiff on the 10th October 1900. On the 20th October 1900, a Magistrate had made the initial order under sec. 145 of the Criminal Procedure Code and on the 22nd December 1900 had passed the final order under that section in favour of the Defendant in the possessory suit. It appears to have been contended before the Mamlatdar that he had no jurisdiction to hear the suit by virtue ot the order of the Magistrate made on the 22nd December 1900. This contention was allowed to prevail. The High Court, however, held that the view was erroneous and that the Mamlatdar had improperly refused jurisdiction. The learned Judges pointed out that the effect of the order of the Magistrate was to maintain the Defendant in possession on the ground that he had established his possession on the date of the initial order, that is, the 22nd October 1900, but that this did not in any way affect the question of possession on the 10th October 1900. Under these circumstances, it could not be successfully contended that the Mamlatdar had no jurisdiction to determine the question of possession on the latter date and to make a decree in favour of the successful party under Bom. Act III of 1876. In the case before us the facts are essentially different. Here the Court had possession of the property between the 9th of November 1900 and the 11th of February 1907. As a result of the order made in favour of the Defendant on the latter date he entered into possession two days later. It is difficult to perceive how such entry can be said to be unlawful and how the dispossession of the Plaintiff can be regarded as a dispossession otherwise than in due course of law. It may be added that the case of *Chytun Chunder* v. *Brojo Kanto Roy* (2) is also distinguishable on somewhat similar grounds. In that case, an action was commenced under sec. 15 of Act XIV of 1859. Subsequently, criminal proceedings were instituted under sec. 318 of Act XXV of 1861. The party in whose favour the Magistrate made his award contended in the Court which had seizin of the possessory suit that its jurisdiction was ousted. This objection was everruled and, in my opinion, the Court could not have adopted any other course. Not only had the two Courts, criminal and civil, to determine the question of possession as it stood upon two different dates but the Civil Court was invited to withhold its hand by reason of an award made by the Criminal Court in a proceeding which had been instituted subsequent to the commencement of the civil suit. Such a position as this is obviously untenable.

The result, therefore, is that this Rule ought to be made absolute and the order of the Court below discharged with costs both here and in the Court below.

Rule made absolute.

(1) I. L. R. 26 Bom. 353 (1901).

(2) 20 W. R. 12 (1873)

145 c.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 198 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
20, March.

FEROZE ALI MULLIK and others, Petitioners,
v.
THE EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 107—Order to prevent a party from taking a procession along a road—Procession, right to take.

A party insisting upon their right to take a procession along a certain road to which another party objected cannot be bound down under sec. 107, Cr. P. C., to keep the peace unless there is a finding that the taking of the procession along the particular path is a wrongful act or that the processionists are themselves likely to commit a breach of the peace or disturb the public tranquillity.

Per WOODROFFE, J.—*When a party have the right to take a procession along a particular road they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party.*

This was a rule granted on the 21st of February 1908, against an order of Babu N. C. Ghattak, Sub-divisional Magistrate of Uluberia, dated the 14th of February 1908, directing the Petitioners under sec 107, Cr. P. C, to execute a bond in Rs. 200 each to keep the peace for 7 days.

The facts material to this report so far as they appear from the police-report were briefly these :—

There was a Mohurrum festival with Tajias held by a sect of Musalmans headed by one Firoze Ali of village Ghoradhaha. The party wanted to pass with their Tajia through a disputed passage which passed by the house and a musjid of one Jahander Buksh, Honorary Magistrate and zemindar of the village, who had strong objections to their passing with festivity and drums from the religious point of view of his own sect.

The Mohurrum party has not been allowed to pass through the road, as there was a likelihood of a breach of the peace. From enquiry it transpired that Mohurrum party had passed in previous years through the same disputed road.

There were other passages through the village which the party could use but inspite of that the party did not want to lose the privilege of passing through the disputed road and insisted upon passing through that road. In order to prevent them from carrying the procession through that road the Sub divisional Magistrate on the police-report and without taking any evidence bound down the Petitioners under sec. 107, Cr. P. C. The rule was issued to set aside the order under sec. 107, Cr. P. C.

Moulvi Khudabux and *Babu Monmotha Nath Mukerjee* for the Petitioners.

None for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

GEIDT, J.—I am of opinion that the Magistrate was not competent on the materials before him to bind down the Petitioners to keep the peace. The act which the Magistrate's proceedings were designed to prevent was the taking of the procession by a particular path. This is not an act which comes within the terms of sec. 107, Cr. P. C, as giving the Magistrate jurisdiction to call on the Petitioners to show cause why they should not be bound down to keep the

peace. The taking of a procession along a path is not by itself a breach of the peace, nor is it likely to disturb the peace, nor has it been shown in this case that the taking of the procession along the particular path was a wrongful act.

For these reasons, I am of opinion that the Magistrate's order is wrong and should be set aside and I agree in making the rule absolute.

WOODROFFE, J.—The police-report shows that the Mohurrum party has in previous years passed through the land through which the applicants now claim to pass. If the road is a public road and one over which the applicants have a right to pass in procession, the fact that there are other passages through which they may pass does not affect that right, though it is to be here observed that it is claimed that this is the most convenient route to the Darga. If the Appellants have the right claimed it is obvious that they cannot be properly bound down because some one else proposes to interfere with that right. The proper course in such a case is to bind down the other party. To put it at the lowest it has not been shown that the Appellants are not entitled to do what they want to do. As I have said the alleged right has been exercised before and the Court has not negatived the right. All that has been said is that the Honorary Magistrate, Hafez Jahander Buksh, has an objection. This objection is stated to be not that the road is not a public road but his private property, but that he has a "strong objection" to the applicants "passing with festivity and drums from his sect's religious point of view." It is obvious that if the applicants have the right claimed they cannot be restrained from exercising it because of the Honorary Magistrate's religious objections if he really has any. He must like any one else tolerate the religious usages of his neighbours. Nor am I satisfied on the materials before me that he could have any religious scruple. The Honorary Magistrate is stated to be a Sunni and the learned Counsel, who is well versed in these matters, tells us that the only sect which has ever objected to the Mohurrum procession are the Khayites which sect is now extinct. I cannot of course decide what the applicants' rights are as against the Honorary Magistrate who is not a party to the application and anything that I say does not affect him. I am, however, entitled to deal with the right claimed so far as the applicants before me are concerned and so far as is necessary for the purpose of this application. For that limited purpose and on the materials before me I may say that there is nothing whatever to show that the applicants have not got the rights they claim and so far as the materials before me go they would rather indicate that they have such a right. But apart from this it must be affirmatively shown that the accused is about to do a wrongful act. Of this there is no evidence whatever. Or it must be shown that a party is likely to commit a breach of the peace or disturb public tranquillity. This has not been shown. The Sub-Inspector's report states that the party "are willing to pass silently through the passage with their Tajia" and that their object is that "they do not want to lose the privilege of passing through the same disputed

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JUNE 8, 1908. [No. 30

Contents.

NOTES

IN THE CASE OF *Arumuga Govindan* v. *Venkata Subbier* reported at p. 82 of the current volume of Indian Law Reports, Madras series, a Magistrate holding an inquiry as to possession of land in a proceeding under sec. 145, Cr. P. C., after issuing notices to the parties and recording their statements directed a Subordinate Magistrate to record the evidence adduced by the parties and submit a report. On the evidence thus recorded and submitted by the Subordinate Magistrate, the Magistrate decided that one of the parties were entitled to be retained in possession. The question arose for the decision of the High Court of Madras whether the Magistrate acted within his jurisdiction in deciding the question of possession on the evidence recorded by another Magistrate.

UNDER SEC. 148, CR. P. C., A LOCAL INQUIRY IN A proceeding under sec. 145, Cr. P. C., is allowable. But the Magistrate cannot decide the case under sec. 145, Cr. P. C., solely on the report of the inquiring Magistrate. The report of the inquiring Magistrate may only be read as evidence in the case. But that does not absolve the Magistrate from his duties under sec. 145, cl. (4) to peruse the written statements of the parties, hear them, receive the evidence produced and consider the effect of such evidence. When an inquiry has been directed under sec. 148, the Magistrate can only take into consideration the report of the inquiry in weighing the evidence produced before him by the parties to the proceeding. Their Lordships of the Madras High Court therefore held that the orders of the Magistrate were without jurisdiction and they were set aside.

BUT WE MUST NOTICE HERE THAT THE WHOLE PROceedings under sec. 145 were not set aside. Only the final orders declaring one of the parties to be in possession were set aside and the Magistrate was directed to take the cases again on his file and dispose of them in accordance with law. This would seem to be the only proper order to be made under the law. Because in cl. (5), sec. 145 it is laid down "but subject to such cancellation, the order of the Magistrate under sub-sec. (1) shall be final." This shows that when once a proceeding under sec. 145, Cr. P. C., has been instituted in accordance with law under sub-sec. (1), it can only be cancelled when it is proved that no dispute likely to cause a breach of the peace exists and on no other grounds. In some of the reported cases it has been held that when a Magistrate has decided a case under sec. 145 in contravention of cl. (4)—the whole proceeding becomes bad and ought to be set aside. We had occasion to remark (*vide* 9 C. W. N. ccxli) that the provisions of sec. 145, Cr. P. C., do not warrant such a view. We are glad to notice that this decision of the Madras High Court lends support to our views.

THE LATE MR. J. T. WOODROFFE.

It is with great sorrow that we have to record the death of Mr. J. T. Woodroffe, who till lately represented in his person the dignity, learning, independence, force of character and able advocacy for which the leaders of the Calcutta Bar have for a long time past been distinguished throughout India. He was an Irish Roman Catholic who had in his early life distinguished himself as a scholar of Trinity College, Dublin. He was not an eloquent speaker but his mathematical training had taught him to study his subject, be it the facts of the case or the technicalities of the law, with an amount of patience and thoroughness that eventually threw many a brilliant adversary into the

shade in forensic fights at the Bar. The brilliance of Sir Charles Paul's addresses and the ingenuity of Sir Griffith Evan's argument would at times seem to carry every thing their own way, but Mr. Woodroffe like a powerful Indian wrestler would pound down his opponents' cases by his mastery of facts and the solid weight of his arguments. Amongst all sections of the profession he enjoyed the reputation of being the best advocate at the Bar and there is no question that his success was unprecedented. He did not however attain this position through any influential backing or powerful patronage. With patient perseverence, plodding industry, super-abundant self-possession and Celtic courage. Mr. Woodroffe had to fight every inch of the ground till he came to the fore. The Acting Chief Justice and the Advocate General have both alluded in appreciative terms to Mr. Woodroffe's independence in advising Government and conducting cases according to his sense of fairness and the dictates of his conscience and surely the tribute paid to his memory from the Bench and the Bar is well deserved.

In 1899 Mr. Woodroffe was appointed Advocate-General and he filled this office according to the best traditions of the Bar till 1904. During this period he was also appointed a member of the Governor-General's Council. The circumstances under which he had to resign that office has now become a matter of history. The Hon'ble Advocate General happened to differ from the policy of Lord Curzon and his Government in providing in the Lower Burma Courts Bill that the Chief Judge of the Burma Chief Court need not necessarily be a practising barrister. Mr. Woodroffe in the interest of the commercial community and in deference to public opinion freely and fearlessly opposed this provision from his place in Council. Lord Curzon could never brook opposition and his notions of official loyalty were sorely outraged by this honest opposition of the Advocate-General in open Council. Mr. Woodroffe's fortune had never depended on the favours or frowns of Government and like a self-respecting man he preferred to resign his seat in the Council rather than keep it at the cost of his independence. He retired from the Bar after forty-four years of hard work in April 1904, as the Chief Justice very appropriately said, with "honour," "love," "affection" and "troops of friends." He was intensely religious and charitable in his private life and of him it might have been truly said that his left hand did not know what his right hand gave. The death of such a man even at the mature age of seventy cannot but be deeply deplored and it is with sincere grief that we convey our heartfelt condolence to Mr. Justice Woodroffe and the other members of his family.

SIR T. MUTHUSAMY IYER.

A BIOGRAPHICAL SKETCH.

The *Madras Law Times* publishes an account of the life of this great judge collected from a biographical sketch by a Bengalee author Mr. L. N. Ghose and other sources. The career of this self-made man is so very remarkable that the lessons of his life will always be a source of inspiration to his own countrymen and of admiration to the outer world. We present below the bare outlines of the life of this great man which will surely prove interesting to our readers.

Muthusamy was born of poor Brahmin parents in 1832. His father lost his eye-sight when he was only eight years of age and from this time his struggles in life commenced. Like many men who have made a mark in life he had a good mother who being conscious of the natural intelligence of the boy struggled to give him education and find scope for his talents. His early education and business training commenced as an assistant of a village accountant. At the age of 12 when his salary was fixed at 1 rupee he was quite proud of it. Later on in life when he became a High Court Judge, he would often tell his friends how he regarded the day when he brought to his mother a whole rupee, being his first earning for a whole month, as the proudest moment of his life and how he felt that he was quite an independent man on the high way to fame and fortune when his salary was raised to Rs. 3.

The next lift in his career was due to the patronage of the village Tahsildar. The Tahsildar had been butler of Sir Henry Montogomery and, as was not uncommon in the old days, for having faithfully discharged his duties as such was rewarded by being appointed a revenue officer. Two incidents chiefly brought young Muthusamy to the prominent notice of the Tahsildar. One day the Tahsildar was very much upset by receiving a report of a breach in the embankment of an adjoining river when no clerk was available for attending to the matter. Young Muthusamy volunteered and in a short time submitted a written report detailing the nature and extent of the breach and mentioning the nearest places from which the materials would be available for repairing it. The Tahsildar was at first loath to rely on the boy's report but on verification by his head clerk, it turned out to be quite accurate. On another occasion a certain person had called on the Tahsildar to ascertain the arrears of rent due from him. He had lands in more than twenty villages. The Tahsildar was unable to ascertain the arrears as the clerk in charge was absent. Muthusamy, who was standing by, soon conveyed to him the information, which on verification turned out to be quite accurate. These incidents raised Muthusamy in the estimation of the Tahsildar and he secured him an employment under Government

and at the same time made arrangement for his education in the local primary school. The Tahsildar also commenced giving him lessons in English himself in his leisure time and the boy made such wonderful progress, that the Tahsildar first sent him to a Mission School and next to the Madras High School. At the latter place through the kindness of the Tahsildar's patron Sir Henry Montgomery, Muthusamy found in Mr. Powell, the principal of the High School, a warm-hearted tutor and friend who greatly influenced his future life and career.

At the close of his academic career Muthusamy won a prize of Rs. 500 awarded by the Council of Education for the best English essay. Mr. Holloway, a distinguished Haileybury man and an eminent Madras Civilian who, with Sir Alexander Arbuthnot was the Secretary of the Council of Education, when awarding the prize of Rs. 500 remarked "Mr. Muthusamy was one of those whose intellectual attainments any country may be proud of."

Mr. Powell, the Principal of the Madras High School, and Mr. Holloway influenced the character and career of Muthusamy greatly. Mr. Powell, like the tutors of the English Universities, became a warm friend of Muthusamy and admitted him to terms of intimate companionship in private life. Such intimacy with an warm hearted Irishman gave Muthusamy an insight into the habits, customs and thoughts of Europeans and removed that vague and undefined horror for them that often finds a place in the minds of Indians who have never had an opportunity of associating freely with them. In those days there were many cultured and large hearted Europeans in India who had a genuine desire for doing good to the people of this country and of raising them in the scale of nations and it is little to be wondered that Muthusamy like his contemporaries on this side of India had a genuine high regard for Englishmen. But this honest admiration for them never made him sacrifice his self-respect or independence before them. In their company he was always free and easy and was never known to cringe before the powers that be. He had the bearing and manners of a born gentleman and the eminence to which he rose was as much due to this quality as to his intellectual attainments.

After his distinguished carreer as a student, he became a teacher and was translated to the office of a Record-keeper by Sir Henry Mentgomery. Sir Alexander Arbuthnot, however, brought him out of the record-room and appointed him a Deputy Inspector of Schools on a salary of Rs. 150 a month. Mr. Holloway, who was a distinguished member of the Judicial branch of the Indian Civil Service, felt that the talents of this Madrasi youth will find, perhaps, greater scope in the judicial line than in any other branch of public service open to the Indians and he got Muthusamy appointed as a District Munsif. While employed as a Munsif, the following account of an inspection of his Court, published originally in the *Madras Standard*, is enough to show how methodical and efficient he was in the discharge of his duties. The thoroughness with which he used to do his work as the village accountant's assistant was manifest in every position of trust and responsibility that he occupied at the successive stages of his distinguished carreer.

"Mr. Beauchamp, wishing to inspect the office, resolved to take the Munsif by surprise. He went to Tranquebar without previous announcement; but Mr. Muthusamy hearing of his arrival saw him at his lodgings and contrary to the general dread among Munsifs, when District Judges go to their Courts for inspection, requested the Judge to grant him the favour of a searching inspection of his office, down to the keeping of diaries and of his sitting with him on the Bench to witness how he conducted cases. The Judge attended the Court and was highly delighted with the excellent manner in which the Munsif conducted cases and kept the registers in the office. The Judge returned to Tanjore and expressed it as his opinion that Muthusamy was one of those who was fitted to sit with him on the same Bench."

After he had thus made his mark in the judicial service, his services were always in great demand for various kinds of responsible work. Sir Charles Trevelyan requisitioned his services as a Deputy Collector for special work. He became a Sub-Judge in 1865. Three years after he became the Police Magistrate in Madras. Although he was very friendly with officials this never interfered with the fearless discharge of his duties. The following instance taken from the *Madras Mail* is enough to show how strong was the sense of duty in eminent Indians of the past generation.

"When he was Police Magistrate, a native who had been thrashed by a European, a High Court Judge, for an alleged trespass into the latter's premises, applied for a summons against that official for assault. Mr. Muthusamy Iyer did not resort to the temporising procedure of issuing a notice to show cause, as it is called; but immediately issued the summons asked for. His Senior Magistrate later on proposed at the trial not to insist on the appearance of the High Court Judge. But this Mr. Muthusamy Iyer would not accede to. The result was that the High Court Judge had to appear and was fined Rs. 3, for a breach of the law which he had to administer."

The above incident did not however seal his career. He was later on appointed as the third Judge of the Court of Small Causes in Madras. While still a Small Cause Court Judge he was invited to the Imperial Assemblage at Delhi in 1877 and was presented with a commemorative medal. In the following year he was made a C. I. E. and was raised to the High Court Bench.

He was the first Indian Judge of the Madras High Court and it must be said to his credit that very few Indian or European judges brought on the High Court Bench such a vast amount of varied experience. From the position of a village accountant's assistant to that of a Munsif, a Deputy Collector, a Sub-Judge, a Presidency Police Magistrate and a Presidency Small Cause Court Judge, he had made himself thoroughly familiar with different kinds of work varying from that of a common clerk to that of a responsible judicial officers and it is

little to be wondered that as a High Court Judge he more than maintained the high reputation that his countrymen and contemporaries acquired on the Benches of other High Courts in India. For the volume and quality of work that he performed in the Madras High Court Bench he had, perhaps, no equal amongst his brother judges and it should be remembered that he had for his contemporaries on the Bench such men as Sir Charles Turner and Mr. Justice Holloway. It may no doubt be said of him that in spite of his vast erudition and thorough familiarity with the laws and customs of the Hindus he did not always make himself bold to extricate the Hindu Law from the errors of uniform interpretation to which it had been subjected owing to the implicit faith of English judges in the early commentaries of Jones, Colebrook, Strange. But we must say that a zeal for innovation in a judge does not always lead to the happiest of results. Perhaps, there has been no judge on the Bench of any of the Indian High Courts who has been so bold in breaking through the trammels of former decisions in matters of Hindu Law as the late Mr. Justice Dwarka Nath Mitter, the first Bengalee Judge of the Calcutta High Court. Notwithstanding his epoch-making decisions and his brilliant career on the Bench, one may question whether by his doctrine of "spiritual benefit" he did not forge for the Hindu Law a uniform and rather artificial groove of interpretation which has brought in its train consequences that would have surprised to-day even that eminent Judge him-self.

Outside the Court, Sir Muthusamy Iyer always took great interest in social, sanitary and educational matters. In extra-judicial capacity Sir Muthusamy was the author of some very valuable minutes, amongst which the one on Malabar Marriage Bill must be assigned the first place. His opinion on this as also in other matters was greatly valued by Government. His addresses as the Vice-Chancellor of the Madras University were greatly appreciated for their straightforwardness, good advice, and noble sentiments. Like every patriotic Hindu he had a high regard for his own religion. But like all cultured Hindus he drew his inspirations from the fountain head of its noble faith and philosophy and rejected the latter day excrescences of unmeaning superstition, blinding prejudices and extravagant fictions in which its resplendent truth had become enshrouded in its degenerate days. He did more than any body else in Madras to remove the racial and religious differences which are so pronounced in the Western Presidency and which certainly is a source of weakness to the Hindu community all over India. Like all great minds he felt that unless those differences are minimised, the solidarity of the Hindus as a people could hardly be secured by other means.

The climax of his official career was reached when in 1892 when a knighthood was conferred on him and he was appointed to officiate for the Chief Justice of the Madras High Court. His exemplary character, his intellectual capacity, his wide sympathy, his kindliness of disposition, want of self-conceit, genial manners and handsome presence and almost statuesque features had made him immensely popular amongst all sections of the community and had secured a large circle of friends from amongst them. If it is not destined for any children of the Indian soil to rise from a log cabin to the Whitehouse, the career of Sir Muthusamy Iyer certainly presents the nearest parrallel to the lives of those self-made and truly great men who always furnish a source of inspiration to the future generations and add materially to the self-respect of the nationality to which they belonged.

THE DEATH OF MR. J. T. WOODROFFE.

MENTION IN COURT

At 11 A.M. in the Court of the Chief Justice, before a large assembly, it was announced that cable had been received that morning of the death of Mr. J. T. Woodroffe.

Mr. S. P. Sinha, Advocate-General, addressing their lordships said :—

My Lord Chief Justice, and Justices of this Court,—It is my painful duty on behalf of the Bar to announce to your lordships the death of Mr. James Tindall Woodroffe, which occurred in England yesterday. Mr. Woodroffe was born in 1838, so that he had just attained the age of 70 years, and we had hoped in this country that when he retired in 1904 to his own country he would have been spared for many years more to enjoy the rest and peace which he had amply earned by his arduous labours in this country. He was educated in Trinity College, Dublin, where after a most brilliant career, having obtained the University scholarship in Mathematics and the gold medal in Ethics and Logi , he graduated as a Bachelor of Arts in 1858. In 1860 he was called to the Bar by the Honourable Society of the Inner Temple. In 1860 he joined the late Supreme Court as an advocate of that court, and from 1860 down to the year 1904, with a break of a few years, during which he practised in the Privy Council, he worked as an advocate of this Court continuously. I can only say without any fear of contradiction that there has been no advocate in this country who has commanded the confidence of his clients in a more extraordinary degree than Mr. Woodroffe did, and if I may say so without impertinence it was well deserved. No counsel that we have ever known gave more minute attention to all the details of a case than Mr. Woodroffe did, and it is the common belief in this country that no advocate of this court has been more successful than Mr. Woodroffe was on behalf of his clients.

In 1892 he officiated for some time as Advocate-General of this court, and from 1899 to 1904 he was the Advocate-General. During that time he was in the Supreme Council, and it was a matter of regret both to the members and the public at large that his services in that capacity could not be utilised for a longer period, because there Mr. Woodroffe displayed sterling independence, worthily maintaining the best traditions of the Bar. In him the Bar lost, when he retired—and the loss is felt much more heavily now—one of its best and highest examples, and we desire to convey to your lordships and through your lordships to the members of his family and particularly to Mr Justice Woodroffe, whom we have the happiness to have on the Bench here, our most sincere and heartfelt condolence on the death of Mr. Woodroffe.

Dr. Rash Behary Ghose said: My lords,—In the absence of Babu Ram Charan Mitter, I on behalf of the Vakils' Bar beg to associate myself with everything that has fallen from the learned Advocate-General.

Babu Kally Nath Mitter said: My lords,—On behalf of the attorneys I beg to express our most sincere condolence at the death of Mr. Woodroffe.

THE CHIEF JUSTICE.

The Acting Chief Justice said:—Mr. Advocate-General, Dr. Rash Behary Ghose, Babu Kally Nath Mitter, and Gentlemen, I beg on behalf of my colleagues and myself to express the very great regret we feel at the announcement of the death of Mr. Woodroffe. The news of the death of Mr. Woodroffe has excited in us a feeling of most painful surprise. We had not heard of his illness and it is a great shock to learn that he is no more. When I joined this Court in 1888 Mr. Woodroffe was then in the zenith of his practice and in the full vigour of mind and body. He had many able contemporaries at the Bar,—Sir Charles Paul, Sir Griffith Evans, and Mr. Pugh and others. They have all passed away and now we have to deplore the death of Mr. Woodroffe. I cannot quite follow you in your account of the earlier career of Mr. Woodroffe, but I remember some particulars of his earlier career which may have been forgotten. I think few know that he was at one time the Chief Judge of the Small Cause Court, and his abilities first attracted notice in the great rent case, when he was invited by Sir Barnes Peacock to plead the cause of the zemindars He did so with conspicuous ability. It was a difficult task to fulfil, because in that case there were fourteen Judges against him, but he satisfied the zemindars so well that after the conclusion of the case they, quite unsolicited by him, sent him a handsome honorarium. Another case in which, I remember, Mr. Woodroffe took a conspicuous part was the prosecution of one of the former Commissioners of Police, Sir Steuart Hogg—for some offence under the Municipal Act—in which he horrified the Police witnesses by examining them as to the doings of the prisoner Hogg.

Mr. Woodroffe's abilities were undoubted. The great features of his character as an advocate were, I think, the industry which he showed, the persistency with which he pleaded his clients' cause, and the independence of character he displayed. He always knew the minutest facts of his case. He was never at a loss as to details. We never found him at fault This was not due to the promptings of his juniors, but because he closely studied his brief and minutely questioned the gentlemen who came to instruct him. As regards his persistency he used to press cases which seemed to be hopeless. He was like the British Army, which never knows when it is beaten. He often won cases at the very post as it were. As to his independence of character it is well known. He was Advocate-General, but his views were often against Government, though he pleaded for them strenuously.

I think it would be out of place to say anything as to his private character, but I may say without offence that he was a sincere Christian and a truly religious man, and that he was a free and generous giver, for all charitable and religious purposes. I fully agree with you, Mr. Advocate-General, in your expressions of sympathy with the family, especially with our valued colleague Mr. Justice Woodroffe. Gentlemen, Mr. Woodroffe has departed this life with all that Shakespeare has told us should accompany age, namely, "honour, love, affection, troops of friends."

CURRENT INDIAN CASES.

ETAKKOTT MANMOD KUTTI'S SON MOYAN *v.* ETAKKOTT KUTHAYI'S DAUGHTER PATHUKUTTI, I. L. R. 31 Mad. 1. *Oaths Act, secs. 11, 12.*

There was an agreement that Defendant would be bound by Plaintiff's oath and that if Plaintiff failed to take the oath the suit would be dismissed: Plaintiff declined to take oath; *held* that the suit ought to have been proceeded with and that the order for dismissal was bad.

SARALA *v* KAMSALA, I. L R. 31 Mad. 5. *Limitation Act, Sch. II, Art. 11—C. P. C., sec. 278.*

Art. 11, Sch. II of the Limitation Act is not applicable to an order dismissing a claim under sec. 278, C. P. C., for default.

RANGASAMI *v.* ANNAMALAI, I. L, R. 31 Mad. 7. *Transfer of Property Act, sec. 78—Negligence.*

What amounts to gross negligence under sec. 78 of the Transfer of Property Act is to be determined according to the circumstances of each particular case. The failure on the part of the first mortgagee to obtain the title deeds did not under the circumstances of the case amount to gross negligence so as to postpone his mortgage to that of the second mortgagee.

VENKATESWARA *v.* THE SECRETARY OF STATE, I. L. R 31 Mad. 12 *Endowment—Civil Court—Jurisdiction.*

A Civil Court has jurisdiction to entertain a suit to set aside a Government order which imposed the full assessment on certain lands in Plaintiff's possession which, he alleged, were granted to his ancestors as an endowment.

RAMASWAMI *v.* SUNDARA, I. L. R 31 Mad. 28. *Decree of Appellate Court affirming first Court's decree,—Effect in enlarging time granted by first Court.*

Where a certain time is allowed by a Court to do a particular act from the date of the decree, the party does not get an extension of time by virtue of the decree of the Appellate Court when the Appellate Court simply affirms the decree of the first Court.

JIVARATHNAM *v.* SRINIVASA, I. L. R. 31 Mad. 33 *Assignee of a decree—Equity—Execution.*

A property which could not be sold at the instance of a decree-holder in view of sec. 99 of the Transfer of Property Act cannot also be sold at the instance of the assignee of the decree.

RAGHAVAN *v.* ALAMELU, I. L. R 31 Mad. 35. *Income tax—Contract, secs. 69, 70.*

Where a money is paid for income tax by a person assessed, he on payment of the same cannot recover the same from person who is alleged to be the party really liable to pay.

KOLINTAVITA MAMA *v.* KOLINTAVITA HAJI, I. L. R. 31 Mad. 37. *C. P. C, sec. 244.*

A claim by an auction-purchaser for damages for

injury alleged to have been committed by the judgment-debtor and other persons not parties to the suit after confirmation of sale and before delivery of possession is not maintainable under sec. 244, C. P. C.

THE SESSIONS JUDGE OF MANGALORE *v.* MALLINGA, I. L. R. 31 Mad. 40. *C. Cr. P., secs. 287, 288.*

The phrase "committing Magistrate" in secs. 287, 288, C. Cr. P., is merely a compendious way of referring to the Magistrate or Magistrates who hold the preliminary enquiry on which the committal is made.

KRISTNA *v.* KRISHNA, I. L. R. 31 Mad. 43. *C. Cr. P., sec. 195.*

No sanction was considered to be necessary for complaint made under secs. 323 and 355, I. P. C., for an assault committed when the agent of a decree-holder accompanied by an Amin went to execute a decree.

VENKATA SUBBIAR *v.* GOVINDA RAJULU, I. L. R. 31 Mad. 45. *Evidence Act, secs. 91, 92.*

There is nothing in sec. 91 or 92 of the Indian Evidence Act which is inconsistent with the following rule of English law :—

In an action on a written contract between Plaintiff and B oral evidence is admissible, on behalf of the Plaintiff, to show that the contract was in fact, though not in form, made by B, as agent of the Defendant, for the evidence tends not to discharge B, but to charge the dormant principal, *Wilson* v. *Hart*, 7 Taunt 295, and it is admissible although B named his principal at the time he entered into the contract (*Calder* v. *Dobell* L. R. 6 C. P, 486, Ex. Ch. 18).

SRIMATH DAIVASIKAMANI *v.* NOOR MAHOMED, I. L. R. 31 Mad. 47. *Head of Mutt—Debt—Decree against successor.*

A decree in respect of debts properly incurred by the head of a mutt may be passed against his successor.

GOPALA *v.* RAMASAMI, I. L. R. 31 Mad. 49. *C. P. C., secs. 584, 591, 623, 629.*

Sec. 584 or sec. 591, C. P. C., does not control sec. 629, C P. C. so as to confer a right of appeal in a case where the appeal is not based on one of the objections mentioned in sec. 629, C. P. C.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 255 OF 1908. RAM CHANDRA HALDER, Petitioner *v.* THE EMPEROR, Opposite Party. 28th April 1908.

Criminal Procedure Code, sec. 107—Binding down a person with his consent, without taking evidence, illegality of.

It appears that there was a dispute between the Petitioner and some other persons regarding their rights to a certain plots of land and the Magistrate drew up a proceeding under sec. 107, Cr. P. C., for binding down the parties. The Petitioner appeared before the Magistrate and put in a petition in which he stated that he was a poor man and he could hardly expect any benefit by contesting the case, so a recognizance bond for a small amount should be taken from him.

On this the Magistrate recorded the following order, without taking any evidence in the case. "Accused Ram Chandra Howladar agrees to be bound down. He will execute a bond for Rs. 100 with one surety for Rs. 50 to keep the peace for one year. In default, he will undergo one year's simple imprisonment.

(Sd). J. K. Ghose.
D. M."

Against this order an appeal was preferred to the Additional Magistrate who declined to interfere and the appeal was dismissed.

This rule was obtained to set aside the order binding down the Petitioner on the grounds *inter alia* that the Magistrate's order was bad because there was no finding as to any apprehension of the breach of the peace and because the said order was passed without taking any evidence.

Their Lordships observed :—

The order complained of is one binding down the Petitioner under sec. 107, Cr. P. C. "When the proceedings were instituted against the Petitioner he appeared and, as the Magistrate records, agreed to be bound down. He said he was a poor man and he had very little expectation of getting any benefit by fighting the case. He therefore agreed to be bound down. . .

It appears to us that the proceeding of the Magistrate was illegal, because no evidence was taken. There was no evidence to show that the Petitioner was about to break the peace. It is true that the Petitioner agreed to be bound down. But that does not make him guilty. The proceeding under sec.

107, Cr. P. C. is a precautionary measure and not a trial for an offence and in such a proceeding no one should be bound down unless it is shown that he is about to commit a breach of the peace. We therefore make the rule absolute.

Mr. Huq with *Babu Monmotha Nath Mukerjee* for the Petitioner.

No one for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before COXE and DOSS, JJ. APPEALS FROM REMAND ORDER NOS. 32 AND 119 OF 1907. SALIM SAIKH AND ORS, Defendants, Appellants *v.* NAZER KHAN, Plaintiff, Respondent. 25th May 1908.

Civil Procedure Code (Act XIV of 1882), sec. 562—Remand—Preliminary point—Suit for damages to crops—Title to law if must be proved.

Plaintiff brought the suit for recovery of damages on the ground that he grew the crops on certain lands and the Defendants took away the crops. The defence was that the land belonged to them and they raised the crops and took the same. The first Court held that the Plaintiff had failed to prove that the land was his, and he grew the crops. On appeal the Subordinate Judge was of opinion that as the Plaintiff grew the crops and the Defendant took away the same, and the Plaintiff was entitled to a decree even if the Plaintiff had failed to prove his title to the land and remanded the case to the first Court under sec. 562 for ascertaining the amount of damages. Against this order of remand the Defendants appealed to the High Court and it was contended (1) that without proof of title to the land the Plaintiff was not entitled to damages (2) the order of remand under sec. 562, C. P. C., was bad as the decision of the first Court was not on a preliminary point and the evidence on all the points was recorded by the first Court. Their Lordships desired to be satisfied first as to whether a second appeal lies in this case having regard to sec 586, C. P. C, and their attention having been drawn to I. L. R. 10 Cal. 523, I L. R. 3 All 18 and I. L. R. 7 Bom. 292 heard the appeal on the merits. As regards the first ground of appeal the Respondent's vakil referred to the case in I. L. R 21 Cal, p. 244 and as to the second point to I. L R. 16 Mad. 207, I L. R. 27 All 691,

Held—It was not necessary for the Plaintiff to prove his title to the land in a suit for damages for crops and he can succeed on proof that he grew the same. The remand under sec 562, C P. C., was good as the decision of the first Court was on preliminary point inasmuch as the relief the Plaintiff claimed depend upon two points (1) whether he was entitled to the crops (2) what is the value of the crops and it was not unreasonable to hold the decision on the first question was a decision on a preliminary point.

I. L. R. 16 Mad. 207, I. L. R. 27 All. 691 followed.

Babu Khetra Mohun Sen for the Appellant.

Babu Ram Chandra Mozumdar for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE NO. 1452 OF 1906. HANSRAJ ROY, Defendant 2nd Party, Appellant *v.* BECHIT LAL PICHIT LAL MISSER and others, Respondents. 20th May 1908.

Mortgage of moveable property, if valid—Decree, form of.

The Plaintiff sued upon a mortgage bond in which certain moveable as well as immoveable properties were hypothecated. The Court of Appeal below gave the Plaintiff a decree and the Defendant No. 2 who was the purchaser of the moveable property, appealed to the High Court and contended (1) that the mortgage of cattle was invalid, and (2) that supposing that the cattle were not mortgaged, the Plaintiff in order to succeed must show that the cattle in the possession of the Appellant were the same as were mortgaged

There was nothing in the record to show that the cattle in possession of Defendant No. 2 were differrent from the cattle mortgaged. The cattle mortgaged were 13 in number; there was no finding that there were births and deaths. The mortgagor never purchased any new cattle after the mortgage.

Held—That the mortgage of moveable property was valid *Srish Chandra Roy* v. *Mungri Bewa* (9 C. W. N. 14) followed.

A decree giving the Defendant power to redeem the cattle if he chose was valid.

Babu Joy Gopal Ghosa for the Appellant.

Babus Jogesh Chunder Roy and *Khetra Mohun Sen* for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before BRETT, J. APPEALS FROM APPELLATE DECREE NOS. 420 AND 489 OF 1906. SUJAUDDIN CHOWDHURY, Defendant, Appellant *v.* JADU NATH SHAHA, Plaintiff, Respondent. 21st May 1908.

Burden of proof—Brahmottur land—Additional rent for additional land— Bengal Tenancy Act (VIII of 1885), sec. 36.

The appeal arose out of a suit brought by the Plaintiff to have the rent fixed and to realise the additional rent on the land in possession of the Defendant in excess of that for which he was paying rent. The suit was brought to have the rent fixed at a fair and reasonable rate. The Defendant took settlement of a holding of 5 bighas at a rent of 5 rupees per annum. The Defendant was found by

both the Courts to be in possession of 42 bighas, that is to say, of 37 bighas in excess of the 5 bighas for which he was paying. In order to ascertain what would be the fair and reasonable rent of the land held by the Defendant a commission was issued to a revenue officer, and local enquiry was made and evidence taken, and the result of that investigation was that the revenue officer reported that a rent of one rupee per bigha was fair and reasonable for all land held by the Defendant. The Defendant, however, when admitting that he held those 42 bighas of land alleged that he held 22 of them as "tenant under a *brahmotturdar* Nil Ratan Bhattacharjee to whom he had been paying rent." The Court of first instance came to the conclusion that the Defendant held as tenant under the *brahmotturdar* 17 bighas 8 cottahs of land and that for so much of the land in suit the Plaintiff was not entitled to recover rent at the rate fixed by the revenue officer. The Munsif therefore gave the Plaintiff a decree for recovery of rent for 24 bighas 14½ cottahs of the land in suit. He also decided that the Defendant would pay the enhanced rent beginning with 8 annas in 1308 and ending in the full rate in 1312. On appeal the lower Appellate Court set aside the judgment of the Court of first instance and gave the Plaintiff a decree for rent at the rate assessed by the revenue officer for all the land claimed on appeal to the High Court,

Held—That the onus lay on the Defendant to prove that a certain portion of the land was land for which he was paying rent to the *brahmotturdar*.

Bachharam Mondal v. *Peary Mohun Banerjee* (I. L. R. 9 Cal. 813) distinguished.

The provisions of sec. 36 of the Bengal Tenancy Act do not apply to the case as the Defendant had been for some years in possession of those lands without paying any rent at all.

Babu Harendra Narayan Mitter for the Appellant.

Babus Nilmadhub Bosu and *Mohini Mohun Chuckerbutty* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ. APPEAL FROM ORDER NO. 312 OF 1906. MOHARAJ BEJOY CHAND MOHATAB BAHADUR, Appellant *v.* LAKHINARAIN CHOWDHRY AND OTHERS, Respondents. 28th May 1908.

Mesne profits—Apportionment between two wrongdoers—Principle.

The Plaintiff was a tenant of some jungle under the Burdwan Raj. The Moharajah brought a suit for rent of this jungle against another person and obtained a decree and and in execution brought the jungle himself and settled the same with Defendant 2nd party. Plaintiff brought a suit for recovery of ... and for mesne profits against the Moharajah and Defendant 2nd party and obtained a decree against both the Defendants. In execution he took delivery of possession and prayed for ascertainment of mesne profits and the mesne profits were assessed at Rs. 632 and both the Moharajah and his tenant Defendant 2nd party were made jointly liable for the same. In the execution case the Moharajah prayed for the apportionment of mesne profits between him and the Defendant 2nd party which both the Courts below refused to do. On second appeal to High Court,

Held—The mesne profits should be apportioned between the Moharajah and Defendant 2nd party, the Moharajah being liable to the extent of the rent payable to him by Defendant 2nd party who will be liable for the rest. That both of them will however be jointly liable to the Plaintiff who will in the first place execute his decree against the judgment-debtors according to their respective liability but failing to realize the amount from Defendant 2nd party the Moharajah shall have to pay the whole amount to the Plaintiff, 6 W R. 113 and 230, 12 W. R. 104 referred to.

Babus Basanta Kumar Bose and *Shoroshi Charan Mitra* for the Appellant.

Babu Khetra Mohan Sen for the Plaintiff.

Babu Jotindra Nath Ghose for *Babu Sashi Sekhar Bose* for the Defendant 2nd party.

A. T. M. *Decree modified.*

High Court Notice.

THE following Rule made by the High Court of Judicature at Fort William in Bengal is published for general information.

By order of the High Court,
A. P. MUDDIMAN,
Registrar.

(CIVIL APPELLATE JURISDICTION.)

It is ordered that the following proviso be added to Rule I, Part II, Chapter X, page 67 of "The Rules of the High Court, Calcutta, Appellate Side," published in Part I, pages 1523 to 1583 of the *Calcutta Gazette* of the 19th November 1902:—

Provided that, in every appeal from an interlocutory order made in the course of a suit and coming under cl. (24), sec. 588 of the Code of Civil Procedure, the Deputy Registrar shall only call for from the lower Court copies of the plaint, of the written statements, if any, of the order-sheet, and of the papers directly relating to the interlocutory proceeding under appeal. The parties to the appeal will, however, be at liberty to apply to the Court for a special order for the transmission of any other papers or copies thereof.

Calcutta Gazette, 1908, Part I, p. 1057.

The 22nd May 1908.

FEROZE ALI MULLIK v. THE EMPEROR.

road and therefore they have stopped passing with their Tajia pending your (that is the Magistrate's) order on the subject." Further the police-report says that there is a likelihood of breach of the peace between the Mohurrum party and the Honorary Magistrate. It requires at least two opposing parties to cause a breach of the peace and there can be none unless the Honorary Magistrate helps to create it. His intervention would not be justified unless the proposed action of the applicants threatened his legal rights. Whether he has any has not been shown. The Magistrate says that the accused admitted their liability to be bound down. What, however, happened was this—that the Magistrate ordered them to be detained and in order to release themselves the applicants put in a petition in which they stated (a) that they had not committed a breach of the peace, (b) that there was no likelihood of their breaking the peace and (c) that they would not carry the Tajias through the road in question. I do not think that this petition even if it was voluntarily made (which I greatly doubt) was sufficient, under circumstances stated, to support the order before the making of which admittedly no evidence was taken. Tajias ought to be carried on the 10th day after the Mohurrum and both that period and that of the Magistrate's order have passed. The Tajias may however, it is stated, be carried up to the 40th day and it is represented to us that any application which might be made to the Police in respect of the proposed procession would not be listened to as long as the Magistrate's order remains unreversed. I would therefore reverse that order and make the rule absolute.

B. C. *Rule made absolute.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 463 OF 1906.

FLETCHER, J. 1908. Heard, 28, January. Judgment, 4, February.	A. J. KING v. THE SECRETARY OF STATE FOR INDIA.

Jurisdiction, waiver of—High Court, Letters Patent, 1865, cl. 12—Leave under—Step in the action, a waiver of plea in bar to jurisdiction—Power of Registrar to grant leave— Ultra vires.

The Registrar of the High Court has no power to grant leave to institute a suit under cl. 12 of the Letters Patent of 1865, and his action in so doing is ultra vires.

LALITESSUR SING v. MAHARAJAH SIR RAMESSUR SING BAHADUR (1) *followed.*

There is no distinction between a case where no leave has been granted and a case where leave has been granted by a person not entitled to grant the same.

The objection that the leave was granted by the Registrar or Master is one which can be waived by the Defendant by taking any step in the proceedings before applying to have the action dismissed.

MOORE v. GAMGEE (2) and IN RE JONES v. JAMES (3) *followed.*

This suit was instituted to recover damages for wrongful dismissal of the

(1) 11 C. W. N. 649: s. c. I. L. R. Cal. 619 (1907).
(2) 25 Q. B. D. 244 (1890).
(3) 19 L. J. (Q. B.) 257 (1890).

A. J. KING v. THE SECRETARY OF STATE FOR INDIA.

Plaintiff from service. The Defendant appeared, filed his written statement in due course, and applied for the issue of a commission to examine certain witnesses. While this application for the commission was pending, a question was raised as to whether the suit was validly pending before the Court, having regard to the fact that the Plaintiff in the plaint stated that a portion of his cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction of the Court, and having regard to the fact that leave under cl. 12 of the Letters Patent 1865, that was necessary for the institution of the suit in this Court was obtained from the Registrar, acting as the Master. The application for the issue of the commission stood over pending the decision of the question of jurisdiction. It being pointed out by the Court (Fletcher, J.) as a point of law as to whether the question of want of jurisdiction, the leave having been obtained from the Registrar or Master not authorised to grant it, could, by the Defendant's action in the suit, be waived, the argument was principally directed to this part of the question.

The Standing Counsel (*Mr. S. P. Sinha*, with him the *Advocate-General, Mr. P. O'Kinealy*) appeared for the Defendant and submitted that the Defendant could not waive the plea, that waiver of the plea could not give the Court jurisdiction, that pleas in bar with regard to irregularities could be waived but not that of want of jurisdiction and that, as a matter of fact, in the present case the Defendant had done nothing to preclude him from taking the objection that, improper leave having been obtained the suit was wrongly pending before this Court. He cited, *Rampurtab Samruthroy* v. *Premsukh Chandmal* (4), *Ledgard* v. *Bull* (5), *Gurdeo Sing* v. *Chandrikah Sing* (6).

Cases collected in Mr. O'Kinealy's edition of the Code of Civil Procedure (6th edn.) at p. 98; Annual Practice (1908) O. 70, r. 1, Vol. 1, p. 1012; *Keate* v. *Phillips* (7).

Mr. L. P. E. Pugh (with him *Mr. T. Thornhill*) appeared for the Plaintiff and submitted that the plea could be waived by the Defendant. He cited, *Fry* v. *Moore* (8), *Doya Narain Tewary* v. *The Secretary of State for India* (9), *In the matter of the Ship "Fannie Skalfield* (10)."

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—The present application comes before me in a somewhat unusual manner.

This suit is brought by the Plaintiff to recover damages for wrongful dismissal. The Plaintiff in his plaint alleges that his cause of action arises in part in Calcutta and prays for leave under cl. 12 of the Letters Patent to institute this suit. Leave to institute this suit was granted by the Master. The Defendant duly filed his written statement and applied to the Court for a commission to examine certain witnesses. Upon this application

(4) I. L. R. 15 Bom 93 at p. 98 (1890).
(5) L. R. 13 I. A. 134 (1886).
(6) 5 C. L. J. 611 (1907).
(7) (1878) W. R 186.
(8) 23 Q. B D. 395 (1889).
(9) I. L R. 14 Cal. 256 (1886).
(10) I. L. R. 17 Cal. 887 (1889)

A. J. KING v. THE SECRETARY OF STATE FOR INDIA.

coming on for hearing before Woodroffe, J., he directed the matter to be set down for argument as to whether or not the suit is validly pending in this Court, having regard to the fact that leave to institute the suit was obtained from the Master. Now, it has been decided by a Special Bench in this Court in the case of *Laliteswar Singh* v. *Maharajah Sir Rameshwar Singh Bahadur* (1) that the granting of leave under cl. 12 of the Letters Patent being a Judicial Act cannot be delegated to the Registrar or Master and that the rules of the High Court, in so far as they authorise the Registrar or Master to grant such leave, are *ultra vires*.

But neither in that case nor in the present case, until I pointed out the question to counsel, was it argued whether the objection that the leave was granted by the Registrar or Master is one which can be waived. If the objection is one that cannot be waived, the matter is one of far reaching consequences. It means that in every case where the suit has proceeded even to judgment, the Defendant can turn round and say that the whole proceedings are a nullity. Fortunately, in my opinion, this is not the result. The case is, I think, covered by the authority of *Moore* v. *Gamgee* (2) which though not referred to in the argument before me is not distinguishable from the present case. In that case, there was an application by the Defendant for a prohibition directed to the Judge of the County Court of Surrey to prohibit the proceedings in an action by the Plaintiffs against the Defendant in that Court.

By the County Courts Act, 1888 (51 and 52 Vict. c. 43) sec. 74, it is provided that—"every action or matter may be commenced in the Court within the district of which the Defendant or one of the Defendants shall dwell or carry on his business at the time of commencing the action or matter or it may be commenced by leave of the Judge or Registrar in the Court within the district of which the Defendant or one of the Defendants dwelt or carried on business at any time within the six calendar months next before the time of commencement or with the like leave in the Court in the district of which the cause of action or claim wholly or in part arose."

At the hearing of that action, on the second day, the solicitor for the Defendant took the objection that the Court had no jurisdiction to entertain the action on the ground that the Defendant did not dwell or carry on his business within the district of the Court at the time of the commencement of the action and no leave had been obtained to bring the action in that Court. The County Court Judge held that the Defendant by appearing and contesting the action had waived the objection and proceeded with the hearing. The Defendant accordingly applied to a Divisional Court of the Queen's Bench Division (Cave and A. L. Smith, JJ.) for a prohibition to prohibit the proceedings in that action. Now, pausing here for a moment, it will be noticed that sec. 74 of the County Courts Act is very similar to cl. 12 of the Letters Patent. Doubtless, in cases under sec. 74 of the County Courts Act, leave

(1) 11 C. W. N. 649: s. c. I. L. R. 34 Cal. 619 (1907).

(2) 25 Q. B. D. 244 (1890).

A. J. KING *v.* THE SECRETARY OF STATE FOR INDIA.

may be granted by the Judge or the Registrar, whereas under cl. 12 of the Letters Patent leave must be granted by a Judge. But in *Moore* v. *Gamgee* (2) no leave at all had been granted and there can be no distinction between the case where no leave at all has been granted and a case where leave had been granted by a person not authorised to grant leave.

The judgment of the Court in *Moore* v. *Gamgee* (2) refusing the application for a prohibition was delivered by Cave, J., who, in the course of his judgment, made the following pertinent remarks :—

"There are two senses in which it may be said there is no jurisdiction to entertain an action—first, where under no circumstances can the Court entertain the particular kind of action as in cases within sec. 56 of the Act—that is libel slander, seduction or breach of promise of marriage; secondly, there are the cases provided for by sec. 74 where, under certain circumstances, leave can be given to bring an action which the Court could not otherwise entertain; in these cases there is no want of jurisdiction over the subject-matter of the action but leave is required in the particular case, before the Court can entertain the action and it is an objection which may be taken to the hearing of the action that the Defendant does not dwell or carry on his business within the jurisdiction and leave has not been obtained. In the present case, the plaint was issued and the case was heard and partly decided before the objection was taken. There is always some difficulty in drawing an analogy between proceedings in the High Court and proceedings in the County Court because the High Court has jurisdiction by the common law whereas the jurisdiction of the County Court is entirely created by statute but there is some analogy between such a case as the present and a case in the High Court where it is sought to serve a writ on a Defendant who is resident abroad. In such a case, in the High Court, if the Defendant is served and takes any step in the action except in moving to set aside the service, he waives the objection of want of jurisdiction and cannot be heard; but, a conditional appearance may be entered which has not the effect of waiving the Defendant's right to object to the jurisdiction. In my opinion, the case is much the same in the County Court . . . . I think, therefore, that the objection of the Court may be waived by taking any step in the proceedings before applying to dismiss the action and this view is borne out by a case which was not cited in argument *In re Jones* v. *James* (3)."

The remarks of the learned Judges in *Moore* v. *Gamgee* (2) appear to me to apply to a case where leave has been purported to be granted by some person other than a Judge under cl. 12 of the Letters Patent.

In such a case no leave within the meaning of cl. 12 has been granted.

The present suit is one where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under cl. 12 of the Letters Patent is required before the Court can entertain the suit.

(2) 25 Q. B. D. 244 at p. 246 (1890).

(2) 25 Q. B. D. 244 (1890).

(3) 19 L. J. (Q. B.) 257 (1850).

A. J. KING v. THE SECRETARY OF STATE FOR INDIA.

The Defendant in this suit ought to have known as a matter of law that there was a want of jurisdiction unless leave as provided by cl. 12 of the Letters Patent had been granted. He has filed his written statement and applied for a commission to examine witnesses. By taking these steps, the Defendant has, in my opinion waived his objection to the jurisdiction. The application by the Defendant for a commission to examine witnesses must be set down for argument on its merits.

Messrs. Leslie and Hinds, Attorneys for the Plaintiff.

Mr. Kesteven, Attorney for the Defendant.

P. R. C.

CIVIL APPELLATE JURISDICTION.

RULE No. 3053 OF 1907.

STEPHEN, J. MOOKERJEE, J. 1908. Heard, 21, January. Judgment, 7th April.	CHAIRMAN OF GIRIDHI MUNICIPALITY, Plaintiff, Petitioner, *v.* SURESH CHANDRA MOZUMDAR, Defendant, Opposite Party.

Bengal Municipal Act (III B. C. of 1884), secs. 85 (a), 87 (d), 116—Salary earned but not spent within Municipality, if may be assessed—Civil Court's jurisdiction to review assessment—"Circumstances and property within the Municipality."

The Defendant was assessed by the Plaintiff Municipality with taxes under sec. 85 (a) *of the Bengal Municipal Act on the basis of the salary earned by him within the Municipality, but he objected that he spent a portion of it outside the jurisdiction of the Municipality and therefore no assessment could be made on that portion. The Plaintiff Municipality having sued the Defendant for the tax as assessed,*

Held—*That the Defendant was not precluded from raising his objection to the assessment in the Civil Court.*

That the Defendant had been correctly assessed "according to his circumstances and property within the Municipality,' within sec. 85 (a) *of the Bengal Municipal Act.*

Jurisdiction of Civil Courts to review the decisions of quasi *judicial bodies like a Municipality in regard to assessment of taxes discussed with reference to authorities.*

This was a rule against the decision of Dr. Vepin Chandra Ray, Munsif of Giridhi, exercising the powers of a Small Cause Court Judge, dated the 17th of August 1907.

The facts of the case fully appear from the judgment.

Babu Hara Prosad Chatterjee for the Petitioner.

Babu Baikuntha Nath Dass for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

STEPHEN, J.—This is a curious and important case turning on the proper construction of sec. 85 of the Bengal Municipal Act. The case was tried by the Small Cause Court Judge of Giridhi. The Plaintiff was the Chairman of the Giridhi Municipality, the Defendant a Deputy Magistrate engaged on Land Acquisition work and having his headquarters and living at Giridhi. His salary was Rs. 300 a month, of which he spent 150 on the maintenance of his family and like expenses, including

payment of premiums on a life policy, outside the boundaries of the Municipality. He occupied one house as an office and another chiefly as a residence. An assessment was made on the owner of the houses leased on their rental. This was withdrawn on objection being made. But the Defendant was assessed on his full income of Rs. 300 a month at 1 per cent. or Rs. 9 a quarter. His contention was that the assessment on him personally ought to be on Rs. 150 only, the amount which he may be taken to have spent in the Municipality. The Judge agreed with this view and gave judgment accordingly. A rule has been granted to show cause why the decree should not be set aside and the Plaintiff's claim allowed in full.

It has been suggested before us on behalf of the Petitioner that the present question is merely the amount of the assessment that has been made, and that under sec. 116 this is not a matter that can be dealt with by a Civil Court. It is hardly necessary to discuss the contention in view of the decisions in *Navadip Chandra Pal* v. *Purnananda Saha* (1) and *Kameshwar Pershad* v. *Chairman of the Bhabua Municipality* (2), where it is laid down that a remedy may be sought in a Civil Court against an action of a Municipality that is *ultra vires*, and that the taxation of a man in respect of property and circumstances outside the jurisdiction of the Municipality is *ultra vires*. The principle is well recognised in English law. *Cf. Nando Lal Bose* v. *Corporation of Calcutta* (3), and a derogation from it by the legislature is not to be lightly inferred. I am, therefore, of opinion that the Munsif had jurisdiction to deal with this case in which the jurisdiction of the Corporation of Giridhi to tax the Plaintiff in respect of certain property was called in question, and therefore of course we can exercise our revisionary jurisdiction over his decision.

On the merits then what we have to decide is the meaning of sec. 85 (*a*) of the Municipal Act. The section empowers the commissioners to impose "(*a*) a tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality," and the question argued before us turns on the meaning to be attached to the words "circumstances and property." Is it the case that as far as the Plaintiff's income is used as a test of his circumstances and a measure of his property only that part of his income is to be considered which he spends in the Municipality? Shortly, is he to be taxed on what he gets or on what he spends in the Municipality? The question seems to be one of first impression as no authorities have been quoted before us nor are we aware of any. The case of *Kameshwar Pershad* v. *Chairman of the Bhabua Municipality* (2) was decided on this section; but the decision does not touch the present point. It has been suggested that sec. 87 (*d*) may throw light on the subject where it is enacted that a list is to be drawn up showing an assessed's holding, property and profession or business, an this may show that his holding and

(1) 3 C. W. N. 73 (1898).
(2) I. L. R. 27 Cal. 849 (1900).
(3) I. L. R. 11 Cal. 275 (1885).

(2) I. L. R. 27 Cal. 849 (1900).

CHAIRMAN OF GIRIDHI MUNICIPALITY v. SURESH CHANDRA MOZUMDAR.

profession or business are his circumstances, but this brings us no nearer to the solution of the present question, as the question is how much of his circumstances connected with his business is within the Municipality.

On the words themselves his "property" seems to mean moveable and immoveable property in the widest sense and to include certainly any salary that he receives in the Municipality, without any deductions on account of his manner of spending it. Does the word "circumstances," coupled as it is with property, cut down this meaning or extend it? For it must do one or the other, otherwise the phrase would be a mere pleonasm. If the word circumstances is to be taken as limiting the scope of the word property, we must attach to it the meaning that it has in such a phrase as "easy circumstances" meaning the whole of his position in life from an economical point of view. It then becomes necessary to consider all his expenses and liabilities and allowance must be made for debts and possibly for improvident habits. This may lead us a good deal beyond the bounds of the Municipality, and I find it impossible to suppose that it can have been intended that matters such as these should form a basis of taxation. On the other hand, it may very well be that "property" does not include all a man's wealth and that it is at nothing less than his total wealth that this section is aimed. Are voluntary offerings to a priest property? I should imagine not. But their regular receipt would surely be included in a man's circumstances, although they may not for that reason only be a proper subject for a tax. Other states of fact may easily be supposed where a man's resources extend beyond his property, and the word circumstances is apt for describing them. Taking the word in this sense it offers in conjunction with "property" a fairly definite basis for taxation. It has been argued that it cannot have been intended by this Act to impose a second income-tax. I do not think this has been done, as from the point of view I suggest the tax provided by sec. 85 (a) is not only an income-tax; but something else besides. I have at least no doubt that the Defendant in the case now before us is liable to pay a tax on all the salary he receives in Giridhi however virtuously, or otherwise he may see fit to spend it.

The rule is therefore made absolute, but without costs.

MOOKERJEE, J.—The circumstances of the present case in which we are invited to exercise our revisional powers in favour of the Plaintiff under sec. 25 of the Provisional Small Cause Courts Act raise a question of some novelty and importance. The Plaintiff is the Chairman of the Giridhi Municipality which was established on the 1st January 1902 and the powers of which are regulated by the Bengal Municipal Act (III of 1884). The Defendant is a Deputy Magistrate employed by Government in Land Acquisition work. He occupies a holding within the municipal limits and, as a rate-payer, was under sec. 85, cl. (a) of the Bengal Municipal Act, assessed with an annual tax of Rs. 36 payable in four equal quarterly instalments. The Defendant took exception to the assessment under sec. 113, but his application was summarily dismissed by the Municipal

authorities without recourse to the procedure laid down in sec. 114. He declined, however, to pay the sum assessed and the present action was commenced on behalf of the Municipality for the recovery of the taxes due in respect of the first two quarters of the year 1905 6. The claim was resisted substantially on the ground that the assessment was *ultra vires*, that the Municipality had no jurisdiction to assess the tax with reference to the salary earned by the Defendant, *viz.*, Rs. 300 a month, and that the proper basis of assessment was the sum spent by the Defendant within the limits of the Municipality which, he alleged, amounted to Rs. 150 a month. In reply it was contended on behalf of the Municipality that as an application for review presented by the Defendant had been rejected under sec. 114, the assessment had become final under sec. 116, that its legality could not be questioned either directly or collaterally before the Civil Court and that consequently the Plaintiff was entitled to a decree for the entire sum claimed. The Small Cause Court Judge overruled the preliminary objection taken on behalf of the Plaintiff and upon the merits decided in favour of the Defendant. The rule now under consideration was thereupon issued by this Court at the instance of the Plaintiff and the learned vakil, who appears in support of it, has called in question the propriety of the order of the Court below on two grounds, *viz.*, *first*, that it was not competent to the Court below and is consequently not competent to this Court to question the legality of the assessment and, *secondly*, that upon the merits, the assessment ought to be treated in conformity with the provisions of sec. 85 of the Bengal Municipal Act.

As regards the first of these objections, reliance is placed by the learned vakil for the Petitioner upon sec. 116 of the Bengal Municipal Act which provides that no objection shall be taken to any assessment or rate in any other manner than in this Act is provided. It is contended that a remedy by recourse to a regular suit in the Civil Court for cancellation of the assessment or by way of a proper defence to an action by the Municipality in the Civil Court for recovery of assessed taxes is not expressly mentioned as a possible mode of objection in any portion of the Act, nor is such a remedy, it is asserted, contemplated by the Legislature. In my opinion, this contention is not well founded upon principle and is not supported by any authority. The effect of the provisions of sec. 116 was considered by this Court in the cases of *Navadip Chandra Pal* v. *Purnananda Saha* (1), *Kameshwar Pershad* v. *Chairman of the Bhabua Municipality* (2). In these cases it was pointed out that sec. 116 does not take away the jurisdiction of the Civil Courts in a case in which it is alleged and established that the assessment the propriety of which is in controversy is open to objection on the ground that it is *ultra vires*; in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no authority to interfere. The distinction is obviously well-founded on principle. A corporation which is invested

(1) 3 C. W. N. 73 (1898).
(2) I. L. R. 27 Cal. 849 (1900).

with authority to assess taxes is really invested with a *quasi*-judicial power and although its action when taken in conformity with the provisions of the law which created the authority may not be liable to challenge in the Civil Courts, it does not enjoy a similar immunity when that action can be challenged on the ground that it has been taken either in excess of or, in contravention of the powers conferred upon it by the statute. An analogous view has been taken by the other Indian High Courts with reference to other statutory provisions of similar scope and import. Reference may usefully be made to the decision of the Madras High Court in *Municipal Council, Cocanada* v. *The Standard Life Assurance Company* (4), where the previous decisions were reviewed, as also to decisions of the Bombay High Court in *Municipality of Wai* v. *Krishnaji* (5), *Morar* v *Borsad* (6) and *Kesandas* v *Ankleshwar Municipality* (7). The true test is whether there has been a substantial disregard of the provisions of the law which creates the authority of the Municipality and regulates its powers and duties. As my learned brother has already pointed out, a similar view had been taken in this Court in *Nando Lal Bose* v. *The Corporation of Calcutta* (3) in which Sir Richard Garth, C. J., relied, in support of this position, upon the principle deducible from the cases of *Rex* v *Moreley* (8) and *Rex* v. *Plowright* (9) which shew that the distinction recognised between a case in which the corporation has acted within its powers but probably exercised an erroneous discretion and another in which the corporation has acted in contravention of its powers is analogous to the distinction between an error of fact and an error of law. To put the matter in a different way the Civil Court is not called upon to try the merits of the question but to see whether the authorities possessed of limited jurisdiction have exceeded their bounds. A similar view has been taken in the English Courts in more recent cases: *Ex Bradlaugh* (10) and *Reg* v. *Bradley* (11), and the provisions of sec. 220 of the Municipal Corporation Act of 1882 (45 and 46 Victoria, Chap. 50) have been similarly interpreted. The principle applicable to cases of this description was elaborately examined by their Lordships of the Judicial Committee in *Colonial Bank of Australasia* v *Willan* (12), where it was pointed out by Sir James Colville that the Court would have jurisdiction to interfere and quash the order of the *quasi*-judicial authority upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it. It was also ruled that objection on the ground of defect of jurisdiction may be founded on the character and constitution of the Court or on the nature of the subject-matter of enquiry, or on the absence of some preliminary proceeding which was necessary to give the jurisdiction to that

(3) I. L. R. 11 Cal. 275 (1885).
(4) I. L. R. 24 Mad. 205 (1900).
(5) I. L. R. 23 Bom. 116 (1898).
(6) I. L. R. 24 Bom. 607 (1900).
(7) I. L. R. 26 Bom. 294 (1901).
(8) 2 Bur. 1041 (1760).
(9) 3 Mad. Rep. 95 (1881).

(10) 3 Q. B. D. 509 (1878).
(11) 17 Cox C. C. 739 (1877).
(12) L. R. 5 P. C. 417 (1874).

tribunal. But the objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the tribunal has erroneously found a fact which was essential to the validity of the order and which it was competent to try. That the distinction which the learned vakil for the Petitioner invites us to ignore is well established on principle is further obvious from the fact that it is recognised not only in our system of law but in other systems of jurisprudence, for instance, it is universally recognised in American Courts. It has been repeatedly ruled that errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the statute which creates the authority, and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction makes the act liable to challenge in such Court, [*State* v. *Williams* (13), *Hacker* v. *Howe* (14), *Dauglas* v. *Stone* (15), *Stanley* v. *Albaney* (16)]. It was argued, however, by the learned vakil for the Petitioner, as had been argued on behalf of the Plaintiff in the Court below, that even if we assume that it was open to the Defendant to obtain a declaration in a suit properly framed that the assessment was illegal, it is not open to him to raise the question by way of defence to an action for recovery of the tax. No authority was shown in support of this position and I am unable to hold that it is based upon any intelligible principle. The test is, as I have pointed out, whether the assessment is or is not in conformity with the statutory provisions. If it is not, it does not enjoy any security from collateral attack. If the assessment is open to objection on the ground of lack of jurisdiction, which, be it remembered, has to be exercised in conformity with the statute, it is open to collateral attack [*Muir* v. *Bardstown* (17)]. The essence of the matter is, that the action of the Municipality is in its nature *quasi*-judicial, and is not subject to collateral attack except upon the ground of fraud, actual or constructive, or on the ground of exercise of a power not conferred by the statute If errors or irregularities are committed, they must be corrected in the mode appointed by the statute and, if not so corrected, they become conclusive, for Courts have not the power to control the *quasi*-judicial authority in a matter of discretion. But when the assessment proceeding is in clear violation of the provision of the statute, the Court has jurisdiction to afford relief. It follows consequently that the first ground upon which the decision of the Court below is challenged on behalf of the Plaintiff cannot be sustained.

The second ground upon which the

(13) 123 Wes. 61 ; 100 N. W. 1041 (1904).

(14) 101 N. W. 255 (1904).

(15) 191 U. S. 557.

(16) 121 U. S. 535.

(17) 87 S. W. 1096 (1905).

decision of the Small Cause Court Judge is impugned raises an important question as to the true scope and meaning of sec. 85 of the Bengal Municipal Act. That section authorizes the Commissioners of a Municipality to impose within its territorial limits taxes upon persons occupying holdings within the Municipality "according to their circumstances and property within the Municipality." The question raised is as to the precise effect of the phrase "circumstances and property," which is not defined in the Act. So far as we can make out, the question is one of first impression, and our attention has not been invited to any decided cases which have any direct bearing upon the matter now in controversy. As I have already stated, the Defendant earns a salary of Rs. 300 a month within the limits of the Municipality. But he urges that he spends within the jurisdiction of the Municipality only half of that sum and the other half he spends outside the Municipality for the maintenance of his family, for payment of premiums for life Insurance and expenses of a like character. It is contended on his behalf that his circumstances and property within the Municipality are indicated and measured by the amount which he spends within its territorial limits. After careful consideration of the arguments addressed to us on both sides, I am unable to treat this contention as well-founded. The term "property" designated as a subject of taxation without any qualification obviously includes both real and personal property or estate and intangible as well as tangible rights of value, *Carrol* v. *Perry* (18). No doubt the word "property" in any particular case must receive a construction in accordance with the context. There can be no question, I think, that, if sec. 85 mentioned property within the Municipality and nothing else, the whole of the income earned by the Defendant would be assessable under the law. The question, therefore, resolves itself into this, *viz.*, whether reference to the circumstances of the rate-payer within the Municipality does in effect restrict and narrow down what is indicated by property within the Municipality. I am unable to see that it has any such alleged effect. If any such effect was intended by the Legislature, the phraseology might have been appropriately made different, and one would expect that if the test intended was not what is earned, but what is spent, the statute would have expressly so provided. In the same way, if it was intended that a deduction should be made, either for the expenses of the rate-payer or for his indebtedness or for possible insolvency, the exemption would probably have appeared on the face of the statute. On the other hand, if we look to sec. 92 of the Bengal Municipal Act we find that "circumstances" is used as equivalent to "means" which indeed is given in the Oxford Dictionary, Vol. 2, page 435, as one of the ordinary significations of the term, "circumstances" which is "condition or state as to material welfare, or means." I am unable to hold therefore that the word "circumstances" was introduced in sec. 85 to restrict the term "property." The intention on the other hand, seems to have been to widen the scope of the section so as to make

(18) 4 McLean 25.

taxable what might perhaps be not properly comprised under the term "property" and at the same time ought not to escape assessment. I feel no doubt in this particular case that the property of the Defendant which was taxable under the law was unquestionably worth Rs. 300 a month and that the fact that he spent only half of it within the Municipality does not make his circumstances and property within the Municipality worth only that sum of money It follows consequently that the assessment made by the Commissioners was in conformity with the law and that it cannot be successfully challenged on the ground that it was in excess of their powers or had been based upon a principle contrary to that recognised by the statute. The view taken by the learned Small Cause Court Judge is clearly erroneous, and I agree with my learned brother that this rule must be made absolute and the decree of the Court below modified.

Under the circumstances no order need be made for costs.

N. G. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 456 OF 1906.

HARINGTON, J.	MUNSHI BASIRUDDIN
HOLMWOOD, J.	MULLICK, Defendant
1908.	No. 1, Appellant,
Heard, 10 and	v.
13, January.	SURJA KUMAR NAIK
Judgment,	and ors., Plaintiffs,
13, January	Respondents.

Partnership—Fraud by co-partner,—Hatchitta—Material alteration by a partner to set up exclusive title to debt—Suit on behalf of firm—Maintainability—Claim, if to disallowed to the extent of the interest of the fraudulent partner—Apportionment, before dissolution.

A fraud committed by a partner while acting on his own separate account and not as agent for the firm is not imputable to the firm although had he not been connected with the firm he might not have been in a position to commit the fraud.

Where one of the partners of a firm sued to recover a debt which was really due to the firm on the allegation that it was due to himself and not to the firm and his suit was dismissed on the ground that he had materially altered the hatchitta *executed by the debtor by striking out the other partners' name without the debtor's consent,*

Held—*That the other partners were not precluded from suing for the debt on behalf of the firm, making the first-mentioned partner a Defendant in the suit.*

MASTER v. MILLER (1), GOUR CHANDRA v. PRASANNO KUMAR (2) *distinguished.*

That it was not open to the Court in such a suit to give them a decree for such portion only of the claim as represented their share in the firm.

Questions regarding the share of the debt to be allocated to the partners inter se *can only be decided when the accounts of the partnership are taken.*

This was an appeal preferred on the 29th of November 1906, against the decree of Babu Dina Nath Sarkar, 2nd Subordinate Judge of Zillah Hooghly, dated the 18th of August 1906.

(1) 2 R. R. 399; 4 Term Rep. 320 (1791).
(2) I. L. R. 33 Cal. 812 (1906).

MUNSHI BASIRUDDIN MULLICK v. SURJA KUMAR NAIK.

The facts of the case are as follows :-

The Defendant No. 1 borrowed various sums of money on different dates from a firm of which the Plaintiffs and Defendants Nos. 2 and 3 constituted the partners. The amounts advanced to the Defendant No. 1 were entered in the khata books of the firm as also in a *hatchitta* executed by the Defendant No. 1 in favour of Defendant No. 2 and the predecessor in interest of Plaintiffs Nos. 3, 4 and 5, one Mrittunjoy, who appears to have been at that time the managing members of the firm Mrittunjoy having died the Defendant No. 1 instituted a a suit against the Defendant No. 1 for the recovery of the amounts advanced with interest and costs without making the Plaintiffs or Defendant No. 3 parties, and in fact alleging that the loan was due to him alone and not to the firm In proof of this allegation he produced the *hatchitta* which showed that the name of Mrittunjoy had been scored through and he alleged that Defendant No. 1 had himself made the alteration and appended his signature to it. The Court held that the alteration had been made by Defendant No. 2 without the knowledge of Defendant No. 1, and that he had done it, not intending to defraud his co-partners, but foolishly with a view to save the expenses of having to take out succession certificate in respect of Mrittunjoy's share, in other words, to defraud Government of revenue. The Court was of opinion that the alteration of the *hatchitta* was material and on that ground dismissed the suit. On appeal, the High Court affirmed this finding and was further of opinion that Plaintiff alone had no right to sue for money due to the firm.

Whilst the above appeal to the High Court by Defendant No. 2 was pending, the Plaintiffs instituted the present suit for recovery of this money. They alleged that the money was due to the firm. They made Defendant No. 2 and Defendant No. 3, (who had given evidence in the previous suit supporting Defendant No. 2's claim in that suit) parties Defendants and sought to recover the money on behalf of the firm.

The Subordinate Judge decreed the suit so far only as regards a 12 annas share of the claim, which in his opinion was the share which the Plaintiffs owned in the firm. He disallowed the remaining four annas share representing Defendant No. 2 and Defendant No. 3's interest in the firm, holding that their conduct in the previous suit disentitled them from recovering their share of the money Against this decision the Defendant No. 1 preferred the present appeal and on his behalf it was contended that (1) inasmuch as the Defendant No. 2 was the managing member of the firm his act was binding on the firm and the firm must suffer for the fraudulent and illegal act of a partner and its consequences must equally affect all the partners, (2) That the alteration of the *hatchitta* was a material one and extinguished the debt.

The Plaintiffs also filed cross-objections against the portion of the decree which disallowed a 4 annas share of the claim, on the ground that the rights (and liabilities) of the partners *inter se* could not be apportioned in this suit, the debt to the firm being one and indivisible.

Babu Lal Mohun Das and *Moulvi Sowghat Ali* for the Appellant.

MUNSHI BASIRUDDIN MULLICK *v.* SURJA KUMAR NAIK.

Dr. Rash Behary Ghose and *Babu Nagendra Nath Ghose* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against the judgment of the learned Subordinate Judge in favour of the Plaintiffs.

An action was brought by certain persons who are members of a firm for money advanced by that firm to the Defendant No. 1. The firm in question consisted of the Plaintiffs Nos. 1, 2, 3, 4 and 5 and two other persons who appear on the record in the category of Defendants, namely, Defendants 2 and 3. These persons were the brothers of the Plaintiffs 1 and 2. It has not been disputed that the money was advanced by the firm, to the Defendant and that it has not been repaid ; but the Defendant says that he cannot be sued by the present Plaintiffs because the loan in question was covered by a *hatchitta* given in favour of Ramprosad and Mrittunjoy, and that Ramprosad having already sued on that *hatchitta* and having failed to recover judgment, the present Plaintiffs are debarred from recovering the debt in respect of which the *hatchitta* was given.

Now, the *hatchitta* was given in favour of Ramprosad and Mrittunjoy. Mrittunjoy died. Ramprosad brought an action claiming the debt as though it were due not to the firm but to himself, and for the purpose of representing that the debt was due to himself, he fraudulently struck out the name of Mrittunjoy from the *hatchitta* and forged the Defendant's signature to the alteration in the *hatchitta*. The suit which he brought on this forged document was dismissed and it is contended that Ramprosad's action extinguished the debt due to the present Plaintiffs.

The first proposition insisted upon by the learned vakil for the Appellant is that Ramprosad could not sue in respect of the present debt. To that proposition, we agree.

The second proposition insisted on by him is that the debt has been extinguished by the action brought by Ramprosad. In this proposition we do not agree. Ramprosad's action was not for the debt alleged to be due to the partnership but for a debt alleged to be due to himself. It is true the suit was dismissed on the ground that the document which he had relied on, as evidence of the debt was fraudulent : and even if it had not been fraudulent, the suit could not possibly have succeeded because he was suing in his individual capacity for a debt which was due not to him in his individual capacity but was due to the firm of which he was a member. The position, therefore, with regard to Ramprosad's action is this that Ramprosad is in precisely the same position as he would have been if the action had been dismissed on the ground that the debt was due not to him but to the firm, and the firm was not then suing in respect of it. For these reasons, it appears to us that Ramprosad's action does not affect the right of the present Plaintiffs.

The learned vakil for the Appellant cited the case of *Master* v. *Miller* (1) as an authority for the proposition that where an alteration is made in an instrument given in respect of a debt,

(1) 2 R. R. 899 ; 4 Term Rep. 320 (1891).

that extinguishes the debt; but that case has no application to the present one. That was an alteration in a Negotiable Instrument and the Negotiable Instrument having been accepted as payment for the debt operated to extinguish the debt. Here in the present case, it is not a Negotiable Instrument and that distinguishes this case from that cited by the learned vakil for the Appellant.

Then he relies on another case, *Gour Chandra* v. *Prasanno Kumar* (2), in which a bond was sued upon which had been fraudulently altered: and in the course of the judgment it was pointed out that the Plaintiff having fraudulently altered it, had destroyed the evidence of the debt and that there was no evidence to sue on the original consideration. That case is distinguishable from the present because the persons who are suing in the present case were not parties to the alteration in the *hatchitta* and they have done nothing which precludes them from giving evidence of their debt.

To enable the Appellant to succeed, he would have to show that the fraud committed by Ramprosad was imputable to the firm. The proposition of law which is laid down in Lindley on Partnership, p. 189, and which the Appellant would have to meet is this: A fraud committed by a partner while acting on his own separate account is not imputable to the firm, although had he not been connected with the firm he might not have been in a position to commit the fraud. In the present case though Ramprosad would not have been able to commit the fraud if he had not been connected with the firm, and had access to the *hatchitta*, yet, inasmuch as he did it on his own separate account and not as agent for the firm to which the debt was really owing, such fraud is not imputable to the Plaintiffs' firm and they were not barred from realising the debt which is due to them.

For these reasons we think that the judgment of the learned Subordinate Judge in favour of the Plaintiffs was right.

A cross-objection is taken on behalf of the Plaintiffs against so much of the judgment of the learned Judge as directs that Ramprosad and his brother are to have no portion of the debt which is recoverable by the firm.

We think that the objection as to this part of the judgment must be sustained; because the learned Judge had no jurisdiction to interfere as between the partners of the firm with regard to the share of the debt which would be allocated to them *inter se*. This is a question which can only be decided when the accounts of the partnership are taken. As between particular partners, the Court in deciding only whether a debt is or is not due has no power to say in what proportion the partners should share in the proceeds.

For these reasons, we dismiss the appeal against the judgment of the learned Subordinate Judge subject only to this modification that the direction that Defendants Nos. 2 and 3 are to have no share of the debt to be recovered must be expunged. In this view, we direct that the amount claim by the Plaintiffs be paid over to them for their firm.

The Plaintiff-Respondents will be entitled to costs of the appeal and of the cross-objection.

Appeal dismissed:
Cross objections allowed.

(2) I. L. R. 33 Cal. 812 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEL FROM APPELLATE DECREE
No 1688 of 1905

BRETT, J.
COXE, J.
1908.
18, February.

ISHWARDHARY SINGH and ors, Plaintiffs, Appellants,
v.
BIBI SAHEBZADI and ors, Defendants 1st and 2nd Party, Respondents.

Appellate Court—Power to make co Defendants liable upon appeal by a Defendant Mortgage-suit.

In an appeal by Defendants Nos. 2 to 8 against the decision of the 1st Court in which the real contest was whether Defendant No. 1 who was joined as a Respondent with the Plaintiffs or Defendants Nos 2 to 8 were liable for the mortgage debt, the Appellate Court has power to alter the decree of the 1st Court so as to make Defendant No. 1 liable and to direct that a decree to recover the mortgage debt against Defendant No. 1 be made in favour of Plaintiff.

This was an appeal preferred on the 24th August 1905, against the decree of E. P. Chapman, Esq, District Judge of Zillah Mozafferpur, dated the 2nd May 1905, reversing that of Babu Rajendra Nath Dutt, Subordinate Judge of that district, dated the 29th of September 1904.

The facts of the case appear from the judgment.

Babu Baldeo Narain Singh for the Appellants.

Moulvi Mahommed Taher for the Respondents, Defendants Nos 2 to 8.

Babus Dwarka Nath Mitter for *Babu Joy Gopal Ghosha* for the Respondent (Defendant No. 1.)

The JUDGMENT OF THE COURT was as follows:—

The only point raised in this appeal is whether the District Judge, when he set aside the judgment and decree of the Court of first instance and held that the Plaintiffs were not entitled to recover the mortgage debt against Defendants Nos. 2 to 8 on their appeal, erred in law in refusing to grant the Plaintiffs a decree for the recovery of the mortgage debt against Defendant No 1.

In our opinion the grounds which the District Judge has given for refusing to grant the Plaintiffs a mortgage decree against Defendant No. 1 are not sufficient in law. The cases of *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee* (1), *H. W. Hudson* v. *Baldeo Bajpye* (2), and the Full Bench decision in the case of *Rup Jaun Bibee* v. *Abdul Kader Bhuyan* (3) are sufficient authority for the view which we take that in an appeal like the present by Defendants Nos. 2 to 8 against the decision of the Court of first instance in which the real contest in the case was whether Defendant No. 1, who was joined as Respondent with the Plaintiffs or Defendants Nos. 2 to 8 who were the Apellants, were liable for the mortgage debt, the Appellate Court has power to alter the decree of the Court of first instance so as to make Defendant No. 1 who was a joint Respondent in the appeal with the Plaintiffs liable, and to direct that a decree to recover the mortgage debt against her be granted in favour of the Plaintiff. The case of

(1) 2 C. W. N 425 : s c I. L. R. 25 Cal. 525 (1898)

(2) 3 C. W N. 76 : s. c I. L. R. 26 Cal 109 (1898)

(3) 8 C. W. N. 496 . s c. I L. R. 31 Cal. 643 (1904)

ISHWARDHARY SINGH v. BIBI SAHEBZADI.

Bishun Churn v. *Jogendra Nath* (4) on which the learned Judge has relied does not lay down a different principle. It is true, the other cases to which we have referred are suits for contribution, but we are of opinion that the principle laid down in those cases must be taken to apply equally to a case like the present.

We therefore set aside the judgment and decree of the lower Appellate Court and in lieu thereof direct that a mortgage decree in the ordinary form be granted to the Plaintiffs to recover the sum due under the mortgage from Defendant No. 1. An account will be taken of the amount due on the mortgage bond and on Defendant No. 1's failing to pay the sum due within six months from the date of this decree the Plaintiffs will be entitled to recover the sum from Defendant No. 1 by sale of the property. The Plaintiffs are entitled to recover their costs in this appeal and in the lower Courts from Defendant No. 1.

Defendants Nos. 2 to 8 are also entitled to their costs of this appeal as well as to the costs in the lower Appellate Court which costs must be paid by Defendant No. 1 against whom more than against the Plaintiffs the appeal was directed.

S. C. S. *Decree modified.*

(4) I. L. R. 26 Cal. 114 (1898).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1031 OF 1906.

RAMPINI, C. J.
RYVES, J.
1908.
Heard, 22, May.
Judgment, 27, May.

BIBI ASMATUNNESSA KHATUN SAHEBA & ors. Defendants Nos. 6 to 11, Appellants,

v.

HARENDRA LAL BISWAS, Minor, represented by his mother and guardian SM. MONMOHINI DASYA, Plaintiff, and NASIMANNESSA BIBI and ors., Defendants Nos. 1 to 5, Respondents.

Occupancy holding, non-transferable—Purchase by landlord in execution of money-decree, whether subject to previous mortgage—Estoppel—Evidence Act (I of 1872), sec. 115.

Where in execution of a money decree the landlords of a non-transferable occupancy holding purchased the holding after it had been mortgaged by the tenants in favour of a third party,

Held—*That in a suit by the latter to enforce the mortgage, the landlords were not estopped from setting up the defence that the holding was not transferable without their consent.*

That the sale of the holding by the landlords did not amount to a representation that it was transferable without their consent, but only that it was transferable with their consent.

That the landlords did not merely purchase the equity of redemption, the English law of mortgage not being applicable to the case.

pet in force in this

BIBI ASMATUNNESSA KHATUN SAHEBA *v.* HARENDRA LAL BISWAS.

country is contained in sec. 115 of the Evidence Act.

AYENUDDIN NASHYO *v.* SRISH CHANDRA BANERJEE (1) *distinguished.*

This was an appeal preferred on the 20th of June 1906, from a decision of W. S. Coutts, Esq., District Judge of Faridpur, dated the 5th of March 1906, confirming a decision of Babu Purna Chandra Chowdhuri, Additional Subordinate Judge of Faridpur, dated the 29th of August 1905.

The appeal arose out of a suit brought by the Plaintiffs on the basis of a mortgage executed by Defendants Nos. 1 to 5 in respect of 4 jotes which they held as tenants under Defendants Nos. 6 to 11. The jotes were at first sold in execution of a money-decree obtained against the Defendants Nos. 2 to 5 by their landlords, the Defendants Nos. 6 to 11 and were purchased by one Bunwari Lal Ghose, who however did not take possession and ultimately sold the jotes back to the tenant Defendants. The tenant Defendants found money to buy the jotes by mortgaging them with the Plaintiff on the 21st September 1898. Subsequently, in May and July 1899, the Defendants Nos. 6 to 11 attached a decree obtained by one Mohim Chandra S[illegible] against the tenant Defendants, [illegible] and themselves became purchasers of the jotes. The Defendants Nos. 6 to 11 resisted the Plaintiff's suit on the ground that the jotes were non-transferable and that therefore the mortgagee had no title.

The Court of Appeal below held that the jotes were non-transferable but that the Defendants Nos. 6 to 11 were estopped by their own conduct from raising such objections. He accordingly affirmed the judgment of the Court of first instance decreeing the Plaintiff's suit.

The Defendants Nos. 6 to 11 preferred this second appeal and the Plaintiff also preferred a cross objection.

Babus Mohendra Nath Roy and *Girija Prasanna Roy Chaudhuri* for the Appellants.

Dr. Rash Behary Ghosh and *Babu Hari Charan Sarkhel* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This appeal arises out of a suit brought by a mortgagee to realize his debt by the sale of the mortgaged property. The mortgaged property unfortunately for the mortgagee consists of 4 non-transferable occupancy jotes.

The lower Appellate Court has found that the Defendants Nos 6 to 11, who are the purchasers of the jotes at a sale held in execution of a money-decree and who are also the landlords of the jotes, are estopped from pleading that the jotes are not transferable. It has therefore given the Plaintiff a decree.

The Defendants Nos. 6 to 11 appeal. They contend that they never represented that the jotes were transferable without their consent and (2) that their conduct in no way amounted to an estoppel.

The facts are that in 1894 the Defendants Nos. 6 to 11 sold the 4 jotes in execution of a money-decree. The jotes were purchased by one Banwari Lal Ghose, who, however, did not take possession He re-sold the jotes to the former tenants

(1) 11 C. W. N. 76 (1906).

BIBI ASMATUNNESSA KHATUN SAHEBA v. HARENDRA LAL BISWAS.

who apparently obtained the money to buy them back from the father of the Plaintiff, to whom they mortgaged the jotes on the 21st September 1898. Subsequently, the Defendants Nos. 6 to 11 again sold the jotes in execution of a money-decree, obtained by one Mahim Chandra Shaha, who had a money-decree against the tenants. The Defendants Nos. 6 to 11 attached this decree, executed it and themselves became the purchasers.

The District Judge says: "In this case they were appearing not in the character of landlords, but as ordinary purchasers and in order to realize their dues they sold up the jotes. By doing so, they raised the presumption that the holding was transferable. Having done so and got their relief, I do not think they can now come forward in another capacity and say that the holding is not transferable."

The learned pleader for the Appellant contends that the Defendants Nos. 6 to 11 never represented that the jotes were transferable without their consent. By selling them, they represented only that they were transferable with their consent

He further urges that they bought the jotes in May and July 1899, and the Plaintiff's mortgage was executed on the 21st September 1898; so there was no estoppel *in pais*.

We must admit the force of these arguments. Dr. Rash Behary Ghose for the Respondents replies that the provisions of sec. 115 of the Evidence Act are not exhaustive, that according to English law, the Defendants by their purchase in 1899, only purchased what the mortgagors had to sell, *viz.*, the equity of redemption, and they are therefore now in the place of the mortgagors and so cannot in equity resist the claim of the mortgagee, and finally, on the strength of a ruling reported at *Ayenuddin Nashyo* v. *Srish Chandra Banerjee* (1), that the question of transferability does not arise in this case. He further urges as cross objection that the Plaintiff has a mortgage over the 16 annas of the jotes and not over only a 9 annas 4 pie share in them.

We are of opinion that the English law of mortgage is not applicable to this case. The law of estoppel in force in this country is contained in sec. 115 of the Evidence Act. The Appellants are clearly not estopped from pleading and proving, as they have done, that the jotes are not transferable without their consent. That being so, the Plaintiff's mortgage is of no avail. The case of *Ayenuddin Nashyo* v. *Srish Chandra Banerjee* (1) on which the learned pleader for the Respondent relies has no application to this case.

In that case the contest was between a mortgagee and the purchasers of jotes sold at the instance of certain co-sharer landlords, who bought only the right title and interest of the tenant. None of the landlords were parties to the suit. The facts of the present case are entirely different. But in that case it is said: "No doubt if the question was between the assignee of the interest of Dharma Dass, the tenant," (as is the case in the present suit) "and the landlord the Plaintiff could not recover without proving that they were transferable according

(1) 11 C. W. N. 76 (1906)

to custom and usage." So that according to this *dictum*, the question of the transferability of the jotes does arise in this case. We must therefore decree this appeal, which we accordingly do with costs. The cross appeal only arises if the appeal is unsuccessful. When we hold that the Plaintiff is not entitled to any thing, it is immaterial what share of the jotes he would have a right to, if his mortgage had been valid.

The cross appeal is therefore dismissed.

Appeal and cross-appeal dismissed.

N. G.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 61 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
11, March.

BHOLA NATH DAS and the Basuria Coal Co., Ld., Defendants, Appellants,
v.
RAJA DURGA PROSAD SINGH, Plaintiff, Respondent.

Notice—Transfer of Property Act (IV of 1882), sec. 108 (j)—Limitation Act (XV of 1877), Sch. II, Arts. 110, 116—Royalty, suit for.

Where it was stipulated that a certain notice was to be given two months before the 30th of Chaitra,

Held—*That a notice dated 1st Falgoon (=13th February) was not a valid notice when the 30th Chaitra fell on 12th April, as it was not a full two months' notice but fell short of it by one day.*

In view of the provisions of cl. (j) *of sec. 108 of the Transfer of Property Act, all lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights*

A suit for recovery of royalty upon a registered document is governed by Art. 116 and not Art. 110 of Sch. II of the Limitation Act.

THE RANIGANJ COAL ASSOCIATION v. JUDOO NATH GHOSE (1) *followed.*

This was an appeal preferred on the 25th of February 1907, against the decree of Babu Bepin Behary Chatterjee, Subordinate Judge of Zillah Manbhum, dated the 7th of February 1907.

The facts of the case appear from the judgment. The *kabuliyat* upon which the suit was brought was a registered one.

Babus Sib Chandra Palit and *Hera Lal Sanyal* for the Appellants.

Dr. Rash Behary Ghose, Babus Joges Chandra Dey and *Lalit Mohan Ghose* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal against a decision of the Subordinate Judge, dated the 7th February 1907.

The appeal arises out of a suit brought to recover, with interest, the minimum royalty due under a *kabuliyat* executed by the Defendant No. 1 in favour of the Plaintiff. The claim is laid at Rs. 38,960. 10 as. 6 pie.

The facts of the case are as follows:— The Plaintiff is a zemindar, who is the owner of certain lands in which coal is found. He leased by a deed, dated the 19th July 1899, certain sub-soil rights in the lands owned by him. The lease conveyed a *mokurari mourasi* tenure. It was stipulated in the *kabuliyat* executed by the Defendant No. 1, Bhola Nath Das, that

(1) I. L. R. 19 Cal. 489 (1892).

BHOLA NATH DAS v. RAJA DURGA PROSAD SINGH.

he was to pay a certain royalty (Rs. 8,400 per annum) for the raising of coal. Then there was stipulation that "if in any year, I sell a very small quantity of coal, or be unable to sell any quantity of coal at all in any year, owing to the market rate of coal being very low, or owing to the absence of purchasers of coal, or for any other reason, then, by giving you notice two months before, I shall not pay you more than Rs. 6,000 as minimum royalty for that year. The amount of minimum royalty shall be due each year on the 30th Choitra."

The Plaintiff now sues for the royalty at the rate of Rs. 8,400 per annum for the years 1309, 1310, 1311 and 1312.

The defence is that the Defendants Nos. 1 and 2 (the Defendant No. 2 being assignee of the interest of the Defendant No. 1) had given notice to the Plaintiff that the latter was not entitled to a royalty of Rs. 8,400, but to the minimum royalty of Rs. 6,000 per annum.

The Subordinate Judge had found in favour of the Plaintiff.

The Defendants appeal; and on their behalf the following pleas have been raised:—*First*, that the Plaintiff is not entitled to get more than a minimum royalty of Rs. 6,000 per annum; *secondly*, that the Defendants are entitled to a deduction of the land encroached upon by the East Indian Ry. Co. and by Mr. Crete; *thirdly* that the *kistibundi* put forward by the Defendants is not binding on the Plaintiff; *fourthly* that the Defendant No. 1 is not liable at all, as he assigned his rights to the Defendant No. 2; *fifthly*, that a certain portion of the claim is barred by limitation; *sixthly*, that the Subordinate Judge has excluded certain evidence, *viz*, notices and correspondence and, *seventhly*, that the Defendants are not liable for interest and costs to the full amount, as they made a tender of a certain sum which was refused.

The first point we shall deal with is as regards notice. The notices relied upon are to be found in pages 23 and 26 of the paper-book. The first notice is dated the 13th February 1905 (1st Falgoon 1311). It is a notice given by the Defendant No. 2, and not by the Defendant No. 1. If it is of any avail it would only entitle the Defendant to pay the smaller amount of Rs 6,000 for 1311. But it appears to us that this notice was not in terms of the *kabuliyat*, because the *kabuliyat* provided that the notice must be given two months before the date on which the royalty for each year was payable, the 30th Chaitra of each year. Now, the 30th Chaitra 1311 was the 12th April 1905. So the notice dated the 13th February 1905 is not full two months notice, but less than two months by one day. Therefore it is not valid and in accordance with the terms of the *Kabuliyat*. The so-called notice at page 26 is a letter written by the Defendant No. 1 to the Plaintiff. It contains no notice at all. It does not make any reference to the terms of the *kabuliyat*, under which the Defendant No. 1 would be liable for Rs. 6,000 for any particular year. It says "I am trying my best to make a part payment at least at an early date. I hope to get a good sum from one of my customers next week, when I will not fail to pay." This is no notice as required by the *kabuliyat*.

The next point is that the Subordinate

BHOLA NATH DAS *v.* RAJA DURGA PROSAD SINGH.

Judge is wrong in not holding the Defendant entitled to a deduction for the land encroached upon by the E. I. Ry. Co. and Mr. Crete. There is, however, no evidence at all to show that the Defendants have been obstructed in any way in the raising of coal by these encroachments. The Company have run lines only over the surface, and there is nothing on the record to show that they have interfered with the working of the coal by the Defendants. Then, the report of the Commissioner deputed to enquire into the encroachments show that the encroachments by Mr. Crete, the Manager of the Basdebpur Colliery were entirely outside the land leased to the Defendants.

The third point is as to the *kistibundi*. That is not binding on the Plaintiff, because the evidence shows that the Plaintiff refused to have anything to do with the *kistibundi* or to agree to it in any way.

The next point is that the Defendant No. 1 is not liable, because he assigned his rights to the Defendant No. 2. It appears to us, however, that according to sec. 108, cl. (*j*) of the Transfer of Property Act, the lessee is liable, even if he transfers his rights. The pleader for the Appellants says that this clause does not apply to permanent rights. But that is not so. It applies to all cases, in the absence of a contract or local usage to the contrary, and there is no evidence of a contract in this case, or of local usage.

The next plea is that part of the claim is barred by limitation. The Appellants say that the royalty in this case comes within the definition of rent and that, therefore, the period of limitation is that prescribed by Art 110 of Sch. II of the Limitation Act. It appears to us that the article applicable is Art. 116, as laid down in the case of *The Raniganj Coal Association* v. *Judoo Nath Ghose* (1). That being so, the claim is not barred by limitation.

The next ground of appeal is that certain evidence of notices and letters was excluded. But we find that they were not attempted to be put in till after the close of the case, and then they were not proved They are not sworn to by any one. They are private documents and do not prove themselves. They have, therefore, been properly excluded.

The last point is that a certain amount was tendered, which the Plaintiff refused to receive. It appears that a sum, not of Rs. 21,000, as the pleader for the Defendant says, but of Rs. 5,000 was tendered along with the *kistibundi*; and it was, of course, refused, because, if it had been received, it would have been treated as an acceptance of the *kistibundi*. So far as we can see, the Rs. 5,000 was not tendered by itself. It was tendered along with the *kistibundi* which the Plaintiff was not bound to accept. He never agreed to it. Therefore, in these circumstances, when the Rs. 5,000 were tendered with the *kistibundi*, the Plaintiff was entitled to refuse to receive the money, because he was not willing to agree to the *kistibundi*.

On these grounds we are unable to interfere with the decision of the lower Court, and we dismiss this appeal with costs.

S. C. S. *Appeal dismissed.*

(1) I. L. R. 19 Cal. 489 (1892).

[CRIMINAL REVISIONAL JURISDICTION.]

No. 337 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
30, April.
Judgment,
5, May.

RADHAKANTA LAL, Petitioner,
v.
THE EMPEROR, Opposite Party.

Special constables—Appointment—Act V of 1861, secs. 17, 19—Circumstances justifying appointment—Refusal to comply with an improper order of appointment.

The circumstances which justify an order under sec. 17 of Act V of 1861 are that a disturbance of the peace is apprehended and that the Police force available is insufficient to preserve the peace, and protect the inhabitants of the village where disturbances are apprehended.

BENI MADHAB SINGH v. THE EMPEROR (1), GOPINATH PARYAH v. THE EMPRESS (2) *followed.*

In a case where it was not clear that there was any danger of a disturbance of the peace or that if there was such a danger, the ordinary police force available was not sufficient to cope with it,

Held—*That the appointment of the Petitioner as special constable was unnecessary and inexpedient,*

Held further—*That the Petitioner should not be prosecuted under sec. 19 of Act V of 1861 for his refusal to act in accordance with such appointment.*

This was a rule granted on the 23rd of March 1908, against an order of the District Magistrate of Gaya, dated the 28th of February 1908 directing the prosecution of the Petitioner under sec. 19 of Act V of 1861, for disobeying the orders passed by the Sub-Divisional Magistrate of Nawadah and by the District Magistrate of Gaya, under sec. 17 of Act V of 1861.

The facts of the case will appear from the judgment.

Messrs. P. L. Ray, Asgur and *Babu Atul Chandra Dutt* for the Petitioner.

Babu Sris Chandra Chaudhury for the Crown.

The JUDGMENT OF THE COURT was as follows:—

This is a rule to show cause why the prosecution of the Petitioner under sec. 19 of Act V of 1861 should not be set aside on the ground that his appointment under sec. 17 of the Act was not justified by the terms of that section.

It appears that on a recommendation of the Sub-Divisional Magistrate of Nawadah, the District Magistrate of Gaya appointed the Petitioner and 12 other persons as special constables under Act V of 1861, and the Petitioner was, also by an order of the District Magistrate, appointed a special lance constable for a period of 6 months, commencing from the 17th December 1907.

On the 14th January 1908 the Sub-Divisional Magistrate of Nawadah issued a notice to him calling on him to appear before him on the 23rd January 1908, to show cause why he should not be prosecuted for not obeying these orders.

By an order of the District Magistrate of Gaya, dated the 28th February 1908, he is now being prosecuted under sec. 19 of the Act, and it is this order we are asked to set aside.

(1) 12 C. W. N. 366 (1908).
(2) 10 C. W. N. 82: s. c. 2 C. L. J. 555 (1886).

RADHAKANTA LAL v. THE EMPEROR.

It has been urged by Mr. P. L. Ray Counsel for the Petitioner that as the appointment of the Petitioner under sec. 17 of the Act, was not warranted by law, he was justified in refusing to act as special constable, and that therefore his prosecution under sec. 19 of the Act is illegal.

Mr. Ray has drawn our attention to the case *Beni Madhub Singh* v. *The Emperor* (1) as an authority for his contention. We feel no doubt that the order under sec. 17 of the Act was inexpedient and unnecessary. The Petitioner had a dispute about property with a lady named Najima Begum, who, he alleged, was the mistress of his father now dead.

It is entirely this dispute, and not any riot or general disturbance of the peace, which led to his being appointed a special constable. The Petitioner complains that the Sub-divisional Magistrate has espoused the cause of Najima Begum, and has consequently instituted various criminal proceedings against him, in which he has been uniformly successful and finally had been appointed a special and a lance constable so as to interfere with the prosecution of his civil dispute with Najima Begum. We need not enquire into this matter: suffice it to say that in the case of *Beni Madhab Singh* v. *The Emperor* (1), it has been laid down that "the circumstances which justify an order under sec. 17 are that a disturbance of the peace is apprehended and that the Police force available is insufficient to preserve the peace, and protect the inhabitants of the village where disturbances are apprehended. The same principles were laid down in *Gopinath Parya* v. *Empress* (2). We doubt if there was ever any danger of a disturbance of the peace. If there was, it would appear that it was not such as the ordinary Police were unable to cope with. There has been no disturbance of any kind. If there had been the Petitioner could not, as a special constable, have prevented it and there was really no necessity to appoint him to be a special constable. If the Magistrate apprehended that the Petitioner was about to commit a breach of the peace, he could have instituted proceedings against him under sec. 107, C. P. C., but in our opinion the orders appointing him a special constable and particularly a special lance constable, were entirely unnecessary and inexpedient. For these reasons, we make the rule absolute and set aside the order for the prosecution of the Petitioner under sec. 19.

This order will also govern the case of the Petitioner Kashinath in revision case 339 of 1908: the order for whose prosecution under sec. 19, Act V of 1861 is also set aside.

B C *Rule made absolute.*

(1) 12 C. W. N. 866 (1908).

(2) 10 C. W. N. 82: s. c. 2 C. L. J. 555 (1886).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JUNE 15, 1908. [No. 31

Contents.

NOTES

THE EASTERN BENGAL "TENANCY" (AMENDMENT) Act. by which the Bengal Tenancy Act has been amended for the Eastern Bengal received the assent of the Governor-General on the 25th May 1908.

WE ARE GLAD TO WELCOME THE INCORPORATION OF a Law Society in Calcutta. The objects of the society, amongst others, are to protect the character, status and interest of the solicitors and attorneys practising within the jurisdiction of the Calcutta High Court and Courts subordinate thereto, to promote honourable practice, to repress malpractices and to determine questions of professional usages and courtesy prevailing in the profession and decide disputed questions of professional propriety or practice, to make representations to the proper authorities on questions affecting the interest of the profession and to procure changes in the law and secure its better administration. The Society also proposes to adopt disciplinary measures, such as the opposing of the admission of attorneys or solicitors for any good and sufficient cause and for such cause to take steps for getting others struck off the rolls. Besides these the Society also proposes to establish libraries, organise lectures and otherwise help the cause of legal education amongst the articled clerks. We wish every success to the Society and hope it will secure the hearty support and co-operation of the profession and in course of time be entitled to all the privileges that the Incorporated Law Society in England enjoys.

WE INVITE ATTENTION TO THE RULES PUBLISHED IN the *Calcutta Gazette* and reproduced in these columns relating to the registration of the names of clerks serving under pleaders practising in mofussil Courts. It should be remembered that pleaders in the mofussil have to do a lot of drafting and conveyancing work. In fact all the work that is done by a firm of attorneys or solicitors in the Presidency towns has to be, done by the pleaders in the mofussil. Although we regard the rules to be on the whole, wholesome yet care should be taken in putting them in operation. A too strict or injudicious enforcement of the rules may work some amount of inconvenience. The penalty attached to the employment of unregistered clerks is only that such clerks shall not be allowed access to the Court offices. So after all the rules may not work any serious hardship.

THE OBSERVATIONS OF THE LORD CHIEF JUSTICE OF England sitting in the newly constituted Court of Appeal and quashing the conviction in the case of *Rex* v. *Lee* is deserving of more than casual attention in this country. In view of the apprehension felt in some quarters that the conferring of a right of appeal in criminal cases might prevent juries from giving the benefit of the doubt to prisoners, Alverstone, L. C J, in delivering judgment in the above case expressed the hope, "that the passing of the Act would not lead to any modification of the well-established practice in the administration of the criminal law that there is a presumption of innocence which is only to be rebutted by such evidence with regard to the particular offence as leaves no reasonable doubt that the prisoner is guilty." The learned Lord Chief Justice proceeded to add "but for ourselves we have no fear in this direction, and we feel sure that judges in the future, as they always have in the past, will continue to tell juries that it is the duty of the prosecution to make out their case and that any question of doubt should be decided in favour of the prisoner."

IN THE CASE *In re the Public Prosecutor*, reported at p 84 of the current Volume I. L. R. Madras Series, an important question as to the power of the Magistrate to award imprisonment in lieu of whipping, which could not be inflicted, was decided by their Lordships Benson and Sankaran Nair, JJ. There one M was convicted of theft and sentenced by the District Magistrate to receive 20 stripes.

The Medical Officer certified that M was unfit to receive 20 stripes but was fit to receive 6 stripes. These stripes were inflicted and in lieu of the balance of 14 stripes, the District Magistrate sentenced M under sec. 395 of the Criminal Procedure Code to 3 months' rigorous imprisonment. Sec. 394 (*b*) provides for cases where the Medical Officer present at the time of the infliction of whipping certifies that the offender is not in a fit state of health to undergo the whole or any part of sentence of whipping and the whipping in consequence is suspended. Then the following sec. 395 lays down that the Magistrate in such a case will be competent to revise the sentence and award imprisonment in lieu of so much of the sentence of whipping as was not executed.

But there is no provision in the Code of Criminal Procedure which relates to cases where the Medical Officer certifies before the infliction of whipping, that the offender is unable to bear the whole whipping and in consequence a part of the whipping sentence is suspended. Their Lordships therefore ruled that where the Medical Officer before the infliction of the whipping certified that the offenders could not undergo more than 6 stripes, the District Magistrate had no power under the law to sentence the offender to imprisonment in lieu of the 14 stripes suspended. In other words the learned Judges held that sec. 395 (1) does not cover such a case and therefore the Magistrate has no jurisdiction in such a case to revise the sentence and award imprisonment. It is difficult to see why the Magistrate should be incompetent to revise the sentence when the Medical Officer certifies before the execution of the sentence that the offender is unable to undergo the whole whipping, but would be competent under the law to revise the sentence when the Medical Officer certifies during the execution of the sentence that the whole whipping should not be inflicted.

The Legislature, no doubt, contemplated that the medical examination should take place at the time of execution as in the case of any previous examination it may be that at the time of the execution the person may not be in a fit condition to undergo the sentence of whipping; and there seems hardly any doubt that the distinction drawn in this case did not occur to the framers of the Code. But whether the distinction drawn in the two cases be material or not, we have no doubt that the decision of their Lordships is not open to exception. It is a well-known principle of interpretation of statutes, that penal laws should be strictly construed. As secs. 394 and 395 do not provide for a case like the one under notice and as there is no other section in the Code meeting such a case, the learned Judges held that the Magistrate had no power under the Code to sentence the offender to imprisonment in lieu of the portion of the sentence of whipping which had not been inflicted.

CURRENT INDIAN CASES.

Samasundaram *v.* Manicka Vasaka, I. L. R 31 Mad. 60. *C. P. C., sec. 386—Charter Act, sec. 15.*

Under sec. 15 of the Charter Act the High Court has power to interfere with an order passed by a Subordinate Court for the examination of a witness on commission when such an order cannot be passed under sec. 386, C. P. C.

Vaidiswara *v* Siva Subramania, I. L. R 31 Mad. 66. *Companies Act, secs. 61, 112—Calls, liability to, after liquidation—Limitation.*

". . . . Even though the recovery of the unpaid portions of the calls might have been barred under Art. 112 of the Limitation Act, if the company had sued for them, yet this does not affect the new liability created by sec. 61 (of the Indian Companies Act) "when the company has gone into liquidation." Per Benson and Miller, JJ.

Ramayyan *v.* Kadir Bacha, I. L. R. 31 Mad. 68. *Transfer of Property Act, sec. 89—C. P. C., sec. 235.*

An application under sec. 89 of the Transfer of Property Act is an application for execution; sec. 235, C. P. C., and Art. 178 or 179 of Sch. II of Limitation Act applies to such an application.

Chalanadi *v.* Paloori, I. L. R. 31 Mad. 71. *Execution—Limitation—Obstacle.*

So long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, *i.e*, on every day on which the Court does not *suo motu* continue them—the right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending.

A fresh application for execution is barred if made three years after the removal of an obstacle.

Algirisamy Naidu *v.* Venkata Chellapathy, I. L. R. 31 Mad. 77. *Execution—C. P. C., sec. 232.*

On the death of a decree-holder his heir has the right to apply for execution without being brought on the record.

PERUMALLU *v.* EMPEROR. *C. Cr. P., sec. 195.*

"The words subject to the provisions hereinbefore contained which occur at the beginning of sec. 537 cannot be construed in such a way as to nullify the express provision of the latter part of the section, which in cl. (*b*) enacts that no sentence passed by a Court of competent jurisdiction shall be reversed on appeal 'for want of any sanction required by sec. 195.'" *Per* Benson and Sankaran Nair, JJ.

ARUMUGA *v.* VENKATA SUBBIER, I. L. R. 31 Mad. 82. *C. Cr. P., sec. 145.*

In making an inquiry under sec. 145, cl. 4, C. Cr. P., a Magistrate cannot delegate to a Subordinate Magistrate the duty of recording evidence.

THE PUBLIC PROSECUTOR—PETITIONER, I. L. R. 31 Mad. 84. *Cr. P. C., sec. 395—Whipping*

The accused was sentenced to receive 20 stripes. Before the sentence was executed the Medical Officer certified that he was fit to receive 6 stripes which were inflicted. For the balance of 14 stripes the accused was sentenced to 3 months' imprisonment, *held* that the sentence of imprisonment was bad.

VEERAPPA *v.* TINDAL, I. L. R. 31 Mad. 86. *Suit against a dead man.*

When a suit is instituted against a deceased even upon a *bonâ fide* mistake owing to the ignorance of the death of the Defendant, *held* that the heirs cannot be substituted.

Review.

THE CIVIL PROCEDURE CODE (Act V of 1908) *By Sasi Bhusan Bose, B. L., Vakil, Howrah Court, Calcutta. The Universal Press Company, 1-1, Pollock Street. 1908. Price, Paper, Re. 1.*

This is a neat and handy reprint of the new Code (as it appeared in the *Gazette*) together with the report of the Select Committee. Considering its general get up which is admirable, the price is certainly moderate. The only thing wanting is a subject index without which the new Code with its unfamiliar arrangement of sections and subjects will not lend itself for easy handling.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before RAMPINI and SHARFUDDIN, JJ. CRIMINAL REVISION No. 352 OF 1908. KESHAB CHANDRA KAR, 1st Party, Petitioner *v.* HARADHONE CHATTERJEA, 2nd Party, Opposite Party. 11th May 1908.

Criminal Procedure Code, secs. 145, 146—Refusal of Magistrate to receive all the evidence which a party wanted to offer—Whether a ground for interference by the High Court.

In a proceeding under sec. 145, Cr. P. C., the property in dispute was attached by the Magistrate under sec. 146, Cr. P. C. It appears that the Petitioner put in a list of 29 witnesses and wanted to file some documentary evidence; but the Magistrate did not call for the documentary evidence, and refused to summon more than 10 of the witnesses. The Petitioner obtained this rule to set aside the order of attachment under sec. 146 on the ground *inter alia* that the Magistrate had acted without jurisdiction by his refusal to take all the evidence which the Petitioner wanted to produce.

Their Lordships observed :

"It appears that the Petitioner put in a list of 29 witnesses and the Magistrate summoned ten witnesses. He refused to summon the remaining witnesses He also did not call for certain documentary evidence which the Petitioner wished for. We think, however, that there is no ground for disturbing the finding of the Magistrate on this point. These are not matters which affect the jurisdiction of the Magistrate. They are matters which affect procedure of the Magistrate. We cannot interfere under sec. 15 of the Charter unless there is want of jurisdiction. Furthermore, the Magistrate appears to be right on the merits. He is not bound to summon 29 witnesses. It is the duty of the Petitioner to produce his own witnesses and documentary evidence. This has already been decided in a judgment of this Court. We discharge the rule."

Mr. Sinha with him *Babu Dasarathy Sanyal* for the Petitioner.

Mr. A. Chaudhuri with him *Babu Joy Gopal Ghosha* for the Opposite Party.

Rule discharged.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1189 OF 1906. ANANTA PARIRA AND OTHERS, Defendants, Appellants *v.* PARMANANDA PARIRA AND OTHERS, Plaintiffs, Respondents. Heard, 2nd and 3rd June 1908. Judgment, 3rd June 1908.

Possession—Plaintiff failing to prove separate possession—Joint possession, decree for.

The Plaintiffs brought this suit for a declaration of their *mokaddami* title to certain land and to recover possession on the allegation that the land appertained to their 4 annas 6 gundas share on partition. The defence of the Defendants Nos. 1 to 5, who were the Appellants, was that they had raiyati right to the whole of the land under claim, and that they had been holding possession in that right for a period far exceeding 12 years during which time they had been in possession, partly *khas*, and partly by letting out to tenants. The sub-tenants of the Defendants were Defendants Nos. 27 to 31. (*shikmi* Defendants).

The Court of first instance found that there had been no effective partition, but that the Plaintiffs were entitled to recover joint possession, to the extent of 4 annas 6 gundas share, along with the co sharer Defendants, by ejecting the *shikmi* Defendants. The Munsif also held that no question of limitation arose in the circumstances of the case as the land in dispute was the joint property of all the *mokaddams*.

On appeal, the Subordinate Judge affirmed the decision of the Court of first instance.

On appeal to the High Court, it was *held*, that if a Plaintiff claimed possession of a separate share in certain property and failed to prove the separation, he might nevertheless be entitled to joint possession to the extent of his share along with other co-sharers.

Mookhada Sundari Dasi v. *Ram Charan Karmokar* (I. L. R. 8 Cal. 871) explained.

Babus Debendra Nath Mullick and *Jogendra Chunder Ghose* for the Appellant.

Babu Monmohan Dutt for the Respondent.

A. T. M. *Appeal dismissed.*

High Court Notice.

THE following Rule having been framed by the High Court of Judicature at Fort William in Bengal, in the exercise of the powers vested in it by the Statute 24 and 25 Vic., Chapter 104, section 15, and sanctioned by the Governor-General in Council, is published for general information.

HIGH COURT, ENGLISH DEPARTMENT (CRIMINAL), *The 3rd June 1908.*

By order of the High Court,

A. P. MUDDIMAN, *Registrar.*

Rule No. of 1908.

After Rule 28, Chapter III, page 83 of the High Court's General Rules and Circular Orders, Criminal, *insert* the following :—

Documents not admitted as evidence.

28A. Documents which have not been admitted as evidence should not be made part of the record, but should at once be returned to the party by whom they have been produced.

General Letter No. 5, dated Calcutta, the 19th May 1908.

FROM—A. P. MUDDIMAN, ESQ., Registrar of the High Court of Judicature at Fort William in Bengal,

TO—The District Judge of

I AM directed to forward, for your information and guidance, and for communication to the Subordinate Civil Courts of your district copies of the rules which have been framed by this Court regarding pleaders' clerks.

2. The attention of the Court has recently been drawn to the unsatisfactory condition of affairs which has resulted in certain instances from an excessive number of persons attending the local Courts under the pretext that they are pleaders' clerks. It has also been brought to the notice of the Court that the powers of District Judges in regard to the control of this nuisance are not as clearly defined as is desirable. The Court trust that the rules now issued will be sufficient to meet the evil.

3. I am to request that you will be so good as to state in your next Annual report the way in which the rules have worked during the period they have been in force in your district.

Rules regarding Pleaders' Clerks.

1. The District Judge at head-quarter stations, and such Court at out-stations as the District Judge may direct, shall maintain a register of all clerks employed by the pleaders practising in the Civil Courts at those places, showing their names, residences and the date on which they were registered as clerks of the pleader by whom they are employed.

2. On or before the date on which these rules come into force, all pleaders practising in the Civil Courts shall file a statement of the names and addresses of the clerks employed by them, and shall report any changes as they come. The certificates required by rule 5 shall be furnished in regard to the persons whose names are reported for registration under this rule.

3. No person whose name has not been duly registered shall be recognised as the clerk of a pleader; and no person who is not a party, or a pleader, or a clerk duly registered under these rules, shall be admitted to the offices of the Court on any pretext.

4. No pleader shall employ more than two clerks at one and the same time, without the express permission of the District Judge.

5. A pleader, desiring to employ as a clerk, any person not in his employ at the date these rules come into force, shall state in his application that such person is a fit and proper person to be so employed, and that he will be employed *boná fide*, in his own service, for the purposes of his legal business.

6. These rules shall come into force on the 1st of July 1908.

PRIVY COUNCIL.

[APPEAL FROM BENGAL].*

LORD MACNAGHTEN.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON
1908.
Heard, 5, & 11, February,
Judgment, 14, May.

RADHA PROSAD MULLICK and anr. Appellants,
v
RANIMONI DASSI and others, Respondents.

Hindu Law—Will—Construction—Bequest to "daughters and their respective sons"—Restriction of descent to male issues—Absolute or life-estate—Woman's estate—Survivorship between daughters—Spiritual benefit—Remainder over to sons—Gift over to daughters on failure of adoption—Succession Act (X of 1865), sess. 82, 116, 117.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.

MOULVIE MAHOMED SHUMSOOL v. SHEWUK RAM (1) *followed.*

In the Will of a Hindu drawn up in the English language and probably by an English Solicitor who was one of the attesting witnesses, it was provided, in case of the failure of a prior bequest in favour of a son to be adopted to the testator, (which bequest in fact failed) that the estate was to be made over to and divided between his two daughters in equal shares, "to whom and their respective sons he gave, devised and bequeathed the same." There was a proviso that in the event of one of the daughters dying without leaving any male issue surviving, the share of the deceased daughter was to go to the surviving daughter and her sons—to the exclusion in both cases of female issue. Further, that "in the case of the death of either daughter leaving sons, the share of such daughter was to be paid to such her son or sons, share and share alike,"

Held—*That under the Will the testator's daughters whom he incontestably intended to benefit were to have no more than what is generally known to be a woman's estate in his property.*

That the testator intended to create in their favour an estate for life with a remainder over to their sons.

That in the events that happened the daughters were entitled to the testator's estate in equal shares for life and with the benefit of survivorship between themselves.

This was an appeal from an Appellate judgment and decree of the High Court at Calcutta, dated the 23rd of April 1906, which affirmed a judgment and decree of Mr. Justice Woodroffe, sitting on the Original Side of the said High Court and dated the 31st of July 1905. The judgment of Mr. Justice Woodroffe is reported at 9 C. W. N. 1033 and the Appellate judgment at 10 C. W. N. 695. The suit was for the construction of a Will, dated the 13th October 1875 of one Hurry Dass Dutt who died on the 30th October 1875.

The said Hurry Dass Dutt by his Will

(1) L. R. 2 I. A. 7 (1874).

appointed three executors and trustees, *viz.*, (1) Srimutty Surnomoni Dassi, the testator's widow, (2) Modhosoodan Dutt, his father and (3) Dwarka Nath Dutt, his uncle.

Inter alia the testator made the following provisions :—

"Whereas having no son born to me of my body I am desirous of adopting one in my life-time but in case I depart this life before carrying such my desire into effect, I hereby authorize and empower my wife and executrix Srimutty Surnomoni Dassi and my executors and trustees to whom I give full permission and liberty to adopt after my decease a son and in case of his death during his minority or on attaining his full age and without leaving male issue to adopt a second son and in case of his death during minority or on attaining such age and without leaving male issue to adopt a third son and no more. In any of the above cases of adoption should the adopted son die leaving a son or sons the power of adoption shall cease or remain in abeyance during the life or lives time of such son or sons of such adopted son but shall revive on the death of such son or sons during minority.

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family Idol Sri Sri Radha Govindji and to pay my wife monthly during her natural life for her sole and separate use the sum of rupees two hundred and also the sum of rupees fifty monthly to such adopted son who shall live and attain his full age of 18 years after his so attaining such age of 18 years during the life-time of my said wife provided he remains under her control and bears a good character and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names but in no case shall such adopted son have or exercise any control, dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal or immoveable or moveable whatsoever and wheresoever and of what nature or quality soever to such adopted son who shall survive my wife if he shall have attained his age of 18 years during the life-time of my wife or on his so attaining such age after her decease to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons I desire and direct my exacutors after the death of my said wife or the death of such son after her but under such age of 18 years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same but should

RADHA PROSAD MULLICK v. RANIMONI DASSI.

either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

Hurry Dass Dutt left him surviving the following persons, *viz.*,

1. His widow Sreemutty Surnomoni Dassi.

2. His daughter Sreemutty Ranimoni Dassi.

3. His daughter Sreemutty Premmoni Dassi.

4. Three sons of Premmoni Dassi.

(*a*) Radha Prosad Mullick.

(*b*) Kassi Prosad Mullick.

(*c*) Jyoti Prosad Mullick.

Probate of the said Will was granted on the 30th December 1875 to the widow and uncle of the deceased, two of the executors named. In pursuance of the power of adoption conferred by the said Will Sreemutty Surnomoni Dassi on the 9th August 1876 adopted Jyoti Prosad Mullick who died on the 29th January 1881, she then adopted Amrita Lall Dutt on the 9th February 1881. The validity of the adoption was the subject of litigation which terminated by the judgment of their Lordships of the Privy Council reported in *Amrito Lal Dutt* v. *Surnomoye Dassee* (2). That judgment decided that a joint power to adopt was conferred on the three executors by the Will and was invalid in law—in consequence of which the son adopted in fact had no status in the family. On the 14th August 1904 Sreemutty Surnomoni Dassi died and on the 19th December the present suit was instituted on the Original Side of the Calcutta High Court by Sreemutty Ranimoni Dassi. The Defendants were Sreemutty Premmoni Dassi, his other daughter her four sons Radha Prosad Mullick, Kassi Prosad Mullick, Peary Lall Mullick, and Behari Lall Mullick (the two latter of whom were born after Hurry Dass' death) and Jogul Kishore Sen, a son adopted to the Plaintiff and her husband on the 2nd November 1906. The principal relief claimed on the suit was a declaration of the rights of all parties to the suit and for the true construction of the Will. The issues so far as they are material to this report were,

1. Was there an intestacy as to the residue?

2. If there was no intestacy who take under the Will?

3. And for what interest?

In support of the contention that there was an intestacy it was urged, that there being no present bequest to the adopted son or such bequest being void *ab initio*, the gift over to the Plaintiff and her sister failed.

On this point Mr. Justice Woodroffe held

(1) That there was a present bequest to support the gift over to the adopted son.

(2) On the question whether the gift over failed he decided as follows:—

"Then it is said the events have not happened upon which it is stated in the Will that the gift to the testator's

(2) 4 C. W. N. 549: s. c. L. R. 27 I. A. 128 (1900).

RADHA PROSAD MULLICK v. RANIMONI DASSI.

daughter was to take effect. The answer to this objection appears to be this. There is nothing in the Will to indicate that the testator intended that his daughters should benefit by it only in the two cases mentioned, *viz.*, that of the adopted son dying before his widow before attaining majority or surviving her a minor without male issue. On the contrary the testator's intention was, I think, to benefit the adopted son, and should the provisions in this respect in any manner fail then those who were of his own blood, *viz*, his daughters."

On the second point, Mr. Justice Woodroffe stated that there was no dispute that in case there was no intestacy the estate would go to the Plaintiff and Premmoni in equal shares.

On the question of the nature of the interest they took, whether an absolute one or for life only, Mr. Justice Woodroffe observed as follows :—"As to this there is no doubt, the Will associates the daughters' sons with the gift to the daughters. It is admitted, however, that they do not take together but it is contended that the reference to sons of the daughters shows that the daughters took a life-interest and the sons living at the testator's death a vested remainder.

"This however in my opinion is not so. The words 'and their respective sons' I think are there used as words of limitation and not of purchase. Further, the clause ends with a gift over of the share of the daughter dying without male issue to her surviving sister, a provision which would have no meaning if each daughter had merely a life-interest which would determine in her death whether she had or had not male issue.

"The testator in my opinion has made an absolute gift of a moiety of the estate to each of his two daughters, the Plaintiff and the Defendant Premmoni. Apparently also he meant to make that gift defeasible in the event of a daughter dying without male issue. As to whether the clause of defeasance is valid or not I express no opinion, it being unnecessary to do so unless and until the events take place upon which it is declared that it shall take effect." (Vide, *Sreematty Raneemoney Dassee* v. *Sreematty Premmoney Dassee* (3).

In the decree Mr. Justice Woodroffe directed

1. An enquiry as to what the testator's estate consisted of at the time of his death and also at the death of Srimutty Surnomoni Dassi deceased, the widow of the said testator, and what it consists of at the date of the decree.

2. An enquiry to ascertain the additions and accretions to the said testator's estate in the course of management and administration thereof by Srimutty Surnomoni Dassi deceased and Dwarka Nath Dutt deceased as executrix and executor of the testator's Will and subsequently by the said Srimutty Surnomoni Dassi alone. And further

(3). That a partition be made of the said estate with the appurtenances into two equal parts or shares and that a commission issue directed to a certain Commissioner or Commissioners to be therein named and if the parties differed about any matter relating to the issuing of such commission the Registrar of this Court should settle the same between them.

(3) 9 C. W. N. 1033 (1905).

RADHA PROSAD MULLICK *v.* RANIMONI DASSI.

The appeal to the High Court was heard by a Bench composed of Maclean, C. J., and Sale, Harington, Mitra and Mookerjee, JJ.

The Appellate Court having stated the fact, amongst others, that Surnomoni Dassi had left a Will, dated the 31st January 1903, by which she purported to deal with portions of the property covered by the present suit, and that the Administrator-General of Bengal was in possession of these portions, having taken out probate of the said Will of which he was appointed executor and that he had not been made a party to this suit, observed as follows :—

"The desire of the testator for the perpetuation of his male line and inheritance by an adopted son having failed, the question has arisen as to the validity of the bequest to his daughters. The failure of the bequest to the adopted son is due to the fact that the testator did not live to himself adopt a son, and to the fact that the power given by the Will is void under the Hindu Law. There was none and there could be none to answer the description of an adopted son capable of taking under the Will on the death of the testator. The failure was not due to the legal invalidity of the bequest. It was not void as contravening the rule of Hindu law that a gift must be to a sentient being capable of taking, as it is clear on the authorities that a gift may be made to a son to be adopted by the testator's widow, a son who by a fiction of law is supposed for this purpose to be in being at the date of the testator's death, nor was it void on the ground that the testator intended to create a line of heirs unknown to Hindu law as was unsuccessfully attempted by the testators in *Ganendra Mohan Tagore* v *Jatindra Mohan Tagore* (4) and *Kristoromoni* v. *Narendra Krishna Bahadur* (5). Nor was the the bequest void under any of the rules laid down in secs. 100, 101 and 102 of the Indian Succession Act, sections which have been made applicable to Hindus by the Hindu Wills Act (XXI of 1870). The Will having been executed in 1875, the Hindu Wills Act applies to it.

"Has then the failure of the bequest to an adopted son rendered the bequest to the daughters of the testator void? We see no reason for an answer in the affirmative. The principle well established by *Jones* v. *Westcomb* (6), *Statham* v. *Bell* (7), *Meadows* v. *Parry* (8), *Murray* v. *Jones* (9), *Mackinnon* v. *Sewell* (10), *Arelyn* v. *Ward* (11) has been codified in India in sec. 116 of the Indian Succession Act which says: "where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail the second bequest shall take effect upon the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator." The prior bequest in the present case has failed *ab initio* by reason of its object never coming into existence, and according to sec. 116 the executory gift takes effect, notwithstanding that it was intended to

(4) 9 B. L. R. 377 (1872)
(5) I. L. R. 16 Cal. 383 (1888).
(6) 1 Eq. Cas. Abr. 245 (1711).
(7) 1 Cowp. 40 (1774).
(8) 1 V. and B. 124 (1812).
(9) 2 V. and B 313 (1813).
(10) 5 Sim. 78 (1831).
(11) 1 Ves. 420 (1749).

RADHA PROSAD MULLICK v. RANIMONI DASSI.

take effect in defeasance of the prior gift. There is a necessary implication in favour of the daughters; as there cannot be the shadow of a doubt that the testator would have wished that his daughters should get his property on failure of adoption. Sec. 116 enables us to give effect to this necessary implication of the Will paying regard to the substantial effect of the contingency specified by the testator. In *Okhoy Money Dasee* v. *Nilmoni Mullick* (12), the learned Judges applied the principle in *Jones* v. *Westcomb* (6) to the Will of a Hindu executed in 1860, and on the failure of the prior gift, though not in the particular manner indicated in the Will, the gift over was allowed to take effect.

"Sec. 117 of the Indian Succession Act qualifies to some extent the rule in sec. 116. Where the Will shows an intention that the second bequest shall take effect *only* in the event of the first bequest *failing in a particular manner* the second bequest shall not take effect unless the prior bequest fails in that particular manner. We do not think that, in the present case, the Will shows any such intention,—an intention that the gift over shall not have effect unless as in the case of a gift on a condition, the very event on which the gift is made contingent be fulfilled with strict exactness. The bequest to the daughters in the Will under construction is to take effect if the bequest to the adopted son fails. There are no words in the Will which would make sec. 117 applicable and prevent the operation of the general rule laid down in sec. 116. The primary intention of the testator failing, the secondary intention—the intention to benefit his daughters,—may and ought to be given effect to, and we do not think that sec. 117 prevents this. In the absence of express words or necessary implication restricting the operation of the intention to benefit the daughters, we ought to put a construction on the Will which will effectually fulfil that intention.

"Sec. 111 of the Indian Succession Act and *Norendra Nath Sircar* v. *Kamalbasini Dasi* (13) and *Monohur Mookerjee* v. *Kasiswar Mookerjee* (14) have been relied on by the learned counsel for Premmoni in support of his argument that the bequest to the daughters being contingent on the adopted son dying without male issue during the life-time of the testator's widow—a specified uncertain event—the bequest cannot take effect. The contingency, however, happened before the period of distribution as contemplated by sec. 111, for the reason of the failure of the prior bequest *ab initio* and its incompetency to take effect. Sec. 111 applies only when the prior bequest is capable of taking effect and is not *ab initio* void. If a bequest has failed *ab initio*, as in the present case, the principle laid down in sec. 116 applies. Assuming the period of distribution to be the death of the testator, the contingency happened before it. We are, therefore, of opinion, that the daughters Ranimoni have taken under the Will of their father and have taken as tenants in common.

"What then is the nature of the

(6) 1 Eq. Cas. Abr. 245 (1711).
(12) I. L. R. 15 Cal. 282 (1887)
(13) L. R. 23 I. A. 18 (1896).
(14) 3 C. W. N. 478 (1897).

estate they have respectively taken?" Is it an estate for life, each being entitled to one-half, or is it an absolute estate in equal moieties, or an absolute estate, in equal moieties defeasible in the event of their dying without male issue The testator directed that, on the failure of the adopted son or his male issue during his widow's life-time, his estate, real and personal, should be divided and made over to his daughters in equal shares, and if no other words were added, the daughters would undoubtedly take the whole interest of the testator, an estate of inheritance. They were married daughters, and the rule which has been applied to a bequest in a Will executed before the 1st September 1870 of immoveable property by a husband to his wife, when there are no express words, creating an absolute estate, cannot apply to them. Though under the Hindu law a married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by Will, unless her interest is curtailed by express words or by necessary implication. We may refer to sec. 82 of the Succession Act and *Ramasami* v. *Papayya* (15), *Lala Ram Jewan Lal* v. *Dal Koer* (16), *Musst. Kallany Koer* v. *Lachmee Pershad* (17), *Bhobatarini Debya* v. *Peary Lal Sanyal* (18) and *Atul Krishna Sarcar* v. *Sanyasi Charan Sarcar* (19) in support of our view.

"The words in the Will, to whom and their respective sons I give, devise and bequeath the same do not indicate that the testator intended to create in favour of his daughters an estate for life with a remainder over to their sons. They cannot be construed as creating successive estates. Neither can the words be construed as creating joint estates in favour of the daughters and their respective sons. In fact Ranimoni had no son at the time of the testator's death, and so far as she is concerned she could not take a joint estate with her son or sons. She must be held to have taken an absolute estate. The word "sons" was, in our opinion, used as a word of limitation, and was intended to have the same effect as the words "sons, grandsons, &c." The testator has used the words "sons" and "male issue" without distinction. We, therefore, agree with the Court of first instance that each daughter took an absolute interest in a moiety of the estate. It is premature to decide whether that gift is defeasible in the event of either daughter dying without male issue, Following the practice adopted by the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (20) we leave the question open until it is ascertained what the events are.

"In the view we take, it is unnecessary for us to say what interest Ranimoni would have taken if the bequest to her and her sister had failed and there had been an intestacy.

"We, therefore, agree with. Woodroffe, J., as to his construction of the Will of Hari Das Dutt and the declarations he has made as regards the rights of the Plaintiff and the Defendant Premmoni. We, however, do not see how enquiries,

(15) I. L. R. 16 Mad. 466 (1893).
(16) I. L. R. 24 Cal. 406 (1897).
(17) 24 W. R. 395 (1875).
(18) I. L. R. 24 Cal. 646 (1897).
(19) 9 C. W. N. 784 (1905).
(20) L. R. 24 I. A. 76 (1897).

RADHA PROSAD MULLICK *v.* RANIMONI DASSI.

D and E of the prayer of the plaint can properly be directed in the absence of the representatives either of Hari Dass Dutt, or Surnomoni. Those representatives are not parties to the suit. Nor in the absence of such representatives can a decree be made for partition, as that must necessitate an enquiry of what the estate consisted and consists. These directions must be excluded from the decree and the decree varied accordingly." Vide *Radha Prosad Mullik* v. *Sm. Rani moni Dassi* (21).

In this appeal before the Judicial Committee *Mr. DeGruyther* for the Appellant after stating the facts contended that on the true construction of the Will of Hari Dass Dutt his daughters were only entitled to an estate for life and that the Court below ought to have decided the question of the rights of parties in the event of one of the daughters dying without leaving a natural son her surviving.

Sir R. Finlay, K. C., and *Mr. K. Brown* for the Respondents supported the judgment of the Court below for the reasons given therein.

Sir R. Finlay, K. C., referred to sec. 116, Indian Succession Act, and cited *Lala Ram Jewan* v. *Dal Koer* (16) and *Manikya Mala Bose* v. *Nanda Kumar Bose* (22).

Mr. K. Brown (on the 11th February) cited *Gobinda Chunder Gupta* v. *Benode Chunder Gupta* (23), *Annaji* v. *Chandrabai* (24), *Rajnarain* v. *Katyani* (25), *Hirabai* v. *Lakshmibai* (26).

Mr. DeGruyther replied.

Their LORDSHIPS' JUDGMENT was delivered by

SIR ANDREW SCOBLE.—Hurry Dass Dutt, a Hindu inhabitant of Calcutta, died on the 30th October 1875, leaving a Will which was admitted to probate by the High Court on the 20th December in the same year. The Will was in the English language, and was probably drawn by English solicitor, who is one of the attesting witnesses.

The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator's daughters take under the terms of the Will.

The clause of the Will relating to the daughters is as follows:—

But in case none of such adopted sons survive my said wife, or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors, after the death of my said wife, or the death of such son after her, but under the age of eighteen years without leaving a son or sons, to make over and divide the whole of my estate, both real and personal, unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without leaving any male issue surviving, but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter, or in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike.

Woodroffe, J., by whom the case was heard in the first instance, held that the

(16) I. L. R. 24 Cal. 406 (1897).
(21) 10 C. W. N. 695 (1906).
(22) 11 C. W. N. 12: s. c. I. L. R. 33 Cal. 1306 (1906).
(23) 12 C. W. N. 44 (1906).
(24) I. L. R. 17 Bom. 503 (1892).
(25) I. L. R. 27 Cal. 649 (1900).
(26) I. L. R. 11 Bom. 573 (1887).

RADHA PROSAD MULLICK *v.* RANIMONI DASSI.

intention of the testator was "to benefit the adopted son, and should the provisions (of the Will) in this respect in any manner fail, then those who were of his own blood, *viz.*, his daughters;" that the words "and their respective sons" are used as words of limitation and not of purchase; and that upon the true construction of the Will, the daughters were "each entitled to a moiety of the estate of the testator absolutely." He expressed no opinion, however, as to the right of the parties in the event of the death of one of the daughters leaving no natural son her surviving. Upon appeal to the High Court his judgment, upon these points, was confirmed.

With great respect for the learned Judges in the Courts below, their Lordships are unable to concur with their decision. This is the Will of a Hindu, and as observed by this Committee in the case of *Moulvie Mahomed Shumsool* v. *Shewukram* (1), "in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In spite of the assistance of his English solicitor, it appears to their Lordships that in this case the testator has clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were

(1) L. R. 2 I. A. 7 at p. 14 (1874).

not to have more than what is generally known to be a woman's estate in his property. This is established by the gift to them "and their respective sons," and by the proviso that in the event of one of the daughters dying "without leaving any male issue surviving," then the share of the deceased daughter is to go to the surviving daughter and her sons, to the exclusion in both cases of female issue. Moreover, "in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike." No language could more clearly show that the intention of the testator was to exclude his daughters' daughters from the succession, to which they would have been entitled under the ordinary Hindu law, if their mother's estate had been absolute; and the reason of this is obvious, as the sons of his daughters would be competent to offer funeral oblations to him, the strongest of all possible arguments to an orthodox Hindu.

The learned Counsel for the Respondents strongly relied on sec. 82 of the Indian Succession Act, 1865, which provides that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him." As already pointed out, it is abundantly clear that, under the terms of the Will, only a restricted interest was intended to pass to a daughter dying without male issue.

In the opinion of their Lordships, according to the true construction of the Will, the intention of the testator was to create in favour of his daughters an

RADHA PROSAD MULLICK *v.* RANIMONI DASSI.

estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dassi and Premmoni Dassi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves. They will humbly advise His Majesty that this appeal ought to be allowed and the decree of the High Court varied in accordance with this judgment, and that in other respects the decree ought to be affirmed. Under the circumstances, the costs of the appeal taxed as between solicitor and client, must be paid out of the estate.

Solicitors: *Messrs. Watkins & Lempriere* for the Appellants.

Solicitors: *Messrs. T. L. Wilson & Co.* for the Respondents.

Appeal allowed:

J. H. W. A. *Costs out of the estate.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 618 OF 1907.

FLETCHER, J. 1908. 29, April.

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* LALIT MOHAN ROY.

Administrator, suit by—"Letters" must issue before he can sue—Code of Civil Procedure (Act XIV of 1882), sec. 50 and illustration (b) thereto—Non-suit.

No suit is maintainable when instituted by a person in his capacity as the administrator of the estate of a deceased person unless and until Letters of Administration are issued to him to entitle him so to sue in such representative capacity.

One Girish Chandra Roy died intestate on the 7th August 1907 leaving an infant son and a widow, who requested the Administrator-General of Bengal to take charge and administer the estate of the minor heir. The Administrator-General then applied to the High Court for the issue of Letters to him in the goods of the deceased. But before the grant of such letters of administration, the Administrator-General filed this suit for the recovery of Rs. 6,954-9 alleged to be due from the Defendant to the deceased on account of certain jewelleries sold and delivered or, in the alternative, for an account of the dealings and transactions had between the Defendant and the said deceased and for a decree for what may be found due from the Defendant on the taking of such account. The Defendant in his written statement, among other pleas, raised the preliminary objection that the Plaintiff was not entitled to maintain this suit.

Mr. B. C. Mitter (with him *Mr. Harry Stokes*) for the Defendant raised the preliminary objection as a bar to this suit. He submitted that an administrator could not institute a suit before the letters of administration are actually issued to him. He cited, *Wankford* v. *Wankford* (1). Also, Civil Procedure Code, sec 50 (ill. *b*) and pointed out the analogy of law under the Succession Act (X of 1895), sec 190 and, the Probate Administration Act (V of 1881).

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a suit brought by the Administrator-General of Bengal

(1) Salkeld's Rep. 299 at p. 302.

THE ADMINISTRATOR-GENERAL OF BENGAL v. LALIT MOHAN ROY.

as administrator to the estate of one Girish Chandra Roy.

The Defendant has taken the following preliminary objection to this suits, namely, that, when the Administrator-General commenced the suit, he was not the administrator to the estate of Giris Chandra Roy and therefore the suit must fail. In my opinion, that objection is well-founded in law. It is very old law that an administrator derives his title from the grant and until the grant is made he has no title to the estate of the deceased. But apart from that, the objection is also well-founded having regard to the terms of sec. 50, C. P. C., which among other things enacts as follows :—"When the Plaintiff sues in a representative character, the plaint should show not only that he has an actual existing interest in the subject-matter but that he has taken the steps necessary to enable him to institute a suit concerning it."

Here, had the Plaintiff taken the steps necessary to enable him to institute this suit?—I think he had not. He had not obtained a grant of letters of administration to the estate of the deceased.

Moreover, the illustration to that section is absolutely conclusive on the matter. Illustration (*b*) to sec. 50 of the Civil Procedure Code states as follows :—"A sues as C's administrator. The plaint must state that A has taken out administration to C's estate."

The plaint in the present case states that the Plaintiff had applied for but not taken out letters of administration to the estate of the deceased. I hold, therefore, that at the time of filing the plaint, the Plaintiff had no title to sue. The suit accordingly fails and must be dismissed with costs on scale No. 2.

Messrs. Watkins & Co., Attorneys for the Plaintiff.

Messrs. G. C. Chunder & Co., Attorneys for the Defendant.

P. R. C. *Suit dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 474 OF 1906.

STEPHEN, J.
MOOKERJEE, J.
1908.
Heard,
22, January.
Judgment,
7, April.

RAJA RANJIT SINHA BAHADUR, Defendant, Appellant,
v.
BASUNTA KUMAR GHOSE, Plaintiff, Respondent.

Debutter *estate—Representation in suit by person acting under the authority of* shebait—Res judicata—*Identity of subject-matter not essential—Judgment in previous suit—Admissibility—Evidence Act (I of 1872), sec. 13.*

A decision obtained in a suit instituted in his own name by a person who was in possession of, and had authority to represent, the debutter *estate under an* arpannama *from the* shebait *and who in fact did represent the* debutter *estate, is binding on a succeeding* shebait, *on the principle of the case of* PROSUNNO KUMARI *v.* GOLAB CHAND (1).

GORA CHAND *v.* MAKHUN LAL (2), VENKAYYA *v.* SURAMMA (3), RADHABAI *v.* ANANTRAV (4) *referred to.*

For purposes of res judicata *it is no.*

(1) L R. 2 I. A. 145 (1875).
(2) 11 C. W. N. 489 : s. c. 6 C. L. J. 404 (1907)
(3) I. L. R. 12 Mad. 235 (1889).
(4) I. L. R. 9 Bom. 198 (1885).

RAJA RANJIT SINHA BAHADUR *v.* BASUNTA KUMAR GHOSE.

essential that the subject-matter of litigation should be identical with the subject-matter of the previous suit.

RAJA OF PITTAPUR *v.* RAJA RAO BUCHI (5), BALKISHAN *v.* KISHAN LAL (12), MONI ROY *v.* RAJBUNSEE KOOER (13) *referred to.*

The scope of the former litigation and the question raised and decided therein must be determined by reference not merely to the decree, but also to the judgment, and if need be, to the pleadings

KURRATULAIN *v.* PEARA SAHEB (15) *referred to.*

Held—*That the previous judgment relied on in this case did not operate as* res judicata *but was admissible in evidence, if not under sec. 13, Evidence Act, i.e. proof of all the facts found therein, at least to the extent indicated by* GEIDT, J., *in* ABINASH CHANDRA *v.* PARESH NATH (20).

This was an appeal preferred on the 27th of March 1906, against the decree of Arthur Goodeve, Esq., District Judge of Zillah Birbhum, dated the 4th of January 1906, affirming that of Babu Sham Chand Roy, Subordinate Judge of that district, dated the 31st of March 1902

The material facts will appear from the judgment.

Dr. Rash Behary Ghose, Babus Lal Mohan Das, Satish Chandra Ghose and *Priya Sankar Mozumdar* for the Appellant.

Babus Jogendra Chandra Ghose and *Akhil Bandhu Guha* for the Respondent.

(5) L. R. 12 I. A. 16 (1884).
(12) I. L. R. 11 All 148 (1888).
(13) 25 W. R. 393 (1876)
(15) 9 C. W. N 938 6 C. L. R. 32 I A 244 (1905)
(20) 9 C. W. N. 402 (1904)

The JUDGMENT OF THE COURT was as follows:—

This is an appeal on behalf of the zemindar Defendant in an action for recovery of possession of land commenced against him by the Plaintiff-Respondent. The Plaintiff claims title to the disputed land under leases granted by one Chand Mondal who holds under a *putni* created in his favour so far back as 1853 by the predecessor in title of the Appellant. The *putni* lease contained a reservation under which "the reserved forest and the service lands of the guards of the forest existing of old" were excepted from the grant. The controversy between the parties raises the question, whether the lands in dispute fall within or without the reserved forests. The Plaintiff asserts that the lands are outside the reserved forests and are included in the grant which is the foundation of his title. He further alleges that he and his predecessors have been in adverse possession of the disputed land as part of the grant for a time much longer than the statutory period and have consequently acquired a right to hold the same as part of the lease-hold grant. The Defendant zemindar, on the other hand, asserts that the lands are part of the reserved forest and have been enjoyed as such by him and his predecessors for many years past. The Court of first instance found in favour of the Plaintiff that the lands were included in the *putni* grant, and that even, if they were not included, the Plaintiff has by prescription acquired an indefeasible right to hold possession thereof. Upon appeal the District Judge dismissed the suit on two preliminary grounds, namely, that the

RAJA RANJIT SINHA BAHADUR *v.* BASUNTA KUMAR GHOSE.

suit was bad for mis-joinder of parties and causes of action and that the Plaintiff had no interest in the property claimed as he was a *benamdar* for his wife. Upon appeal to this Court that decision was reversed, and the case was sent back to the District Judge in order that it might be heard on the merits. The District Judge has now affirmed the finding of the Subordinate Judge that the disputed land is included in the grant which is the root of the title of the Plaintiff. He has also found that the Plaintiff and his predecessors had possession as alleged by them. The zemindar Defendant has appealed to this Court and on his behalf the decision of the District Judge has been challenged substantially upon two grounds, namely, first that the decision in the suit of 1883 does not operate as *res judicata*; and secondly, that the decision is not even admissible in evidence upon the question of title.

As regards the first objection taken on behalf of the Appellant, it is necessary to explain the circumstances under which the litigation of 1883 was commenced. It has been stated to us that Hanumant Singh, the founder of the family to which the Appellant belongs, left a widow Rani Fulkumari and a son Raja Kissen Chand. Kissen Chand left a widow Lachmi Kumari. He had also two sons, namely, Kirti Chand, who married Jamuna Kumari, and Uday Chand who married Subhadra Kumari. The Appellant Raja Ranjit Singh is the adopted son of Kirti Chand. It appears that in 1854 Fulkumari created an endowment which included the zemindari of which the disputed land originally formed a part. In 1865 Lachmi Kumari, the daughter-in-law of Fulkumari who was in possession of the properties under the terms of the Will, executed an *arpannamah* in favour of her two daughters-in-law Jamuna Kumari and Subhadra Kumari, who in their turn executed an *angikarpatra* in favour of their mother-in-law. In 1887 Lachmi Kumari executed a Will in which she made various dispositions of her estate inclusive of the *debutter* properties. Under this Will, the Appellant was appointed *shebait* of the *debutter* properties. The Will recites that on the 22nd February 1879 Lachmi Kumari had executed an *arpannamah* in favour of her daughters-in-law under which she had authorized them to make, acquire and grant settlement &c., in respect of the *debutter* properties although she had not vested them with the right of *shebait* or any right of proprietorship or possessory title in them. This *arpannamah* has not been produced before this Court but the Will recites that in accordance therewith the Court of Wards held possession of the *debutter* properties and administered the same on behalf of the daughters-in-law. During the period that the Court of Wards was thus in possession of and administered the estate, a litigation was commenced in 1883 against the *putnidar* of 1853 and his representatives by the Court of Wards as the next friend of Rani Subhadra Kumari. The object of this litigation was to recover possession of a large tract of land which, it was alleged, was really a part of the reserved forest and was not included in the grant of 1853, but had been illegally taken by the *putnidar*. The litigation was carried on

RAJA RANJIT SINHA BAHADUR *v.* BASUNTA KUMAR GHOSE.

to this Court and the judgment of this Court which has been produced before us was delivered on the 1st December 1885. The substantial controversy between the parties is as to the precise effect and bearing of this judgment upon the matters now in dispute. It has been found concurrently by the Courts below that a considerable portion of the land now in dispute formed the subject-matter of the litigation of 1883 and at that time was found to be included in the *putni* grant and outside the limits of the preserved forest. The maps on the record obviously support this conclusion and show that a small portion only of the land now claimed was not the subject-matter of the dispute in the previous litigation. The effect of the decision has to be considered from two points of view which are stated in the two grounds taken before us. As regards the land common to the present and the former litigation, the contention on behalf of the Respondent, which has found fovour with the Courts below, is that the matter is *res judicata.* As regards the lands which are not so common, the contention on behalf of the Respondent is that the judgment; if not *res judicata,* at any rate, affords strong evidence in support of his claim. We are now concerned with the first of these points only and shall deal with the other when we come to consider the second ground of appeal. It was suggested on behalf of the Appellant that he did not claim through and is not the representative of Rani Subhadra Kumari and is consequently bound in no way by the decision in the suit of 1883. This contention was over-ruled and in our opinion rightly over-ruled, by the Courts below. It is not necessary for our present purposes to examine the precise legal effect of the successive documents by which the *debutter* was created and under which the devolution of the *shebaitship* took place. It is sufficient to hold that in 1883, when the previous litigation was commenced, Subhadra Kumari, under the *arpannamah* of 1879, had authority to represent the *debutter* estate and that as a matter of fact she did represent that estate. She undoubtedly sued in her capacity as representative of the estate and there can be no question that the Court of Wards who carried on the suit as her next friend, held possession on her behalf and was in fact and in law the administrator of the estate. Under such circumstances it is impossible to hold that the estate in the hands of the Appellant is not bound by that judgment. If the previous litigation had been brought by the then *shebait* Lachmi Kumari, there could not have been any possible controversy that the decision would be binding upon the present Appellant as *shebait,* on the principle explained by their Lordships of the Judicial Committee in *Prosunno Kumari* v. *Golap Chand* (1) and by this Court in *Gora Chand* v. *Makhun Lal* (2) that the successive *shebaits* formed in effect a continuing representation of the property of the idol. This is of course subject to the qualification that the judgment relied on is untainted by fraud and collusion—and that the necessary and proper issues were raised, tried and decided in the suit. No suggestion

(1) L. R. 2 I. A. 145 (1875).
(2) 11 C. W. N. 489 : s. c. 6 C. L. J. 404 at 407 (1905).

RAJA RANJIT SINHA BAHADUR v. BASUNTA KUMAR GHOSE.

has been made that any exception can be taken to the judgment in the litigation of 1883 on any such ground. The only question is whether the circumstance that the suit was not commenced in the name of the shebait but in the name of Subhadra Kumari affects the binding character of the judgment. Upon the facts placed before us, it is difficult to say that it does, for so far as we can judge from the materials before us Subhadra Kumari was in possession of and represented the *debutter* estate. To use the language of Sir Muthusami Ayyar in *Venkayya* v. *Suramma* (3), the previous suit was brought in the interest of all future successors to the *shebaitship* consequent on the jural relation between the office and the land, and the decision passed therein is therefore binding on the Appellant. To put the matter in another way, as the then *shebait* placed Subhadra Kumari in possession of the *debutter* estate and authorised her to deal with the property for the benefit of the endowment, she may be taken to have represented the estate; and as observed by Mr. Justice West in *Radhabai* v. *Anantrav* (4), it will be contrary to sound legal principles to hold that the same man should have to prove again and again in successive suits that the piece of land held by him as his own did not form part of the *debutter* estate. We must consequently hold that so far as the lands common to the present and the previous litigations are concerned, the decision in the suit of 1888 must be taken to be *res judicata*.

The second ground raises the question whether the decision in the suit of 1883 in any way affects the title to lands which were not then in controversy. The Courts below were inclined to adopt the view that even in respect of these lands the decision operates as *res judicata*. In this Court this view has been controverted on behalf of the Appellant on the ground that the doctrine of *res judicata* has no application inasmuch as the subject matters are not identical. This, however, is a reason which is obviously untenable. It has been ruled by the Judicial Committee in the case of *Raja of Pittapur* v. *Raja Rao Buchi* (5), that an estoppel may be binding notwithstanding that the suit which raises it relates to a different property For instance, a question as to the validity of an adoption may be finally decided in a suit in which the controversy relates to one property alone *Krishna Behari* v. *Brojeswari* (6) and *Soorjomonee* v. *Sudanund* (7). In the same manner an issue as to the factum or validity of a lease or of a partition may be decided conclusively in a litigation which covers only a portion of the property [*Sundhya Mala* v. *Dabi Charan* (8), *Ananta* v. *Damodhar* (9), *Dinkar* v *Hari* (10), *Sitanath* v. *Basudeb* (11)]. In other words as put by Mr. Justice Mahmud in *Balkishan* v. *Kishan Lal* (12) there can be no doubt that for purposes of *res judicata* it is not essential that the

(3) I. L. R. 12 Mad. 235 (1889).
(4) I. L. R. 9 Bom. 198 (1885).

(5) L. R. 12 I. A. p. 16 (1884).
(6) I. L. R. 1 Cal 144 : s. c L. R. 2 I. A 283 (1875).
(7) 12 B. L. R 304 (1875).
(8) I. L. R. 5 Cal. 715 (1881).
(9) I. L. R. 13 Bom. 25 at p. 33 (1888).
(10) I. L. R. 14 Bom. 206 (1889).
(11) 2 C. L. J. 540 (1900).
(12) I. L. R. 11 All. 148 at p. 156 (1888)

RAJA RANJIT SINHA BAHADUR *v.* BASUNTA KUMAR GHOSE.

subject-matter of litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation. If therefore the identity of subject-matter is not essential it is impossible to say that the decision in the suit of 1883 does not operate as *res judicata* merely on the ground that it related in part to another tract of land. The essential question is whether in respect of the lands which are not common, the question of boundary between the lands granted and the lands reserved was directly and substantially in issue in the former suit. If it was, the matter would be *res judicata*; if it was not, the principle of *res judicata* would have no application. This is well illustrated by the case of *Moni Roy* v. *Rajbunsee Kooer* (13). There it was held that a decision as to boundaries between disputed lands in a previous suit was not conclusive in a subsequent litigation in respect of other lands, although in the previous litigation the boundary line between the two villages had been incidentally ascertained. It is, therefore, necessary to examine the precise scope of the former litigation and to ascertain the question which was raised and decided; and this must be determined by reference not merely to the decree, but also to the judgment, and if need be, to the pleadings themselves [*Surjiram* v. *Barhamdeo* (14), *Kurratulain* v. *Peara Saheb* (15)]. Unfortunately, however, the only document which has been produced before this Court is the final judgment of the High Court in the previous litigation, and all we can gather from that judgment is, that although a question was raised as to the boundary between the lands granted in *putni* and the lands reserved as part of the preserved forest, the question was decided only with reference to the lands then in dispute. Under these circumstances, we must hold that the Respondent who relies on the doctrine of *res judicata*, has not been able to satisfy us that the principle is applicable in respect of lands which are not common to the two litigations. The question, therefore, which is raised in the second ground of appeal still remains namely, whether the judgment in the litigation of 1883, though not operative as *res judicata* is not admissible in evidence. It was suggested on the authority of the case of *Tevu Khan* v. *Rajani Mohan* (16) that in so far as the subject-matter of the two suits was not identical, the previous decision was not even admissible in evidence. That case, however, as is clear from an examination of the judgment, does not lay down any universal principle that if the subject-matters are different, the previous decision is necessarily inadmissible. In the circumstances of the case then before the Court, it was held that the titles to the two shares were distinct and consequently a judgment regarding the one might not be relevant and admissible as evidence with regard to the other. Here, however, the position is different. The determintation of the boundary between two parcels of land may very well have an important bearing upon the question of boundary of an

(13) 25 W R 393 (1876)

(14) 1 C L J. 337 at p. 349 (1905).

(15) 9 C W N 938: s. c. L. R. 32 I A 244 (255) (1905)

(16) I. L. R. 25 Cal. 522 (1898).

adjoining parcel. In any event the decision of the previous suit would be admissible to this extent, namely, to show that on that occasion the title which is now asserted was alleged. On this ground alone, the judgment would be admissible under sec. 13 of the Evidence Act, [*Ram Ranjan* v. *Ram Narain* (17), *Bhitto* v. *Kesho* (18), *Denomoni* v. *Brojo Mohini* (19)]. Even if, as held by Mr. Justice Geidt in *Abinash Chandra* v. *Paresh Nath* (20), the judgment is not admissible in proof of all the facts found therein it would be admissible for the limited purpose we have indicated. We are, therefore, unable to say that the Courts below have erred in treating the judgment as admissible in evidence.

The result, therefore, is that the decree made by the District Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 366 OF 1906.

MACLEAN, C. J., DOSS, J. 1908. 21, February.	MUTTY LAL PAL, Plaintiff, Appellant, v. NANDU LAL NEOGI and others, Defendants, Respondents.

Equity of redemption puchased by a mortgagee from one of the mortgagors, effect of.

Where a mortgagor died leaving three sons who became equally entitled to the equity of redemption, and one of the sons sold his one-third share in the equity of redemption to the Plaintiff mortgagee,

Held—*That the Plaintiff was entitled in a suit to realise his mortgage debt to give credit only for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt.*

This was an appeal preferred on the 7th of September 1906, against the decree of Babu Jogendra Nath Deb, Subordinate Judge, 1st Court of Zillah 24-Pergunnahs, dated the 31st of July 1906.

The facts of the case appear from the judgment.

Dr. Rash Behary Ghose, Babus Narendra Chandra Bose and *Surendra Chandra Bose* for the Appellant.

Babu Bepin Chandra Mullik for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is a suit to enforce a mortgage. The original mortgagor was one Fulkumari Dasi who is dead, leaving three sons who became equally entitled to the equity of redemption. One of the sons sold his ⅓rd share in the equity of redemption to the Plaintiff, the mortgagee. The Plaintiff now brings this suit to realise his mortgage, and he offers to allow ⅓rd of the mortgage debt, as being the share of that debt which he is liable to pay as the purchaser of a ⅓rd share of the equity of redemption. *Primâ facie* that would seem to be right. The mortgagors, however, the owners of the other ⅔rd of the equity of redemption claim to deduct

(17) L. R. 22 I. A. 60 : s. c. I. L. R. 22 Cal. 533 (1894).

(18) 1 C. W. N. 265 : s. c. L. R. 24 I. A. 10 (1897).

(19) 6 C. W. N. 386 : s. c. L. R. 29 I. A. 24 (1901).

(20) 9 C. W. N. 402 (1904).

MUTTY LAL PAL v. NANDU LAL NEOGI.

from the mortgage debt the full value of the share purchased by the mortgagee. The lower Court has accepted this view, and dismissed the suit; the Plaintiff has appealed. The contention of the Defendants cannot prevail. If there had been no sale the mortgagor of the one-third share would have been liable only for one-third of the mortgage debt. There is no question here of proportionate value: the shares were equal undivided thirds.

Apart from authority I should have thought that the mortgagee standing in the shoes of the mortgagor to the extent of the ⅓rd share purchased by him, was only bound to give credit for that which his vendor would have been liable to pay, namely, one-third of the mortgage debt. The point, however, is concluded by authority. The case of *Mahtab Singh* v. *Misrulal* (1) decided some forty years ago and reported in N.-W. P. High Court Reports, Vol. II, page 88, supports the principle I have referred to. That has been followed in several other cases. A Full Bench of the Allahabad High Court in *Bishehur Dial* v. *Ram Sarup* (2) held that, where a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage." The judgment in that Full Bench case was delivered by Mr. Justice Banerjee, who in a previous case, *Chunna Lal* v. *Anandi Lal* (3), had taken a different view. This Full Bench case in the Allahabad High Court followed a Full Bench ruling of the Bombay High Court in the case of *Lakhmidas* v. *Jamnadas* (4), where the same principle was acted upon: and, in a subsequent case, *Fakiraya* v. *Gadigya* (5), the same view was taken. There is therefore a current of decisions extending over a period of forty years, which supports the view for which the present Appellant contends. I do not think that any distinction can be drawn between a purchase at an auction sale and a purchase by private treaty. No reason has been suggested for any such distinction.

It is suggested that the *kobala* in this case has not been produced. But the Plaintiff alleged, in para. 4 of his plaint, the effect of that *kobala* and that has not been challenged. On the contrary, in para. 5 of the written statement, the Defendants admit that the Plaintiff purchased one-third share of the mortgaged property, though they say that the present suit is not maintainable. If anything had turned on the terms of the *kobala*, and it had really been challenged, its productions could and would have been directed. The Plaintiff is entitled to the decree he asked for, giving credit for one-third of the mortgage debt; and, consequently the judgment appealed

(1) 2 N.-W. P., H. C. Rep. (Agra) 88 (1867).
(2) I. L. R. 22 All. 284 (1900).
(3) I. L. R. 19 All. 196 (1896).
(4) I. L. R. 22 Bom. 304 (1896).
(5) I. L. R. 26 Bom. 88 (1901).

MUTTY LAL PAL *v.* NANDO LAL NEOGI.

against must be reversed and the Respondents must pay the costs of this appeal and also the costs that have been thrown away in the first Court; and there will be the usual mortgage decree giving the Respondents six months' time from the date hereof to redeem the mortgage.

DOSS, J.—I agree.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 236 OF 1906.

MACLEAN, C. J. DOSS, J. 1908. 27, February.

NARENDRA KUMAR PRAMANIK and DHIRENDRA KUMAR PRAMANIK, minors by their mother and guardian Indumoti Dasi, Plaintiff, Appellant,

v.

CHARU CHANDRA PRAMANIK and anr., Defendants, Respondents.

*Probate and Administration Act (V of 1881), sec. 41—Application for Letters of Administration—*Bona fides*—Discretion of Court to refuse.*

Where a person made a Will devoting the whole of his estate to an idol and appointing his wives and adopted son as shebaits, *executrices and executor, but none of them applied for probate, and the son who was an executor mortgaged the property as if there was no Will,*

Held, *on an application for probate or letters of administration by the minor sons of the adopted son, (in whom the* shebaitship *was to be continued under the Will) through their mother as next friend, that they were not entitled to probate as they were not executors.*

That the application was not a bona fide *one and the Court in its discretion under sec. 41 of the Probate and Administration Act would refuse to grant the letters of administration prayed for.*

This was an appeal preferred on the 28th of June 1906, against the decree of F. MacBlaine, Esq., District Judge of Zillah Nadia, dated the 14th of March 1906.

The facts of the case appear from the judgment.

Babus Nil Madhab Bose and *Sarat Chandra Khan* for the Appellant.

Mr. Caspersz, and *Babus Ram Chandra Mozumdar* and *Brojo Lal Chakravarti* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is an application for probate, and it is of a somewhat novel nature. One Kally Prosonna Pramanik made his Will so far back as the 12th of March 1889. He devoted, in substance, the whole of his property to an idol and appointed his elder wife, his younger wife and his adopted son Hironmoy *shebaits*, executrices and executor of the Will. The Will provided for the continuance of *shebaits* in the sons, grandsons and other heirs in succession. The executrices and executor never applied for probate, and no probate has been taken out. It has been found that the adopted son Hironmoy, suppressing the Will has dealt with the property as if there had been no Will. He appears to have mortgaged it, a suit

was instituted to realize that mortgage, the property was sold, and the purchaser appears on the present occasion to resist this application. Neither the executrices nor the executor have appeared though they had been cited. In these circumstances the present application is made. It is made by the two minor children of the executor Hironmoy, and is made by their mother as their next friend, on the ground that neither the executrices nor the executor have taken out probate, and that the estate has been mal-administered. It is quite clear that probate cannot be granted to them, because they are not the executors of the Will.

Then it is urged that the Court may act under sec. 41 of the Indian Probate and Administration Act, and, had the circumstances been different, we might have taken that course. But we do not think this is a *bonâ fide* application; it strikes as one instigated and set on foot by the executor, the adopted son, who is now putting up his minor sons through their mother to obtain letters of administration with the Will annexed and to set up the Will and say that the property was *debutter*, and consequently the subsequent dealings with it by way of mortgage and sale were bad. The Court below has found, and so far as one can see, properly, that there is no question as to the Will. It is easy to see, if this application be granted, who would pull the strings. The mother, the next friend, is a *purdanashin* woman, and the husband the alleged defaulting executor would manage the whole business. In these circumstances, we decline to exercise the discretionary power vested in us under sec. 41. At the same time it is a case, in which if an application were made for the appointment of a thoroughly independent person to protect the estate, as the executrices and executor have declined to act, it would probably be successful, and our order is not to prejudice any such application being made.

The appeal must be dismissed with costs, hearing fee, seven gold mohurs payable to the Respondent, Charu Chandra Pramanik.

DOSS, J.—I agree.

S. C. S. *Appeal dismissed.*

CRIMINAL REVISIONAL JURISDICTION.

REV. MIS. NO. 8 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
1, April.

KARBAN ULLAH and others, Petitioners,
v.
AZMAT MAHI, Opposite Party.

Transfer—Criminal Procedure Code (Act V of 1898), sec. 526—Apprehension that fair and impartial trial cannot be had—Local inquiry, accompanied by a partisan of the complainant.

Where during the pendency of a case against the accused for the alleged cutting of a bund, *the Magistrate went to the scene of occurrence accompanied by a partisan of the complainant and held a local inquiry into a matter which though not the subject of complaint against the accused could nevertheless be imagined by the accused to be such,*

Held—*That though there were no reasons to suppose, on the materials before the Court, that the Magistrate would not bring to the trial of the case against the accused a fair and impartial mind, still under*

KARBAN ULLAH v. ACMAT MAHI.

the circumstances of the case it was desirable that the trial should be held by some other Magistrate.

This was a rule granted on the 23rd of January 1908, on the application of the Petitioners for the transfer of the case against them under sec. 143, I. P. C., pending before the Sub-divisional Magistrate of Moulvi Bazar.

The material facts of the case will appear from the judgment.

Moulvi Nuruddin Ahmed for the Petitioners.

No one appeared to show cause against the Rule.

The JUDGMENT OF THE COURT was as follows :—

GEIDT, J.—From the explanation submitted by the Sub-divisional Magistrate of Moulvi Bazar, it appears that on 18th November last one Shaha Mahammed petitioned that an order might issue prohibiting Airman Mahi and others from erecting an earth bund across the outlet of a *bil*, on the ground that the earthen bund, if constructed, would cause damage to the lands of the petitioners and others. Thereupon the Magistrate issued an order prohibiting the Mahimals from erecting the bund, or directing them to appear and show cause against the order. At the date, however, of this petition the earthen bund had already been constructed.

Eleven days afterwards, on 29th November, information was given to the Police that, on the previous day, 400 or 500 armed villagers had cut away the bund and committed other mischief. The case was investigated by the Sub-Inspector of Kalanra, and eventually on 18th December, the six petitioners before us were sent up for trial. While the case was under investigation by the police viz, on 9th December the Sub-Divisional Magistrate went to the spot and held a local enquiry. The petitioners pray that the trial of the case may be transferred from the Sub-Divisional Magistrate. The grounds for this prayer are that the Magistrate on his journey to the local enquiry was accompanied by Lydiard, the manager of the estate on which the bund alleged to have been cut was situated; that the complainants are tenants on the estate; and that Lydiard takes a keen interest in the case, is a great friend of the Magistrate and rode to the enquiry on the same elephant as the Magistrate, The petitioners are informed and believe, that during the local enquiry, the Magistrate examined the complainant and several other persons who are tenants and dependents of the estate, that he conversed with Lydiard, and that Lydiard made various allegations against the petitioners, in consequence of which they apprehend that they have been seriously prejudiced in the mind of the Sub-Divisional Magistrate and may not have an impartial trial at his hands.

The petition filed before us undoubtedly implies that the enquiry held by the S. D. O. was an enquiry into the cutting of the bund by the petitioners. The S. D. O, however, informs us that his enquiry was in no way directed to this matter which, at the time, was under investigation by the Sub-Inspectors of Kalanra; that the object of his enquiry was to see the place for himself "and by personal observation ascertain whether

KARBAN ULLAH v. AZMAT MAHI.

an earthen bund, would, as alleged, damage the villagers grazing land." He sent notice to all the villagers concerned that he was going there and would want them to point out the lands which would be damaged by the bund. The villagers assembled to the number of 300 or 400 and accompanied the Magistrate throughout. I fully accept these statements of the Magistrate as well as his further statement that he put no questions regarding the cutting of the bund, that the manager made no allegations against the petitioners, nor were they mentioned and that the manager and himself are not great friends.

Nevertheless it is a fact that Lydiard accompanied the Sub-divisional Magistrate from his camp to the scene of occurrence. They each rode on their own elephants, but occasionally Lydiard rode on the Magistrate's elephant to point out places. Lydiard is manager of the estate on which the complainants, who erected the bund, are tenants, and though the Magistrate does not distinctly say so, I take it that Lydiard was on the side of those who maintained that the bund did no damage to the villagers' grazing grounds. This public association of the Magistrate with a partisan of one side was indiscreet, and when we find that the Magistrate was also accompanied to the scene of the enquiry by the police officer who was at the time investigating the complaint about the cutting of the bund, it is not surprising that the petitioners should imagine that the Magistrate was also concerning himself about that complaint too.

Though I see no reason to suppose, on the materials before us, that the S. D. O. would not bring to the trial of the case fair and impartial mind, I think nevertheless that under the circumstances before mentioned, it is desirable that the trial should be held by some other Magistrate, especially as it does not appear that it will be necessary to hold the trial elsewhere than at Moulvi Bazar.

We accordingly direct that the trial be held by some other Magistrate.

WOODROFFE, J.—I agree.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 1504 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
22, January.
Judgment,
24, January.

MAHADEV LAL,
Petitioner,
v.
DHONRAJ MAISRI,
Opposite Party.

Indian Penal Code (Act XLV of 1860), secs. 417 and 511,—Attempt to cheat—Complainant in a prosecution for attempt to cheat.

The accused without any authority arranged a contract for the delivery of goods to the complainant's firm by Messrs. Birkmyre Brothers. On the repudiation of the contract by the latter, the former pressed their claim under the contract and instructed their pleader to write to the latter firm and demand fulfilment of the contract. The accused then went to the pleader, falsely represented himself to be a member of the complainant's firm and instructed the pleader to write a letter in the name of the complainant's firm to Messrs. Birkmyre Brothers stating that the contract had been cancelled by the complainant's firm. The pleader wrote the letter but on reference to the complainant's

MAHADEV LAL v. DHONRAJ MAISRI.

firm refrained from despatching it. On the prosecution of the accused by the complainant under secs. $\frac{419}{511}$, I. P. C.,

Held—*That the accused committed the offence under secs. $\frac{417}{511}$, I. P. C., as he fraudulently induced the pleader to write the letter which he would not have otherwise done, and as if the fraud had been successful it must necessarily have caused injury to the pleader in mind, reputation and perhaps in his business and might have involved him in litigation.*

That in a prosecution on a charge of attempting to cheat a certain person, that person need not be the complainant.

This was a rule granted on the 21st of December 1907, against an order of Mr. D. H. Kingsford, Chief Presidency Magistrate of Calcutta, dated the 20th of December 1907, convicting the Petitioner under secs 417 and 511, I. P. C., and sentencing him to undergo rigorous imprisonment for one month and to pay a fine of Rs. 50.

The facts of the case appear, from the judgment.

Messrs. Garth and *Pugh* and *Babu Monmotha Nath Mukerjee* for the Petitioner.

Mr. Sinha and *Babu Chandra Sekhar Banerjee*, for the Opposite Party not allowed to oppose.

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why the conviction and sentence passed on the Petitioner by the Chief Presidency Magistrate should not be set aside.

The facts are that the accused arranged a contract for the delivery of goods to the complainant's firm by Messrs. Birkmyre Brothers for whom he had no authority to act. The contract was repudiated by the latter firm as invalid. The complainant's firm pressed their claim under the contract, and instructed a pleader named Srish Babu to write to Messrs. Birkmyre Brothers and demand fulfilment. Then, the accused finding that his fraud in connection with the contract was likely to be discovered went to the pleader Srish Babu, represented himself to be a member of the complainant's firm, which he was not, and instructed him to write a letter in the name of the complainant's firm to Messrs. Birkmyre Brothers stating that the contract which the complainant's firm had entered into had been cancelled. The pleader wrote the letter but before despatching it referred to the complainant's firm and accused's fraud was discovered.

The grounds on which we have been asked to set aside the conviction are (1) that the accused has been convicted of attempting to cheat not the complainant but the pleader Srish Babu (2) that the act of the accused did not amount to an attempt at cheating, as it was not likely to harm the pleader in any way.

The first of these grounds cannot prevail, because the prosecuter in all criminal cases is the Crown. The Presidency Magistrate is entitled to convict an accused of any offence which the evidence given before him discloses he has committed. The accused was put on his trial for attempting to cheat the pleader. A charge for attempting to cheat the pleader was duly drawn up against him. He pleaded to this charge and had every opportunity afforded him to defend himself against this charge.

MAHADEV LAL *v.* DHONRAJ MAISRI

Then, it would seem to us that his act does amount to an attempt to cheat the pleader. He made a very false representation to him. He caused him to write a letter to Messrs. Birkmyre Brothers which the pleader would not have written if it had not been for the false representation made to him by the accused. If this fraud had been successful it must necessarily have caused injury to the pleader in mind and reputation. The pleader would certainly have been likely to lose reputation, and perhaps business, if it appeared that he had been negligent and had been readily deceived by the accused. He might also have found himself involved in litigation. We see no reason to interfere. We affirm the conviction. We, however, think the sentence may be commuted into one of fine. We accordingly commute the sentence into one of fine to the extent of Rs. 500 in all, or one month's rigorous imprisonment in default of payment of fine.

[CRIMINAL REFERENCE.]

No. 13 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908.
5, February.

THE EMPEROR,
v.
MOMIM MALITA,
Accused.

Criminal Procedure Code (Act V of 1898), sec. 106 (3)—Power of the Appellate Court to bind down, when accused was convicted by a second class Magistrate.

An Appellate Court cannot in the exercise of power given by sec. 106 (3) of the Criminal Procedure Code bind down the accused who preferred the appeal when he was not convicted by a Court such as is referred to in sub-sec. (1) of sec. 106, Cr. P. C.'

MUTHIAH CHETTI *v.* EMPEROR (1); PARAMASIVA *v.* EMPEROR (2), MAHMUDI SHEIKH *v.* AJI SHEIKH (3) ***referred to.***

This was a reference under sec. 438, Cr. P. C., made by J. N. Ghosh, Esq., Sessions Judge of Nadia, on the 21st of January 1908, recommending that the order of the District Magistrate of Nadia (J. A. Ezechiel, Esq.), dated the 30th of November 1907, directing, under sec. 106, Cr. P. C., the accused to execute a bond for Rs. 100 with a surety of Rs. 100 to keep the peace for 2 years be quashed, which order was passed while dismissing an appeal preferred by the accused against a conviction under sec. 323, I. P. C., and a sentence of a fine of Rs. 25 passed by the Sub Deputy Magistrate of Kushtia, on the 10th of October 1907.

The facts of the case material to the report will appear from the judgment.

Mr. Orr, Officiating Deputy Legal Remembrancer, for the Crown.

The JUDGMENT OF THE COURT was as follows :—

This is a reference, under sec. 338, Cr. P. C., by the Sessions Judge of Nadia, who invites us to set aside an order passed by the District Magistrate of Nadia, directing, under sec. 106 (3) of the Code of Criminal Procedure, a person, named Momim Malita, to execute a bond for Rs 100, with one surety of Rs. 100, to keep the peace for two years. The learned Sessions Judge points out that Momim Malita was convicted by the

(1) I. L. R 29 Mad. 190 (1905).
(2) I. L. R. 30 Mad. 48 (1906).
(3) I. L. R. 21 Cal. 622 (1894).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JUNE 22, 1908. [No. 32

Contents.

WE ARE GLAD TO NOTE THAT MR. S. P SINHA HAS been confirmed in the appointment of Advocate-General for Bengal and Eastern Bengal and Assam.

IN *Moulvie Shumsool* v. *Shewukram*, L R. 2 I. A. 7, their Lordships of the Judicial Committee observed that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property and that a Hindu knows that as a general rule women do not take absolute estates of inheritance which they are enabled to alienate. The Courts in India have usually given effect to this observation of the Judicial Committee by presuming, in the absence of clear terms indicative of an absolute gift, that a Hindu testator intends to confer the limited interest known as the "woman's estate" on a female heir.

IT IS NOTICEABLE HOWEVER THAT THE CALCUTTA High Court has as a rule been more liberal in its interpretation in favour of the female donee than the other High Courts, notably the Allahabad High Court. A curious illustration of these opposite tendencies is furnished by two cases which recently went up to the Privy Council from the Allahabad and the Calcutta High Courts. In the earlier of these cases, *Musammut Surjamoni* v. *Rabi Nath*; 12 C. W. N. 231, the Allahabad High Court held that the gift by the testator in favour of his widow was the gift of a limited estate only, notwithstanding that the Will provided that the donee was to be *malik wa khud ikhtyar*. The Judicial Committee however preferred the Calcutta view as expressed in *Kallany* v. *Luchmee* (24 W. R. 395), and reversing the judgment of the Allahabad High Court held that the widow got an absolute estate.

IN THE LATER CASE, *Radha Prosad* v. *Ranimoni*, 12 C. W. N. 729, six Judges of the Calcutta High Court were of opinion that the gift to the testator's daughters was an absolute gift. The Judicial Committee on appeal, apparently held that due weight had not been given to the considerations set out in *Shamsool's* case, and that it was "abundantly clear" that the testator intended to confer a "woman's estate" on his daughters. In applying the above principle, the Privy Council went so far as to direct that the daughters were to receive the limited estate of Hindu daughters *with the benefit of survivorship* as between themselves. It is somewhat difficult to reconcile this last direction with the terms of the Will as quoted in their Lordships' judgment. But of course, if a woman's estate was conferred on the daughters, survivorship as between them would follow as a necessary consequence.

IT IS WORTHY OF NOTICE THAT THE PRINCIPLE LAID down in sec. 82 of the Succession Act, *viz.*, that when property is bequeathed to a person without express words of inheritance there is, in the absence of a conflicting context, an implied gift of the whole of the interest of the testator—was relied on by the Judicial Committee in the Allahabad case, whilst in the Calcutta case the section itself is referred to and held inapplicable on the terms of the Will. It is clear therefore that in the opinion of the Judicial Committee, sec. 82 of the Succession Act, which has been applied to Hindu Wills in no way militates against the presumption that a Hindu testator ordinarily intends to confer on his widow or daughter the limited estate known as the woman's estate.

THE MANNER IN WHICH MR. CARNDUFF, THE District and Sessions Judge of Mozufferpur, conducted the trial of Khudiram Bose, is deserving of the highest praise. Although Khudiram, like an ordinary offender, was charged under the Indian Penal Code for murder, yet there cannot be any doubt that he was a political offender. We cannot therefore too highly commend the strictly judicial attitude maintained by Mr. Carnduff throughout this sensational trial. At the very commencement of the trial

he expressed a desire that the prisoner should be defended and gladly accepted the offer of a pleader of his Court to defend the accused. In the course of trial he helped the pleader by giving him references to cases which might help him in the defence and at the conclusion of the trial not only did he record his protest against the abuse of sec. 342 by the committing Magistrate in eliciting incriminating answers from the accused by putting to him questions in the nature of cross-examination, but the Judge very rightly said that if he were charging a jury he would have told them that if they could not convict him without the support afforded by such examination, they ought to acquit him It is no less a remarkable feature of the trial that the Sessions Judge made no observations or unnecessary allusions to such facts or motives of the crime as would create an impression in the public mind that the case before him had any political significance The putting aside of political preconceptions even in political trials and the observance of common fairness towards an accused person, no matter what may be the character or gravity of his crime, far from causing failure of justice, goes to increase the respect for the law and the judges in the popular mind.

CURRENT INDIAN CASES.

Ramu Aiyar v. Sankara Aiyar, I. L. R. 31 Mad. 89. *Court-fee—Suit under sec. 77 of the Registration Act.*

A fixed fee of Rs. 10 (ten) is the Court-fee payable on the plaint in a suit for registration of a document under sec. 77 of the Registration Act.

Manisami Mudaliar v. Subhavayar, I L. R. 31 Mad. 97. *Trusts Act, sec. 84*—Benami—*Fraud.*

Where with a view to defraud creditors a *benami* deed of sale is effected the transferee, if the fraud has not been carried out, holds the property for the benefit of the transferor (sec. 84 of the Trusts Act).

Vedammal v. Vedanayaga, I. L. R. 31 Mad. 100. *Unchastity—Murder of a son—Inheritance.*

Unchastity is no disqualification to inherit under the Mitakshara law in the case of female heirs other than the widow. A mother who takes part in the murder of her son cannot succeed to him.

Reviews.

The Law of Nuisances. *By E. W. Garret, M. A. (Cantab) and H. G. Garret. Third Edition, 1908. Butterworth & Co., Law Publishers, London.*

The work presents the English Common Law, Statutory law and case law on nuisances in a series of well-arranged and well-classified chapters. In the first chapter the principles affecting the subject as a whole are discussed. The chapters which follow deal with such subjects as Highways, Bridges, Buildings, neighbouring properties, and the acts and circumstances in respect of the same that constitute nuisance The keeping of gaming or betting houses and other places or acts that constitute nuisances by reason of their tendency to deprave public morals are also separately dealt with. A separate chapter is devoted to the responsibility of owners of animals for injuries caused by them. Statutory nuisances under the Public Healths and other similar Acts are also fully discussed towards the end. The work is concluded with a Statutory Index, which in the present edition has embodied all recent legislation on the subject. Amongst such legislation the Motor Cars Act and all the rules and orders thereunder deserve special mention. Although the book deals specially with the Statute and Common Law of England yet it must not be suposed that it is not of much use to lawyers in this country. The Anglo Indian Codes give little information on the rights and responsibilities of individuals or of public bodies in respect of acts or omissions that give rise to nuisances and the consequent liabilities. For the determination of such rights and obligations, the principles of English Common Law and the judicial exposition of the same by eminent English Judges must always be adverted to in this country. In this sense this work will be found of special value by Indian practitioners. As an instance we shall draw attention to the exposition of the law relating to nuisances arising in respect of the pollution of waters as affecting public and private rights (secs. 3 and 4, pp. 120 to 137). It is stated as a general principle that a riparian owner has a right to make temporary use of the water that passes his land but he has no right, apart from prescription, as against other riparian owners to pollute it in the smallest degree. Also that the latter will have a cause of action against the former for any act prejudicially affecting the equal right of the latter. It is also very doubtful whether any prescriptive right to pollute water can at all be acquired by anybody. On questions of this character this work may always with advantage be consulted by Indian practitioners.

The Case Noted Bengal Tenancy Act, with latest amendments relating to Bengal and Eastern Bengal and Assam, &c. *By Provash Chunder Mitter, M. A., B. L, Vakil, High Court, Calcutta. Published by R. Cambray & Co., 6 & 8-2, Hastings Street, Calcutta, 1908.*

Although this work makes no pretensions to be a commentary and appears under the modest title of a case-noted edition of the Bengal Tenancy Act yet we find the case-law under each section to be so well digested that it answers the purpose of an annotated edition for all practical purposes. Besides case-law

it furnishes various other informations, which a busy practitioner would look for, in a well arranged and easily accessible form. The notes of cases are on the whole exhaustive and classified under sub-headings, which take the form of propositions of law, the cases under such propositions appearing as instances of its application. This system of annotation has not only the merit of originality but presents with clearness and precision the result of the judicial interpretation of the sections of the Code. There are, however, indications of haste in the preparation of the work which we would like to see rectified in future editions.

The sub-headings and the names of the cases are in bolder types and easily catch the eye. Decisions under the law as it existed before the Bengal Tenancy Act was passed are as a rule left out. We specially notice the notes under sec. 1 (pp. 3 to 6) which show what is the rent-law applicable in the different parts of Bengal and Eastern Bengal. The text of the Act as amended up to date for Bengal with case-notes cover about 400 pages, *i.e.*, nearly half of the work. There are seven appendices covering about 150 pages, containing the amended Rules recently issued by Government for Bengal, the Notifications extending various sections of the Act to Chota Nagpur, the modified Rules issued by Government in regard to Chota Nagpur, High Court Rules and Notifications, the texts of the successive Amending Acts from Act VIII of 1886 to Act I, B. C. of 1903, the text of Chapter X, of the Act before amendment by the Act III, B. C. of 1898, the Notifications extending portions of the Act to Orissa, and lastly the amendments recently passed by the Eastern Bengal Council in so far as they differ from the amendments passed by the Bengal Council. The subject index which is very exhaustive and covers about 150 pages will be particularly useful in tracing the case-law on any point, to which reference may be necessary.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CRIMINAL REVISION No. 458 OF 1908. DEBI PRASAD BHAGAT, Petitioner *v.* NAGAR MULL, Opposite Party. 28th May 1908.

Criminal breach of trust by a partner—Indian Penal Code, sec. 406—No finding of criminal intention.

The Petitioner was convicted under sec. 406, I. P. C., by the 2nd Presidency Magistrate of Calcutta and sentenced to rigorous imprisonment for six months. The Petitioner obtained this rule from the High Court to set aside the conviction and sentence on the ground that the judgment of the Presidency Magistrate did not show any criminal intention on his part. The facts according to the story of the complainant were that he and the Petitioner entered into a contract in accordance with which on the 27th October the complainant gave the accused a sum of five thousand rupees which supplemented by an equal sum to be contributed by the Petitioner, was to be employed in rice business The accused did not perform his part of the contract and made an untrue statement to the complainant when asked as to the expenditure of the money he had received. It was alleged that he had converted the money to his own use and thereby committed an offence under sec. 406, I. P. C.

Their Lordships observed :—

"This contract established a partnership between these two persons (*i.e.*, the complainant and the accused) for the purpose of buying rice. The accused on the findings before us did not fulfil his contract and made an untrue statement when asked as to the expenditure of the money he had received. The offence of conversion is alleged to have been committed between the 29th November when he received the money and the 3rd or 4th of December, when he made his statement just mentioned to the complainants. But considering that there was partnership existing at this time, the accused was plainly entitled to be called upon for an account of the expenditure of the money which he had received, for as the contract was one of partnership and not of bailment. It was open to the accused to spend the money he had received and to account for it in dealing with the partnership. It is not satisfactorily made out that this was not done, and cannot be made out in the absence of a proper demand for account. We are therefore of opinion that no dishonest conversion has been found which would justify the conviction under sec 406, I. P. C., and &c. . . . .

Messrs. Norton, P. L. Roy, E. P. Ghose and *Babu Atulya Charan Bose* for the Petitioner.

Mr. A. Chaudhuri and *Babu Provas Chandra Mitter* for the Complainant.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 908 OF 1906. SARJOO SINGH AND ORS, Appellants *v.* HAR KUMAR SINGH AND ORS., Respondents. 28th May 1908.

Pre-emption—Certain land remaining joint after partition—Interest—Co sharer.

The Plaintiff claimed the right of pre-emption with respect to a share of an estate carved out by parties as against the Defendants Nos. 1 to 5. The Plaintiff and the Defendants Nos. 6 to 10 were co-sharers of the estate. There was a partition under

the old regulation and the estate owned by the Plaintiff and the Defendants Nos. 6 to 10 became separate pattis. Some lands, however, were left unpartitioned as they were lands which could not be partitioned at the time.

The Defendants Nos. 1 to 5 raised, amongst other pleas, the defence that they were themselves co-sharers with the other Defendants and that, therefore, no right of pre-emption existed in the Plaintiff as against themselves.

The Court below decreed the suit.

Held—The fact that certain bits of land either through omission, neglect or for convenience had in making partition been left in joint occupation did not give the proprietor of one estate any interest in the other. If, as the law makes him, he was partner he could be considered such by reason of participation in some plots of ground which had not been properly divided.

Seikh Bundi Hossein v. *Lala Puriag Dutt*, 16 W. R. 110, followed.

Moulvi Mahomed Yusuf and *Babu Hari Bhusan Mukerji* for the Appellants.

Babu Shib Chunder Palit (for *Babu Akhoy Kumar Banerji*) for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 954 OF 1906 BRAHAMDEO NARAIN SINGH, Appellant *v.* RAMDAWN SINGH AND OTHERS, Respondents. 29th May 1908.

Suit to set aside a decree,—Maintainability—Non-transferable occupancy holding, assignee of.

A suit was brought for a declaration that the decree obtained by the Defendants first party against the Defendants second party for arrears of rent was fraudulent and inoperative as against the Plaintiff and for recovery of the sum of money paid by the Plaintiff for satisfaction of the said decree. The Plaintiff alleged that he was compelled to pay the amount as his mortgagee right which he had obtained by assignment from the third party Defendants would have been jeopardized by the sale for arrears.

The lower Courts held that no arrears were due and still the first party Defendants had sued the second party Defendants and obtained a decree and accordingly found that the decree was fraudulent and was intended to defeat the right which the Plaintiff had obtained by assignment from the Defendants third party.

The Defendant appealed and contended, *inter alia*, that as the holding in a portion of which the Plaintiff obtained a mortgage right was not transferable by custom or local usage, the Plaintiff's suit was not maintainable.

Held—That the Plaintiff had *locus standi* to maintain the suit.

Kabil Sardar v. *Chandra Nath*, I. L. R. 20 Cal. 590, referred to.

Babu Joy Gopal Ghosh for the Appellant.

Babus Umakali Mukerji and *Kulwant Sahai* for the Respondents.

A. T. M. *Appeal dismissed.*

High Court Notice.

No. 1018J.D.—The 15th June 1908.—The Governor-General in Council having sanctioned the constitution of the district of Khulna as a separate civil district and Sessions division the Lieutenant-Governor, in the exercise of the powers vested in him by sec. 13, sub-sec. (1) of the Bengal Civil Courts Act, 1887 (XII of 1887), and by sec. 7, sub-sec. (2) of the Code of Criminal Procedure, 1898 (Act V of 1898), is pleased to direct that the district of Khulna be removed from the jurisdiction of the District and Sessions Judge of Jessore Khulna and be a new District Judgeship and Sessions Division with its head quarters at the Sadar station of that district.

Khulna.

In exercise of the powers conferred by sec. 14, sub-sec. 1 of the Bengal Civil Courts Act, 1887 (XII of 1887), and sec. 9, sub-sec. (2) of the Code of Criminal Procedure, the Lieutenant-Governor further directs that the Court of the District and Sessions Judge of Khulna shall hold its sittings for the disposal of business arising in the district of Khulna at the head-quarters of that district.

This notification will come into force on and from the 1st July 1908.

The following rule amending the rules as to the qualification, admission, &c., of pleaders and mukhtars in Courts subordinate to the High Court, having been framed by the High Court of Judicature at Fort William in Bengal, in the exercise of the power vested in it by sec 6 of the Legal Practitioners' Act, XVIII of 1879, is published for general information.

HIGH COURT, ENGLISH DEPARTMENT, (CIVIL), *The 8th June 1908.* — By order of the High Court, A. P. MUDDIMAN, *Registrar*

Cancel cl. (*a*) and the amendment thereto, of Rule No. 6, Chap. XI, p. 263 of the High Court's General Rules and Circular Orders, Civil, and *substitute* therefor the following:—

(*a*) Such lectures must be attended at one of the colleges affiliated in law to the Calcutta University, or in the case of candidates who are natives of the Assam Valley, or of the Surma Valley and Hill districts, divisions, or of the Garo Hills, and who are restricted to practising within the Garo Hill districts or the Commissionerships of the Assam Valley and the Surma Valley and Hill districts, at one of such colleges or at the regular course of lectures delivered by the lecturer in law specially appointed by the Lieutenant-Governor of Eastern Bengal and Assam, for the purpose of delivering lectures to pleadership candidates and the attendance must be for a period of not less than two academical years; in the case of such last-mentioned candidates after passing the Entrance examination of the University of Calcutta, Madras, Bombay, the Punjab or Allahabad and in the case of all other candidates after passing any one of the other examinations referred to in cl. (*a*) of Rule No. 5.

THE EMPEROR *v.* MOMIM MALITA.

Sub-Deputy Magistrate of Kushtia (a second class Magistrate) under sec. 323, I. P. C., and sentenced to a fine of Rs. 25; that he appealed to the District Magistrate, who dismissed his appeal, and passed the above order, under sec. 106, Cr. P. C., binding him down to keep the peace. He further points out that as the order convicting the said Momim Malita, under sec. 323, I. P. C., was passed by a Sub-Deputy Magistrate with 2nd class powers, such a Magistrate had no power to pass any order under sec. 106, Cr. P. C., and, therefore, he contends that a District Magistrate hearing an appeal from an order of such Magistrate, cannot pass such an order. In support of this view, he cited the cases of *Muthiah Chetti* v. *Emperor* (1) and *Paramasiva* v. *Emperor* (2).

The learned District Magistrate shows cause; and, according to his view, a District Magistrate has power to pass such an order in appeal from the decision of any Magistrate. In other words, he thinks that any Appellate Court can, under sub-sec. 3, sec. 106, Cr. P. C., pass an order without any restriction as to the powers of the Court against whose order the appeal is made.

We do not think that this view is right. According to the rulings cited by the Sessions Judge, an Appellate Court cannot exercise the power given by sec. 106, Cr. P. C., when the accused has not been convicted by a Court such as is referred to in sub-sec. (1). And we may also refer to the case of *Mahmudi Sheikh* v. *Aji Sheikh* (3) in support of this view.

(1) I. L. R. 29 Mad. 190 (1905).
(2) I. L. R. 30 Mad. 48 (1906).
(3) I. L. R. 21 Cal. 622 (1894).

We therefore set aside the order of the District Magistrate, dated the 30th November 1907; directing under sec. 106 (3), Cr. P. C., the said Momim Malita to execute a bond for Rs. 100 to keep the peace for two years.

B. C. *Order set aside.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 437 OF 1907.

FLETCHER, J.
1908.
Heard, 14 to 21 & 24, February.
Judgment, 24, February.

S. LAWRENCE
v.
W. BUSHNELL.

Copyright—Infringement—Catalogue, illustrations in—Copyright in a portion of a publication, how far protected—Fraud on the public—Misstatements—"Puffing" statements.

The fact that the copyright in some of the illustrations in the Plaintiff's catalogue is vested in other persons does not preclude him from suing to restrain an infringement of such of the illustrations as he has the copyright in.

LAMB *v.* EVANS (1) *followed.*

The objection that the catalogue contained certain statements which were not strictly accurate (no case of fraud on the public having been made in the written statement) was held to be no answer to an action to prevent infringement of the copyright, such statements being held to be in the nature of "puffing" statements.

MACFARLENE & CO. *v.* OAK FOUNDRY CO. (2), *cited at p. 87 of Copinger's Law of Copyright (4th Edition).*

(1) (1892) 3 Ch. 462.
(2) March 16, 1883, 10 R., 801.

S. LAWRENCE v. W. BUSHNELL.

It was not sufficient for a Defendant merely to give an undertaking not to publish in future those illustrations which he admits to be infringements of copyrights. He ought to have, at the commencement of the suit, offered to consent to an injunction being recorded regarding them.

The Plaintiff, Sydney Solomon Lawrence, carrying on business as an optician under the name, style and firm of Messrs. Lawrence and Mayo among other places in Calcutta, brought this suit against Walter Bushnell, also carrying on a similar business in Calcutta, praying for an injunction and other incidental reliefs in respect of alleged infringements of copyright in certain illustrations in a catalogue of goods sold by the Plaintiff. The blocks of the illustrations were prepared by Messrs. Short and Mason, a firm of wholesale dealers in and manufacturers of scientific instruments, etc., in England at the instance and cost of the Plaintiff, who used to deal with them. The Plaintiff, it appeared, had granted Messrs. Short and Mason the right to use those blocks. The Defendant, in his written statements, amongst other things, denied that the Plaintiff was the author or first publisher of the illustrations or that he was the proprietor of the copyright thereof, or that the illustrations in the Defendant's catalogue were copies of or colourable imitations of the Plaintiff's illustrations or that he suffered any damages. It was further contended in the written statement that those illustrations were in common use in the trade, that, even if the Plaintiff was the first designer, author and publisher of those illustrations, he had lost his sole and exclusive right owing to the circumstances under which he had transferred his rights to Messrs. Short and Mason, who were the actual manufacturers of the instruments as also designers and manufacturers of the original illustrations, that, according to the universal custom in the trade, Messrs. Short and Mason, who were wholesale dealers and manufacturers, had supplied the Defendant, their retailers, with wood cuts to illustrate their goods in his catalogues and that the Defendant was not liable for any alleged infringement of copyright.

Mr. L. P. E. Pugh (with *The Standing Counsel, Mr. S. P. Sinha*) for the Plaintiff, claimed copyright in the illustrations, appearing in his catalogue, in all cases where the blocks were made at his expense and from which the illustrations were produced. He submitted that a permission given to a person to make electros from certain blocks to use them to illustrate his own catalogue does not entitle him to give similar permission to others. Cited,—*Maple & Co.* v. *Junior Army and Navy Stores* (3), *Cooper* v. *Stephens* (4), *Marshall* v. *Bull* (5). The Plaintiff had now registered all his catalogues and each one protected its new matter. *Murray* v. *Bague* (6).

Mr. W. Garth (with *Mr. H. N. Morison*) for the Defendant, showed that the Plaintiff represented in his catalogue that he was the manufacturer of the articles, while, in fact, he was only an importer and that the catalogue was, therefore, a fraud on the public and he submitted that it was not protected. Cited, *Leather*

(3) 21 Ch. D. 369 (1882).
(4) (1895) 1 Ch. 567.
(5) 85 L. T. 77 (1901).
(6) 1 Drewy's Rep. 353 (1852).

S. LAWRENCE v. W. BUSHNELL.

Cloth Co., Ld. v. *American Leather Cloth Co., Ld.* (7), *Slingsby* v. *Bradford Patent Trunk and Trolley Co.* (8).

Besides, he submitted, there was a large amount of matter in the catalogue over which the Plaintiff had no copyright and the inclusion of these matters prevented the Plaintiff from acquiring any copyright in the catalogue. Further, the illustrations, in which the Plaintiff claims copyright, were made from the goods manufactured by Messrs. Short and Mason who supplied the Defendant with electros. The right to illustrate Messrs. Short and Mason's goods must belong to them and not to the Plaintiff and he cannot have any copyright in them.

Mr. Pugh in reply The misstatements complained of are not fraud on the public. Nobody thinks of buying scientific instruments made in India. They are mere traders' puff. See, Copinger on Law of Copyright (4th Edition), p. 81. A person can have copyright in part of a work. Cited, *Lamb* v. *Evans* (1).

The question as to who manufactured the instruments is beside the mark. The Plaintiff had the illustrations made at his expense and the Defendant had no right to make and use copies of them.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—This is a suit by Mr. Sydney Lawrence trading as Lawrence and Mayo as manufacturing opticians in London, Calcutta, Bombay and elsewhere to restrain the Defendant who is a rival optician in Calcutta from infringing the copyright of the Plaintiff's catalogue.

The Defendant was formerly in the employ of the Plaintiff and started business on his own account in 1902. During last year, the Defendant published a catalogue in regard to which the Plaintiff has complained in this action.

The Defendant's catalogue is a small book consisting of 43 pages or thereabouts and what the Plaintiff complains of are the illustrations on pp. 3, 6, 11, 14, 16, 17, 21, 22, 29, 35, 37, 38, 40 and 41 of that catalogue. This is a very substantial portion of the catalogue.

The defences taken to this suit are as follows :—

That Mr. Lawrence is not the proprietor of the copyright in the catalogue.

That the matter stands in this way.

The Plaintiff, as is usual with retailers, obtains from the wholesale manufacturers electro-type blocks of goods manufactured by them and these are published by the Plaintiff in his catalogue. That comprises about 70 per cent. of the Plaintiff's catalogue.

The remaining portion of the Plaintiff's catalogue is that in which he claims the copyright in. The electro-type blocks for these illustrations (other than the illustrations which have been copied by the Defendant into pp. 5 and 6 of his catalogue) were obtained in the manner following. The Plaintiff was a friend of an old gentleman named Mr. Short who carried on business under the name and style of Short and Mason. Some years ago, when the Plaintiff was dealing with Short and Mason, he caused to be manufactured on his own account and at his own expense certain wooden blocks of instruments manufactured by Short and Mason and supplied to him. Each

(1) (1892) 3 Ch. 462.
(7) 4 De Gex. J & S. 137 (1863).
(8) (1905) W. N. Pt. 1, p. 122.

S. LAWRENCE v. W. BUSHNELL.

and every of these instruments has engraved thereon the name of Lawrence and Mayo.

The Plaintiff further says that he authorised Mr. Short to use the blocks for the purposes of their wholesale price lists and on the condition that their use would be limited to that.

Now, the successors of Short and Mason have not been able to prove that during Mr. Short's life-time, except in two isolated instances, any illustrations of these blocks appeared in any of their retail customer's books other than Lawrence and Mayo's. I think that Mr. Lawrence's story is correct that the permission given to Short and Mason was to publish these illustrations in their wholesale price lists and in those only. To hold that the license given to Messrs. Short and Mason was wider than this, would mean that the Plaintiff had undertaken the expense of having these electro type blocks made for the use of all the retail customers of Messrs. Short and Mason, who might be his rivals in trade. I, therefore, hold that the license given to Messrs. Short and Mason was a license to use the electrotype blocks for the very use of their wholesale catalogue only. Then, it is said on behalf of the Defendant that, having regard to the fact that the copyright in 70 per cent. of the illustrations of the Plaintiff's catalogue is the property of other persons; the Plaintiff cannot have a copyright in the remaining portion. This contention is, in my opinion, not well-founded: simply because the copyright in some of the illustrations in the Plaintiff's catalogue is vested in some other person or persons does not prevent the Plaintiff from suing to restrain an infringement of such of the illustrations as he has the copyright in: The point really seems to be covered by the decision of Chitty, L. J., in *Lamb* v. *Evans* (1).

Then it is said that the catalogues of the Plaintiff are a fraud on the public. Now, it is clear from what has been pointed out by Mr. Garth that the catalogues of the Plaintiff do contain statements which are not in every case strictly accurate. But these I think on the whole may be taken to be in the nature of puffing statements. It is to be noticed that no case of fraud on the public was raised in the written statement. The case in the Court of Session cited at p. 81 of Copinger on the Law of Copyright* seems to me to be material on this point. The note in question says that "it was no answer to an action to prevent infringement of the copyright in a book that its author had in some incidental cases made such mistakes as might involve him in a penalty under the Copy-right & Designs Act, and that as the Respondent's averments did not raise the case of a book calculated to make money by misrepresentation or which had something connected with its publication against public morals, these averments were irrelevant." But, even if the Defendant is entitled to raise this defence now, such defence ought only to succeed on a very strong case being made out. The number of cases to which Mr. Garth has been able to call my attention amounts to a very few indeed and none of them related to the illustrations which the

(1) (1892) 3 Ch. 462.

* *Macfarlane & Co.* v. *Oak Foundry Co.*, March 16, 1883, 10 R., 801.

S. LAWRENCE *v.* W. BUSHNELL.

Plaintiff says the Defendant has infringed the copyright. It would not be right, simply because Mr. Lawrence, in a few isolated instances, overstated in his catalogue the merits of his instruments or led the public to believe that he is the actual maker of some of them, that this suit should fail solely on that ground. Then, it is said that Mr. Lawrence is not now dealing with Short and Mason and that it would not be right to allow him to restrain the Defendant who is dealing with that firm from using these illustrations. The evidence is that the business relations between Short and Mason and the Plaintiff only terminated recently and although the amount of business done by the Plaintiff with Short and Mason in recent year is not what it used to be in former times; no case is made out that Mr. Lawrence is advertising these instruments of Short and Mason without having any of them in stock. If any such case can be made out, no doubt Short and Mason would take care to protect themselves.

There remains to be dealt with the illustrations on pp. 3 and 6 of the Defendant's catalogue. The Defendant admits that the illustrations on both of these pages were taken from the Plaintiff's catalogue. The Defendant says that he gave an undertaking not to publish these but that, in my opinion, is not sufficient; he ought in the commencement of this suit to have offered to have consented to an injunction with regard to these illustrations. I think the Plaintiff is entitled to succeed in the present suit. The Defendant must be ordered to deliver up to the Plaintiff all copies of his catalogue which now remain in his possession and must also be restrained by injunction from continuing or repeating any infringement of the Plaintiff's catalogue.

The Defendant must pay the costs of this suit on scale No. 2.

Messrs. Morgan & Co., Attorneys for the Plaintiff.

Messrs. Leslie & Hinds, Attorneys for the Defendant.

P. R. C. *Suit decreed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 405 OF 1905.

MITRA, J. CASPERSZ, J. 1907. Heard, 21, November. 1908. Judgment, 6, January.	MOULVI ABDUL KASHEM, Auction-purchaser, Appellant, *v.* BENODE LAL DHONE, Judgment-debtor, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 274 and 311—Sale proclamation—Service, if should be in every part of the property—Value, statement of, if material—"Property."

The statement in the sale-proclamation of a value which proves to be inadequate is an irregularity but not a material irregularity. Such statements are made without much consideration and it is well-known that purchasers do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold.

Sec. 274 of the Civil Procedure Code does not require that the sale-proclamation should be served in each of the villages comprised in the property to be sold. The word "property" in that section evidently

refers to each "lot" to be sold separately from the rest.

Though it is a sound rule to follow, viz., to serve a separate proclamation in each of the villages embraced in the same process when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, the fact that the processes were not served in each does not necessarily constitute an infringement of the provisions of sec. 274 of the Civil Procedure Code.

TRIPURA SUNDARI v. DURGA CHURN PAL (1) *referred to.*

PEDRO ANTONIO v. JALBHOY ADESHIR (3) *commented on.*

This was an appeal preferred on the 12th of August 1905, against an order of Babu Gopi Krishna Banerjee, Subordinate Judge of Zillah Burdwan, dated the 2nd of May 1905.

The facts of the case material to this report will appear from the judgment.

Mr. C. C. Ghose, Moulvi Syed Shamsul Huda and *Moulvi Nuruddin Ahmed* for the Appellant.

Babus Nil Madhub Bose and *Narendra Chunder Bose* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

On the 11th January 1904, certain properties belonging to the judgment-debtor, Benode Lal Dhone, sold in execution of a decree obtained by one Purna Chandra Chowdhury who is one of the Respondents before us. The properties were described as lot Mirzapur, a two-storied house and lot Laskardighi. The judgment-debtor applied on the 9th February 1904 to have the sale set aside under the provisions of sec. 311, C. P. C. The application was opposed; but the lower Court held, on the 22nd May 1905, that the sale of the properties, Nos. 1 and 2, should be set aside and passed an order accordingly; it confirmed the sale of lot Laskardighi, (lot No. 3). The purchaser, M. Abdul Kasem, has appealed to this Court; but his appeal is confined to lot Mirzapur only and he has no objection to the sale of the house being set aside. The judgment-debtor has preferred a cross-appeal with respect to Laskardighi; but his learned vakil has not pressed it. So that the sale with which we are concerned in the present appeal relates only to lot Mirzapur.

The Subordinate Judge has held that there were irregularities in the publication of the sale-proclamation of lot Mirzapur, and that the price fetched at the sale, namely, Rs. 5,500 was inadequate. He was of opinion that the value of the property was about Rs. 8,250 and, though there was no direct evidence connecting the under-value with the irregularities complained of, he came to the conclusion that the sale was one that should be set aside under the provisions of sec. 311, C. P. C.

Now the first point taken before us on behalf of the judgment-debtor Respondent, is that the notice contained a statement that the value of the property lot Mirzapur was Rs. 4,000, which was inadequate, and that such a statement was in itself an irregularity vitiating the sale. It was undoubtedly an irregular-

(1) I. L. R. 11 Cal. 74 (1884).
(3) I. L. R. 12 Bom. 565 (1887).

MOULVI ABDUL KASHEM v. BENODE LAL DHONE.

ity; but we do not consider it to be material inasmuch as it is well known that purchasers in this province at least do not take serious notice of any statement in the sale-proclamation as to the value of the property to be sold. The value of the property is set down without much consideration and, as a matter of fact, in the present case, the purchaser's bid was Rs. 5,500, that is, more than the value fixed in the sale-proclamation. There is also nothing on the record to indicate that any person would have bid higher if the property had been valued in the sale proclamation at a figure over Rs. 4,000.

The second point urged before us—a point which was pressed before the lower Court and was accepted by it as the basis of its judgment—is that the sale-proclamation was not stuck up in each of the villages. The *putni* taluk lot Mirzapur is within the zemindari of the Maharaja of Burdwan, and was owned by the judgment debtor. Five of the villages are let out in *dur-putni* to one Rajendra Lal Gossami and, it is said, that he pays the rent of the entire taluk receivable by the Maharaja of Burdwan and pays Rs. 500 as net profit to the judgment-debtor, whereas the sixth village Dhoba is held in *dur-putni* by one Chandrabati who pays Rs. 321. Dhoba is on the other side of the river, and is at a little distance from the other five villages. The contention, therefore, is raised that the sale-proclamation ought to have been served separately on each of the villages. The Subordinate Judge relying on two cases to which we shall presently refer, came to the conclusion that the non-publication of the sale-proclamation in each of the villages was an irregularity. Sec. 274 of the Code which is referred to in sec. 289 directs—"publication at some place on or adjacent to such property by beat of drum or other customary mode." The word "property" in sec. 274 evidently refers to each lot to be sold separately from the rest. It cannot refer to different parts of a property which is advertised for sale Of course, if the separate villages constituting a property be so far distant from each other that there is no likelihood of a knowledge of the sale-proclamation being carried from one village to another, it would be more judicious to have the sale-proclamation served in each of the villages. In *Tripura Sundari* v. *Durga Churn Pal* (1), the learned Judges were of opinion that the words "on the spot where the property is attached" in sec. 289 of the Code refer to each property attached and not to each part of the property attached. They thought in that case that the sale-proclamation was irregular because there were several properties attached in the proceeding. Following, however, the decision of the Judicial Committee in the case of *R. Olpherts* v. *Mahabir Pershad* (2), the learned Judges declined to set aside the sale on the ground of mere irregularity in the publication of the sale on each of the properties. In *Pedro Antonio* v. *Jalbhoy Ardeshir* (3), the learned Judges of the Bombay High Court observed:—"A mere breaking up of an area into lots, however, does not necessarily make it several properties for the purpose of a procla-

(1) I. L. R. 11 Cal. 74 (1884).
(2) L. R. 10 I. A. 25 (1882).
(3) I. L. R. 12 Bom. 368 (1887).

MOULVI ABDUL KASHEM *v.* BENODE LAL DHONE.

mation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done." This appears to us to be a sound principle to be followed. But it does not necessarily indicate that there is an infringement of the provisions of the section on account of the mere fact that separate processes were not served on each portion of the property advertised for sale.

The lower Court is obviously in error in thinking that, on account of the repeal of the words "on the spot where the property is attached" by Act VII of 1888, the original provisions were revived. But we have the words in sec. 274 quite clear and distinct, and the repeal did not affect the law as we now find in the Code.

But, assuming for the purposes of argument that the sale-proclamation should have been served at Dhoba which is on the other side of the river, it does not appear to us that the irregularity, if any, was material. None of the witnesses who have been examined in the case—and there are a good number of them—came forward to say that any of them would have bid for the property if they had had knowledge of the publication of the sale in Dhoba. The absence of evidence on such a point is easily accountable because, as we shall presently show, there were other reasons which prevented the sale of the property at a higher price than Rs. 5,500.

The fact seems to be that notwithstanding these irregularities—if we may call them irregularities—the property would most likely have fetched its real price, if the judgment-debtor had not acted in such a way as to prevent its fetching such price. Before the sale took place, he caused two suits to be instituted for a declaration that the properties were *debutter* and asked for an injunction. Any person, therefore, who bid, would have a litigation and a litigation of a costly and serious character before him. The judgment-debtor himself had also declared the property to be *debutter* and not saleable in execution of a decree against him. Notwithstanding, therefore, that the sale might be confirmed under sec. 311, C. P. C., the litigation as to saleability would continue. The judgment-debtor himself, in his deposition, said that he had ceased to be the *shebait* of the thakurs, that his son Promodlal Dhone was the *shebait*, and that he had executed a trust-deed in his favour. Who would bid very high for a property with such a heavy litigation impending? If there is any reason why the sale fetched Rs. 5,500 and not a higher amount—the Subordinate Judge finding that the value of the property would be Rs. 8,250 or it might be higher—it is quite clear to us that the acts and declarations of the judgment-debtor are the reasons for the under-value, and that the irregularities complained of did not lead to under-value. Even in his petition for setting aside the sale which was presented on the 9th February 1904, the judgment-debtor, in para. 7, stated:— "That of the properties sold, the tank called Laskardighi is a *debutter* property

of Thakur Lakshmi Narain Jiu and lot Mirzapur and *lakhiraj bastu* house are *debutter* properties of Thakur Issur Kanta Lal Jiu. Consequently those properties could not be sold for the personal debts of this Petitioner." That is to say he himself as judgment debtor, disclaimed ownership of the property and asked the Court to come to the conclusion that the properties were not his properties. He made the same statement in his deposition in Court and his deposition opens with the statement "I have no personal right in lot Mirzapur but it is a *putni* mehal appertaining to *debutter*." In the face of the statements made by the judgment-debtor in his petition and in Court, one would be led to come to the conclusion that the judgment-debtor was not at all prejudiced by the sale or, to use the words of sec. 311, C. P. C., the judgment-debtor did not sustain substantial injury by reason of such irregularity. He disclaimed ownership of the property and said that some one else was its owner. He had, therefore, no *locus standi* and he did not suffer from the irregularities complained of.

The purchaser has now to fight out his battle with Promod Lal Dhone who is now the constituted trustee of the property. It is, however, not necessary for us to go so far as to say that the judgment-debtor has no *locus standi* to ask the Court to set aside the sale. As judgment-debtor perhaps he has such a right; but it is quite clear that he did not suffer any injury resulting from the irregularities complained of.

We are, therefore, of opinion that the Subordinate Judge was not correct in setting aside the sale of lot Mirzapur. We accordingly set aside his order, so far as this property is concerned, and direct that the sale thereof be confirmed. The appeal is therefore decreed with costs, ten gold mohurs.

The cross-objection is not pressed.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 238 OF 1905.

MITRA, J.
CASPERSZ, J.
1908.
Heard, 8, 9, 20 & 21, January.
Judgment, 5, February.

RAJANI KUMAR DAS and others, Defendants Nos. 6, 7 and 8, Appellants,
v.
GOUR KISHORE SAHA and others, Plaintiffs, Respondents.

Transfer of Property Act (IV of 1882), sec. 53—Mortgage—Part of consideration fictitious—Intention to defeat or delay creditors—False case, setting up of, at a later stage—Effect.

A mortgage purported to secure Rs. 8,500. But it was proved that Rs. 4,853 only of the consideration money had passed. It was, however, not shown that the transaction was intended only *to defeat or delay the realisation of their dues by certain other creditors, though after the latter had attached the mortgaged properties the mortgagees instituted a suit for the recovery of the whole amount stated in the mortgage,*

Held—*That in the circumstances a decree should be passed in favour of the mortgagee on the footing of the amount actually advanced, that part of the transaction being separable from the rest.*

RAJANI KUMAR DAS v. GOUR KISHORE SAHA.

The setting up at a later stage of a false case should not affect rights created by the transaction.

ISHAN CHUNDER DAS SARKAR v. BISHU SARDAR (6), NARAYANA PATTAR v. VIRARAGHAVAN PATTAR (7) *relied on.*

This was an appeal preferred on the 23rd of June 1905, against the decree of Babu Jogendra Nath Mukerjee, Subordinate Judge, 1st Court of Zillah Tipperah, dated the 18th of March 1905.

The facts of the case will appear from the judgment.

Mr. Caspersz, Babus Baikunth Nath Das and *Gunoda Charan Sen* for the Appellants.

Babus Nil Madhub Bose, Golap Chandra Sarkar and *Sarat Chandra Dutt* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal in an action to recover Rs. 8,500 on a mortgage bond, dated the 18th March 1901. The Plaintiffs, who carry on business at Ramchandrapur in District Tipperah by the name and style of "Kebal Krishna Mohan Raj Krishna Shaha," are the mortgagees, the Deb Defendants (except the minor, Bipin Behary Deb, who has been exonerated, by the lower Court from liability under the mortgage) are the mortgagors, and the Dass Defendants, *i.e.*, Defendants Nos. 6, 7 and 8 are attaching creditors of the mortgaged premises under a decree obtained by them against the Deb Defendants. The Deb Defendants carry on business at Ramchandrapur and Brahmanberia, in brass and bellmetal utensils and they used to purchase such utensils on credit from the firm of the Plaintiffs as well as the firm of the Dass Defendants which was established at Brahmanberia.

The business of the Plaintiffs at Brahmanberia, which was called *bhasan karbar*, was closed in the year 1304, B. S., and the accounts, as they were adjusted at the end of that year, showed that the Deb Defendants were indebted to the Plaintiffs in the sum of Rs 2,004-4-6. It appears that the adjusted accounts were duly signed by these Defendants. *Hatchittas* for this sum were also duly signed by these Defendants in acknowledgment of their debt, in the succeeding years 1305 and 1306, B S. On the 5th Choitra 1307, B. S, the Plaintiffs gave up their claim for as. 4-6-1 and a finally adjusted account was signed by the Deb Defendants showing a debt of Rs. 2,004.

The Ramchandrapur accounts of the Plaintiffs with the Deb Defendants were also duly adjusted in successive years, and on the 5th Choitra 1307, B. S, the amount payable by the Deb Defendants to the Plaintiffs was found to be Rs. 2,849. The Subordinate Judge has found, and we agree with him that, on the 5th Choitra 1307, B. S, which corresponds with the 18th March 1901, the Deb Defendants were indebted to the Plaintiffs in the sum of Rs. 4,853 being the total of Rs. 2,004 and 2,849. The mortgage bond in suit covers this sum together with another sum of Rs. 3,647 which, it is alleged, was advanced in cash by the Plaintiffs to the mortgagors on the execution of the mortgage. We, however, have very grave doubts as to the actual advance of the latter sum.

(6) I. L. R. 24 Cal. 825 (1897).
(7) I. L. R. 23 Mad. 184 (1899)

RAJANI KUMAR DAS v. GOUR KISHORE SAHA.

The story told on the side of the Plaintiffs is that the Deb Defendants asked for and obtained this loan of Rs. 3,647 to enable them to pay certain sums to some of their other creditors and that they executed the mortgage bond in suit for the total sum of Rs. 8,500, *i.e.*, Rs. 4,853 and Rs. 3,647. They say that, out of the latter item Rs. 1,500 went towards the satisfaction of the debt due to the Dass Defendants, in respect of another of their firms, and that Rs. 500 and Rs. 800 were paid, respectively, to Durga Charan and Ram Narayan. The evidence, however, as regards these payments, is meagre and unsatisfactory. Durga Charan and Ram Narayan have not been called, none of the Deb Defendants have been examined, and no attempt has been made to produce their books or the books of the creditors showing these or any payments made. The Plaintiff, Ram Kanai Shaha, did not himself see any of these payments being made and we cannot place full reliance on the testimony of the Gomastha, Guru Charan Shaha. The payments, if they had really been made, were capable of very satisfactory proof, but such proof is wanting. The Defendants, it is true, might have rebutted the testimony of Guru Charan by examining Brindaban Chandra Shaha, but though the weakness of the evidence for the Dass Defendants might afford some strength to the Plaintiffs the evidence on the side of the latter is too weak for even a *primâ facie* case, and the Plaintiffs cannot legitimately derive advantage from the short-coming of their adversaries. Even if Brindaban Chandra did receive Rs. 1,500 from the Deb Defendants after the execution of the mortgage there would be nothing to show that this sum was a part of Rs. 3,647 covered by the mortgage. It is not the case of the Plaintiffs that they themselves made any payment to Brindaban. The payments of Rs. 1,500, Rs. 500 and Rs. 800 to the other creditors of the Deb Defendants have not at all been proved.

In the absence of proof of appropriation by payment to creditors of either the whole or part of the sum of Rs. 3,647 the Plaintiffs must fall back on their own books and the oral testimony of their witnesses. We, however, are unable to accept the books produced in Court as books kept in the ordinary course of business. Shib Chandra Saha, who gave his testimony in the lower Court and who, under our directions, has been examined in this Court, also, to clear up, if possible, certain doubtful matters in the account books, has admitted interpolations in the books. He has also failed to explain suspicious entries to which our attention was drawn by the learned Counsel for the Appellants. It is very doubtful, on these books, whether the Plaintiffs were in a position, on the 18th March 1901, to pay to the Deb Defendants Rs. 3,647 in cash. The accounts admittedly were kept in an unusual and awkward way, and the corroboration that they could have afforded to the oral testimony is wanting. It seems to us that the books, instead of affording corroboration, throw discredit on the transaction.

The oral testimony, consisting of the depositions of the Plaintiff Ram Kanie Shaha and some of his assistants, is interested and unconvincing. Kali Kamal

RAJANI KUMAR DAS *v.* GOUR KISHORE SAHA.

Chakravarti, on whom the lower Court has placed considerable reliance as an independent witness, came to the scene of the mortgage transaction by mere chance, and he contradicts the other witnesses on material points.

The probabilities also are against the case made by the Plaintiffs. The Deb Defendants were largely indebted at the time, and their business was not in a satisfactory condition. On the 21st Falgoon 1306, corresponing with the 4th March 1900, they executed a *hatchitta* in favour of the Dass Defendants admitting a debt of Rs. 5,482-9-10. They failed to pay this debt in due time, and it was outstanding on the 18th March 1901. Their immoveable properties were not of any considerable value The Plaintiffs themselves were their creditors and the debts due to them were annually increasing. No part of the sum of Rs. 2,004 4 6-1 due on the Brahmanberia account had been paid within three years. The mortgage had evidently been in contemplation for some time before the transaction actually took place. The stamp for the deed was purchased on the 19th February, and though it was executed on the 18th March, the document was not presented for registration until the 2nd May 1907. The deed makes the amount covered by it repayable in six months. The case of an advance of a large sum of money to debtors, who were on the verge of bankruptcy in the circumstances we have stated, wears an air of improbability. The meagreness and untrustworthy character of the evidence adduced to prove payment is not redeemed by any natural feature in the transaction, and, on the other hand, the patent improbability of the story casts additional discredit on it. We cannot, therefore, accept the finding of the Subordinate Judge on this point.

The conclusion we arrive at is that the real consideration for the mortgage was the original sum of Rs. 4,853 and that the item of Rs 3,647 alleged to have been advanced on the 18th March 1901 was not actually advanced and that the entry to that effect in the books of the Plaintiffs is fictitious.

It might be that there was a secret understanding between the mortgagors and the mortgagees that the sum of Rs. 3,647 would be retained by the latter as security for subsequent transactions or for payment to other creditors if the necessity arose. Such a case, however, was not attempted to be made. The case put forward is that payment was actually made simultaneously with the execution of the mortgage bond. There was thus a partial failure of consideration.

We have next to consider whether we should give the Plaintiffs a decree on the footing of the mortgage being really one for Rs. 4,853, and direct a sale of the mortgaged premises as against all the Defendants thus giving the Plaintiffs a preference over the claim of the Dass Defendants or dismiss the suit so far as it is based on the mortgage. The Dass Defendants instituted a suit on their *hatchitta* about the time the mortgage was registered. That suit was No. 448 of 1901. The suit was contested by the debtors, the Deb Defendants. They failed in their opposition and a decree was made on the 18th December 1903. The debtors appealed to this Court but

RAJANI KUMAR DAS *v.* GOUR KISHORE SAHA

unsuccessfully. The Dass Defendants in the meantime executed their decree. The Plaintiffs waited until then, notwithstanding that the mortgage money was due in 1901. They instituted the present suit on the 23rd February 1905. These are circumstances of grave suspicion and raise doubts as to the *bonâ fides* of the entire mortgage transaction. Did the Plaintiffs enter into a covinous agreement with the Deb Defendants to delay or defeat the creditors of the latter including their creditors the Dass Defendants and does the case come within sec. 53 of the Transfer of Property Act, (IV of 1884) which follows the Statute 13, Eliz. c. 5? The peculiarity in the present case is that the consideration for the mortgage was partly valuable. The case does not come within the scope of the Bankruptcy Law and no question of undue preference directly arises.

Sec. 53 of the Transfer of Property Act enacts that "every transfer of immoveable property made with intent to defraud prior or subsequent transferees thereof for consideration or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated, or delayed." The section, however, saves the rights of transferees in good faith and for consideration. The section also says that when a transfer which has the effect of defrauding, defeating or delaying creditors is made "gratuitously or for a grossly inadequate consideration," the intention to defraud, defeat or delay may be presumed. A contrary presumption would necessarily arise if the consideration is meritorious or valuable. In *Copis* v. *Middleton* (1), Sir Thomas Plumer, Vice-Chancellor, observed, with reference to the Act of Elizabeth.—"A conveyance, therefore, to be affected by the Act, must be shown to be feigned, covinous and fraudulent and made with an intent to delay, hinder or defraud creditors." In *re Johnson. Golden* v. *Gillam* (2), Fry, J, said, "The fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating and delaying creditors and renders the case, therefore, of those who contest the deed more difficult." This was also the view adopted in *Harman* v. *Richards* (3) in which Lord Justice Turner observed:—"Those who undertake to impeach for *mala fides* a deed which has been executed for a valuable consideration have, I think, a task of great difficulty to discharge [see also *Holmes* v. *Penney* (4), *Freeman* v. *Pope* (5)]

It has not been shown by any evidence which may be said to be cogent that the transaction of mortgage between the Plaintiffs and the Deb Defendants was entirely fraudulent or for a grossly inadequate consideration and was intended only to defeat or delay the realisation of the dues of the Dass Defendants. If the considerations for the mortgage (we use the plural number, to indicate the two different sums which make up Rs. 8,500), could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was fraudulent. In that

(1) 2 Madd. 410 (1817).
(2) L. R. 20 Ch. D. 389 (1881).
(3) 10 Hare 89 (1852).
(4) 3 K. and J 90 (1856).
(5) L. R. 5 Ch. 538 (1870).

RAJANI KUMAR DAS v. GOUR KISHORE SAHA.

case the failure of consideration to the extent of Rs. 3,647, taken with the other proved facts would lead to a reasonable conclusion that the mortgagees intended to help the mortgagors to defeat the realisation of the debt covered by the *hatchitta* in favour of the Dass Defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion.

We think, however, in the absence of direct authority on the point, that the two parts of the consideration stated in the mortgage are separable and that effect may be given to the instrument to the amount of the consideration that was valuable. To that extent, the transaction cannot be regarded as fraudulent. The mortgagors did not with reference to the sum of Rs. 4,583 do any act not warranted by law to the prejudice of the Dass Defendants. Their action might be crafty and deceitful in one sense, and morally wrong, but the law does not prevent them from giving proper security for the advances actually made to them. It might also be that the Plaintiffs had a *bonâ fide* intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed but that as the Dass Defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the Plaintiffs withheld payment of the additional sum. They might not have had any such intention as would invalidate the instrument under sec. 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights though a false case might reflect discredit on the original transaction.

We are supported in our conclusion by the views expressed in two Indian cases. In *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (6), it was observed that "mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when it is not shown that the intention of the transfer was to defeat or delay the creditors of the transferor. Where the transferee is a creditor of the transferor and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his doing so has the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of sec. 53 of the Transfer of Property Act." In the present case the Plaintiffs may have made good bargain in their own interest, but no such knowledge has been brought home to them as would make the transaction a mere sham. In *Narayana Pattar* v. *Viraraghavan Pattar* (7), it was said: "No doubt a mere preference of one creditor to another and *a fortiori*, a *bonâ fide* security given to a creditor to the extent of his debt is not within the English Statute 13, Elizabeth c. 5, and we also think it is not within sec. 53 of the Transfer of Property Act. But where a document given by way of such security goes further and secures debts not due, the effect is *quoad* such

(6) I. L. R. 24 Cal. 825 (1897).
(7) I. L. R 23 Mad. 184 (1899).

RAJANI KUMAR DAS v. GOUR KISHORE SAHA.

fictitious debts to defeat or delay the creditor." This principle, it seems to us is exactly applicable to the exclusion of the item of Rs. 3,647 improperly made a part of the consideration (Rs. 8,500) of the mortgage bond in suit.

So far as the debts were real the mortgage may be regarded as a good transaction, so far as they were fictitious, that is, so far as valuable consideration failed to pass the mortgage must be held to be inoperative.

We are, therefore, of opinion that the decree of the lower Court should be set aside and that in supersession thereof, a decree should be passed by this Court on the footing of the original mortgage debt being Rs. 4,853.

As regards costs the proportion of loss and gain to the contending parties is such that we cannot but direct that the parties should bear their own costs in both the lower Courts and this Court, but the amount of Court fees payable on the mortgage money calculated on the above basis at the date of the institution of the suit and the hearing fee in the lower Court according to the ordinary scale, on the said sum, should be added to the mortgage debt and there will be a direction for sale of the mortgaged premises for the entire amount so found.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 248 OF 1906.

MACLEAN, C. J.	SIBA KUMARI DEBI,
DOSS, J.	Defendant,
1908.	Appellant,
Heard, 18 and	v.
19, February.	BIPRODAS PAL CHOWDHURY, Plaintiff,
Judgment,	
19, February.	Respondent.

Landlord and tenant—Abatement of rent of portion of which tenant did not obtain possession—Bengal Tenancy Act (VIII of 1885), secs. 38 and 52.

Where in a suit for rent a tenant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion,

Held—*That he was entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent.*

That a suit under secs. 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do not apply where the tenant has never been put into possession by the landlord.

This was an appeal preferred on the 9th of July 1906, against the decree of Babu Bhagabathi Charan Mitter, Subordinate Judge of Zillah Nadia, dated the 6th of April 1906.

The facts of the case appear from the judgment.

Babus Nil Madhub Bose, Brojo Lal Chuckerbutty and *Bepin Chandra Mullik* for the Appellant.

Babu Monmotha Nath Mukerjee for the Respondent.

SIBA KUMARI DEBI *v.* BIPRODAS PAL CHOWDHURY.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—By a consent decree in Appeal from Original Decree No. 39 of 1899, passed by this Court, it was decreed that the Plaintiff in the present suit should execute to the Defendant in the present suit, who was the Plaintiff in the previous suit, a *dar-maurasi pottah* at an annual rent of Rs. 3,662-6 as. with a bonus into the figures of which I need not enter, and that the present Defendant should execute in favour of the present Plaintiff a *dur-maurasi kabuliyat* according to the terms and conditions contained in the *dar-maurasi pottah.* This decree was passed so far back as the 16th of August 1900 No *pottah,* no *kabuliyat* has been executed. It appears, however, that the present Defendant was either put into possession or any way obtained possession of a substantial portion of the property, which was included in the proposed *pottah.* His case is that, as regards a portion of the property to be let to him he has not been put into possession and has never been in possession since the date of the decree to which I have referred. He says that although no *pottah* or *kabuliyat* has been executed he is perfectly willing to act upon the footing of such *pottah* and *kabuliyat* and to pay the rent reserved. But he contends that, inasmuch as he ought to have been put into possession of all the property covered by the *pottah* and there is a part as regards which he has not been put into possession he ought not to be called upon to pay rent for that part and that from the amount claimed by the Plaintiff for rent a proportionate amount attributable to the part of the land of which he has not been in possession and at the rate stipulated for in the lease, ought to be deducted. That seems to us to be a reasonable contention. But the learned Judge in the Court below has proceeded upon the footing of the *pottah* and the *kabuliyat* although he says in a passage in his judgment that "It is not out of place to note here that the draft *pottah* prepared by the arbitrators in the former inter-parties suit has not yet been executed and therefore its terms are not legally binding against the parties," and he has passed a decree for the whole rent. He says the Defendant must bring a suit for abatement of rent under the conjoint provisions of secs. 38 and 52 of the Bengal Tenancy Act. These sections do not apply where the tenant has never been put into possession by his landlord. It appears that certain parties set up that a part of the lands covered by the *pottah* are their *lakhiraj* lands, and the Defendant brought suits against them for recovery of rent in respect of these lands but failed. He therefore says to the Plaintiff "you agreed to give me a lease of these lands, you have not been able to give me possession of them, and I ought not to have to pay rent for them." That seems to us to be right. The only answer suggested is that this question cannot be gone into in the present suit and that the Defendant must bring a suit against the *lakhirajdar* to have this question decided. That might have been so, if the Defendant had ever been put in possession of these lands, which is not the case. The Defendant is perfectly willing to pay rent, as I understand, for that portion of the property

SIBA KUMARI DEBI *v.* BIPRODAS PAL CHOWDHURY.

of which he has been in and he says that he ought not to be called upon to pay rent for the lands of which he has never been placed in possession and which he has never enjoyed. The Judge in the Court below has declined to go into this question and has given judgment for all the rent claimed.

I should have thought that the parties might have agreed upon the amount to be deducted without requiring the case to be sent back to the lower Court to ascertain the amount. Unless they can do that, the case must go back and the Defendant must have an opportunity of showing of what part of the lands he has never been put in possession and has not been in possession and what ought to be allowed him for those lands by way of deduction from the rent for the whole area covered by the proposed *pottah*

The Appellant must have the costs of this appeal and of the lower Court. The hearing fee of this appeal is assessed at ten gold mohurs.

DOSS, J.—I agree. I desire to add one word to what has been said by my Lord. It appears that the Plaintiff obtained a decree for possession in respect of 131 bighas under sec. 9 of the Specific Relief Act against the Defendant. The Defendant contends that these 131 bighas are comprised in his lease and that he is entitled to obtain possession of those lands. The Subordinate Judge says that the Defendant has been dispossessed by a summary decision only, and that until the Defendant brings a regular suit to establish his title with regard to those lands he is bound to pay rent in respect of them. I do not think the Subordinate Judge is right in so holding. The Defendant is not liable to pay rent in respect of the 131 bighas if he has not been put in possession of those lands. This amounts practically to eviction of the Defendant by his landlords: and this makes the Defendant's case still stronger.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No 354 OF 1906.

RAMPINI, J.	GIRIBALA DASSI,
SHARFUDDIN, J.	Plaintiff, Appellant,
1908.	*v.*
Heard, 18 and 21, April.	SRINATH CHANDRA SINGH and others,
Judgment, 24, April.	Defendants, Respondents.

Hindu Law—Woman's estate—Simple bond executed by Hindu widow for legal necessity—Decree, personal—Sale does not affect reversioner.

A Hindu widow was sued on a simple bond executed by her for legal necessity, and property left by her husband was sold in execution of the decree obtained in th suit,

Held—*That the bond did not bind any immoveable property and the interest of the reversioners was not affected by the sale.*

This was an appeal preferred on the 13th of March 1906, against the decree of Babu Suresh Chandra Ghose, Subordinate Judge of Zillah Midnapur, dated the 14th of November 1905, affirming that of Babu Charu Chandra Mukerjee, Munsif of Gurbeta, dated the 27th of April 1905.

The facts of the case as found by the

GIRIBALA DASSI *v.* SRINATH CHANDRA SINGH.

first Appellate Court are as follows:—One Kenaram Roy died leaving him surviving his widow Khanto Moyi and his daughter the present Plaintiff-Appellant, Giribala Dassi. Khanto Moyi was in straitened circumstances and had to convey most of her husband's properties to provide for the maintenance of herself and the Plaintiff and for the latter's marriage, that she subsequently executed a simple bond on the 18th Magh 1295, B. S., in favour of Defendant No. 2, also for legal necessity. The Plaintiff signed Khanto Moyi's name on the bond and her husband Ambika Charan Ghose was a subscribing witness. The Defendant No. 1 instituted suit No. 12 of 1891 on the bond, obtained a decree against Khanto Moyi, sold the land in dispute which belonged to the estate of Kenaram in execution of the decree and purchased the same along with Defendants Nos. 2, 3 and 4.

On Khanto Moyi's death the present Plaintiff as the reversionary heir of her father instituted the present suit for the recovery of the 18 bighas 19 cottahs of land purchased by the Defendants

Both the Munsif and the Subordinate Judge were of opinion that according to Hindu Law the judgment and decree in suit No. 12 of 1891 having been duly obtained against Khanto bound her daughter, who was the reversioner.

Plaintiff preferred this second appeal.

Babu Sarat Chandra Roy Chaudhury for the Appellant submitted that Courts below missed the real point for inquiry in the case. What was to be seen was whether by the sale the widow's interest or the estate of her husband was sold. The decree in this case is a personal decree against the widow and therefore by the sale her right, title or interest was sold. The Plaintiff claims her father's estate and therefore the decree or sale does not affect her. The question whether there was legal necessity has nothing to do in this case when the creditor in her suit against the widow did not want to bind the estate. Whether Plaintiff was a party to the transaction or was aware of it does not affect the case at all. Several passages from Mayne's Hindu Law, 6th Ed., were read and the following cases were cited, *Baijun Doobey* v. *Brij Bhukun* (1), *Jugul Kishore* v. *Jotendro Mohon Tagore* (2), *Braja Lal Sen* v. *Jiban Krishna Roy* (3).

Babu Joy Gopal Ghosha for the Respondents submitted that the Appellate Court has clearly found that the debt incurred by the widow was for legal necessity and therefore the sale was binding on the estate. He further submitted that the creditors were cheated by the conduct of the Plaintiff and her husband and therefore the Plaintiff should not get any relief.

The JUDGMENT OF THE COURT was as follows:—

The facts of this case are as follows:—Khanto Moyi, the widow of one Kenaram Roy, executed in favour of the Defendant a bond for Rs. 99 for legal necessity. It has been found by the lower Courts that she was in straitened circumstances, and that she had not sufficient funds for her maintenance and that of her family. The Plaintiff Girlbala is Khanto

(1) I. L. R. 1 Cal 133 P. C. (1875).
(2) I. L. R. 10 Cal. 985 (1884).
(3) I. L. R. 26 Cal. 285 (1898).

Moyi's daughter. She signed her mother Khanto Moyi's name on the bond. Her husband Ambika Charan Ghose was a subscribing witness to it.

The Defendant subsequently sued on the bond, but Khanto Moyi denied execution and the Plaintiff and her husband supported her. But the bond was found to be genuine and the Defendant obtained a decree. He then executed his decree against the property left by Kenaram, bought it himself, and is now in possession. Khanto Moyi being dead, the Plaintiff now sues as the reversionary heir of Kenaram for possession of 18 bighas 19 cottahs of land at present in the Defendants' possession. The lower Courts have dismissed her suit holding that there was legal necessity for the bond. The Plaintiff appeals. It is urged on her behalf that the bond was a simple bond, not a mortgage bond, far less a deed of sale, that the decree obtained by the Defendant against Khanto Moyi was a personal decree and did not affect Kenaram's property and that she was no party to the suit or the sale proceedings and is therefore not bound by them.

We consider these pleas must prevail. We come to this conclusion with reluctance, for it is obvious that the Plaintiff and her husband Ambika Charan Ghose did all they could to induce the Defendant to accept the bond of Rs. 99 from Khanto Moyi and to assure him that they would not dispute it. But it was not a mortgage bond or deed of sale; so the signature of the name of Khanto Moyi by the Plaintiff does not bind her reversioner. Similarly, the signature of Plaintiff's husband Ambika as a witness is of no avail. The Plaintiff and her husband did all they could to deny execution of the bond. It is to be regretted that advantage was not taken of the sanction accorded by the Munsif to prosecute Ambika for perjury. Then, the decree given against Khanto Moyi appears from the judgment filed to have been a personal decree against her. It did not affect Kenaram's property, or the Plaintiff who was no party to it. It affected only Khanto Moyi's personal interest in the property—which is now at an end [*Baijun Doobey* v. *Brij Bhukun* (1)]. The Plaintiff, according to Hindu Law, is entitled to a decree, and must get it. We decree this appeal with all costs.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 24 OF 1908.

RAMPINI, J.	NOJEM MIRDHA,
SHARFUDDIN, J.	Petitioner,
1908.	*v.*
29, January.	JAMALALI KHALIFA, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Omission to examine witness and inquire into the question of possession—Absence of a party—Signature of the Judicial officer in a judicial order.

Where in a proceeding under sec. 145, Cr. P. C., one of the parties being absent though served with notice, the Magistrate on the written statement of the other party declared them to be in possession,

Held—*That the order of the Magistrate was without jurisdiction. It was his duty to inquire into the question of possession*

(1) I. L. R. 1 Cal. 133 (1875).

NOJEM MIRDHA *v.* JAMALALI KHALIFA.

and in the absence of the parties, he would have been well advised to abstain from passing any order under sec. 145, Cr. P. C.

A Magistrate should sign his name in full in a judicial order made under sec. 145, Cr. P. C., and should also note his official position.

This was a rule granted on the 9th of January 1908, against an order of Mr. A. J. Laine, Joint Magistrate of Faridpur, dated the 12th of November 1907, directing the 2nd party to remain in possession of the land in dispute until evicted therefrom by a lawful decree of a competent Court.

The facts of the case will appear from the judgment.

Babu Surendra Nath Guha for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule, calling upon the District Magistrate of Faridpur and also upon the opposite party to show cause why the order of the Joint Magistrate, dated the 12th November 1907, should not be set aside.

The order complained of is one dated the 12th November last and purports to be under sec. 145, Cr. P. C. It is signed with the initials "A. J. L.," which we are informed are the initials of Mr. A. J. Laine, the Joint Magistrate of Faridpur. It seems to us that the learned Joint Magistrate should have signed his name in full in a judicial order made under sec. 145, Cr. P. C. He might also have noted beneath his initials his official position, because the initials "A. L. J." by themselves do not sufficiently indicate by whom or by what officer the order has been passed.

The ground on which this rule was issued was that the Joint Magistrate had passed the order without taking any evidence in the case at all. This appears to be so. The order recorded by him runs thus :—"Second party filed written statement. First party absent, though notice served. From the statement of the 2nd party it appears that they are in possession of the land, and as the 1st party has not appeared, he is presumably not in a position to deny it. I therefore declare the 2nd party to be in possession of the land until evicted therefrom by a lawful decree of a competent Court."

It appears to us that such an order is without jurisdiction. The Magistrate, under sec. 145, Cr. P. C, is required to enquire into the question of possession. He was bound to do so, after perusing the statements put in, hearing the parties and receiving the evidence produced by them respectively. We do not think he was entitled to dispose of the case in such a summary manner. In the absence of the parties, he would have been well advised to abstain from passing any order under sec. 145, Cr. P. C.

We therefore make this rule absolute and set aside the order complained of.

B. C. *Rule made absolute.*

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 6 OF 1908.

RAMPINI, J. SHARFUDDIN, J. 1908. 29, January.	KOOHAI FAKIR, Petitioner, v. ROMESH CHANDRA BISWAS, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Trial as in a civil suit—Settlement proceeding, order in, if to be given effect to.

The Magistrate should not deal with a proceeding under sec. 145, Cr. P. C., as if it is a civil suit.

Where the Magistrate tried a case under sec. 145, Cr. P. C., as if it was a civil suit, framed several issues and discussed them at length, but did not deal with the question of possession except that in only one passage in his judgment he observed that the oral evidence as to actual possession was in favour of the second party but in his final order declared the first party to be in possession in order to give effect to a certain order of the settlement department,

Held—That the Magistrate's order was without jurisdiction. The only question the Magistrate had to decide in the case was who was in actual possession of the land in dispute and as he had not done so, his order was entirely without jurisdiction.

This was a rule granted on the 6th of January 1908, against an order of Moulvie Asadazaman, Deputy Magistrate of Faridpur, dated the 5th of December 1907, directing, under sec. 145, Cr. P. C., the first party to be maintained in possession of the land in dispute until evicted therefrom in due course of law.

The facts of the case will appear from the judgment.

Mr. Stokes and *Babu Bidhu Bhusan Ganguli* for the Petitioner.

Babus Promotho Nath Sen and *Bimal Chandra Das Gupta* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule, calling upon the District Magistrate of Faridpur and also upon the Opposite Party to show cause why the order of the Deputy Magistrate, dated the 5th of December 1907, should not be set aside.

The order camplained against is one passed by Moulvie Asadazaman, Deputy Magistrate, first class, ostensibly under sec. 145, Cr. P. C. It has been impugned by the second party, the Petitioner before us, on the ground that it was passed without jurisdiction. We consider that this case is another illustration of the way in which the provision of sec. 145, C. Cr. P., are abused by litigants in the mofussil and misunderstood by Magistrates who usurp jurisdiction and decide questions of a civil nature. The learned Deputy Magistrate in this case has not enquired into the question of actual possession, as he was bound to do under the provisions of sec. 145. He has devoted a large amount of time and trouble to discussing questions which are entirely foreign to the enquiry which he had to make. He deals with this proceeding as if it were a civil case. He has framed four "issues" for his consideration and decision. He says . . . "These facts suggest the following important issues, and I would accordingly proceed to decide them.

"(1) What is the effect of the order of Moulvie Ataur Rahman A. S. O.? (2) Is the present proceeding at all main-

KOOHAI FAKIR v. ROMESH CHANDRA BISWAS.

tainable? (3) What remedy is the second party entitled to? (4) Even if the order of the A. S. O. were not in accordance with law, has this Court any authority to set it aside?"

Then he goes on to point out that the order of the Settlement Officer evidently has the force of a Civil Court's decree and was in effect when these proceedings under sec. 145 were instituted. And he adds:—"I am of opinion that, having regard to the provisions of sec. 34 of Reg. VII of 1882 and sec. 4 of Reg. IV of 1828, and sec. 42 of the Survey Act, Magistrates should not take proceedings under sec. 145 or sec. 107, Cr. P. C., regarding land disputes in areas under settlement. The jurisdiction evidently belongs to the Settlement Officer, and the only question is whether the same provisions would apply when the settlement is under the Bengal Tenancy Act. I am not free from doubt on the point, but it would probably be better both for the settlement department and the Magistrate if an authoritative decision on the point could be had, as there is now hardly any decided case bearing on the point."

Then he winds up as follows: "Viewing the case as a whole, I am for giving effect to the order of the settlement department for the reasons stated above, and I accordingly direct that the first party be maintained in possession of the land in dispute until evicted therefrom in due course of law."

We do not consider it advisable for us to comply with the suggestion of the learned Deputy Magistrate that we should decide the point which he has set forth in the above passage. The only question he had to decide in this case was that which is laid down in sec. 145, Cr. P. C., namely, who was in actual possession of the land in dispute. He has not found that, and therefore his order is entirely without jurisdiction. The only passage in his judgment in which he deals with the question of actual possession is the one in which he says:—"The oral evidence as to the actual possession is certainly in favour of the second party and I may say has been corroborated by the witnesses of the first party. After coming to this opinion he proceeds in his final order to declare the first party to be in possession, whereas he has distinctly said that the oral evidence is that the second party is in possession.

The order complained against is, therefore, without jurisdiction. We make this rule absolute and set it aside.

B. C. *Rule made absolute.*

CRIMINAL APPELLATE JURISDICTION.

APPEAL No. 75 OF 1908.

GEIDT, J. WOODROFFE, J. 1908. 17, March.	NATOBAR GHOSH and ors., Appellants, *v.* THE KING-EMPEROR, Respondent.

Jury trial—Charge to the jury—Misdirection—Culpable homicide—Omission to ask the jury to consider the intention or knowledge of the accused—Omission to tell the jury to consider the question of alibi—Facts, expression of Sessions Judge's opinion on—First information, omission to place before the jury—Indian Penal Code (Act XLV of 1860), secs. 304, 304/149, 148, 147.

Where the Sessions Judge in his charge to the jury observed that the jury in dealing with a charge of culpable homicide had to consider whether a man was dead

NATOBAR GHOSH *v.* THE KING-EMPEROR.

and whether he met with a violent death and whether the accused had any hand in causing the death but he did not specifically ask the jury to consider whether in causing the death the accused had the intention to cause death or such injury as was likely to cause death or the knowledge that he was likely to cause death,

Held—*That this was a very material misdirection and the misdirection was not cured by the fact that the Sessions Judge in the first part of his charge explained the sections of the Penal Code defining murder and culpable homicide and pointed out to them the distinction between the two.*

Where the accused pleaded alibi and the Sessions Judge in the beginning of his charge to the jury referred to the plea of the accused but omitted all reference to it in the subsequent part of his charge,

Held—*That this was a misdirection; the Sessions Judge ought to have told the jury that before they could convict the accused they must find that the accused were present at the occurrence.*

Where the Sessions Judge in his charge to the jury expressed his opinion on various questions of fact arising in the case without telling the jury that his opinion was not binding on them and that they were the sole judges of fact,

Held—*That the charge was unsatisfactory.*

The Sessions Judge was not justified in his charge to the jury in making comments on the first information, without placing it as a whole before the jury.

This was an appeal preferred on the 21st of January 1908, against the conviction under secs. 304, $\frac{304}{149}$, 148 and 147, I. P. C., and the sentence of six years' rigorous imprisonment passed upon the Appellant, Natobar, and the sentence of four years' rigorous imprisonment each, passed on the other Appellants by the Court of Sessions of Hooghly at Howrah, on the 22nd of November 1907.

The facts of the case will appear from the judgment.

Mr. Mahamudul Huq and *Babu Nogendra Nath Bhuttacharjee* for the Appellants.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows :—

GEIDT, J.—The Appellants have been convicted by the Additional Sessions Judge of Hooghly sitting at Howrah with a jury, Natobar of the offence of culpable homicide not amounting to murder and the other three Appellants of that offence read with sec. 149, I. P. C. Three of the Appellants have also been convicted of rioting armed with a deadly weapon and the fourth simply of rioting and they have been sentenced to various terms of imprisonment.

It is urged on their behalf that there has been material misdirection of the jury. The Sessions Judge when dealing with the question which the jury had to consider after stating the case for the prosecution, went on to observe as follows :—"In dealing with a charge of culpable homicide you have first of all to see whether a man is dead and whether he met with a violent end" and then the Sessions Judge referred to the medical evidence showing that the man had met with a violent death. The Sessions Judge goes on to say : "The question now is, had the accused any hand in causing this man's death ; also

NATOBAR GHOSH *v.* THE KING-EMPEROR.

whether they formed members of an unlawful assembly in furtherance of the common object for which this act was committed."

It appears to me that these were not the only questions which the jury had to consider. There was one very important further question to which the Sessions Judge has omitted reference altogether, namely, the question whether in causing the death of the deceased the accused had the intention to cause death or such injury as was likely to cause death or the knowledge that he has likely to cause death." That was a question on which the jury were bound to come to a finding before they could convict the Appellant of culpable homicide. It is true that in the first part of his charge, the Sessions Judge explained the sections of the Penal Code defining murder' and culpable homicide and he pointed out to them the distinction between the two. But in my opinion that was not sufficient. When laying before the jury the questions which they had to consider, it was his duty to lay specifically before them the question I have indicated and to tell them that before they could find the accused guilty of culpable homicide, they must find that the accused had either the intention or knowledge which I have mentioned above. It appears to me that in this matter there has been a very material misdirection of the jury.

In some other respects also the charge is not satisfactory. The accused Nos. 2 and 4 pleaded that they had not been present at the occurrence. The Sessions Judge does refer in the beginning of his charge to the plea but omits all reference to it in the subsequent part of his charge and he does not tell the jury, as he ought to have told them, that with reference to the accused Nos. 2 and 4 they must, before they convict them, find that they were present at the occurrence.

Then, again, the Sessions Judge has, in my opinion, somewhat misrepresented the effect of the medical evidence. The Assistant Surgeon who examined the two accused persons Natobar and Toostoo deposed that the wounds on them might have been self-inflicted. The Sessions Judge has represented this evidence as showing that the opinion of the Assistant Surgeon they were self inflicted and though he afterwards used the expression that in the Civil Surgeon's opinion the wounds could be self-inflicted, he said that this was an opinion which militates against the evidence for the defence.

Then, again, the charge is unsatisfactory in that the Sessions Judge has expressed his opinion on various questions of fact arising in this case without telling the jury that his opinion was not binding on them and that they were the sole judges of fact. He has made no reference to the separate function of the jury as the sole judges of fact.

There is one other point to which I may refer, namely, the matter of the first information. The first information seems to have been proved by the Sub-Inspector but it was apparently not read out to the jury. The learned Sessions Judge in his charge has commented on that first information, but Counsel for the Appellant contends that the contents of that first information have been misrepresented by the Sessions Judge

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JUNE 29, 1908. [No. 33

Contents.

NOTES

THE THIRD CALCUTTA CRIMINAL SESSIONS FOR THE year 1908 will commence its sittings in the High Court on the first of July next. The Acting Chief Justice will preside.

WE ARE GLAD THAT THE HONOUR OF KNIGHTHOOD has been conferred on The Hon'ble Mr. Justice Rampini, now officiating as the Chief Justice of the Calcutta High Court, on the King-Emperor's birthday.

IT IS A WELL SETTLED LAW THAT A BARRISTER cannot sue for his fees. The closer association between the governing bodies of the Bar Council and the Incorporated Law Society is said to be facilitating the realization of arrears of fees. Progress towards this desideratum is being made by the Bar Council giving assistance to the Disciplinary Committee of the Law Society in exposing and punishing clients and solicitors for non-payment of counsel's fees under circumstances that are detrimental to the interests of both branches of the profession. In a recent instance a matter was brought before a Divisional Court where a solicitor had received fees for two counsel from his client but did not pay them over to counsel, the Lord Chief Justice held that this amounted to misappropriation of the money and suspended the solicitor for twelve months and ordered him to pay the costs of the application. We have now an Incorporated Law Society here and we have also a Bar Association of very long standing and co-operation between the two in their mutual interest and also for upholding the honour of the legal profession is sure to be fraught with good results.

WE INVITE ATTENTION TO THE JUDGMENT OF THE Special Bench in *Shamarendra Chandra Deb Barman v. Birendra Kishore Deb Barman* reported in this issue at p. 777. The majority give *inter alia* the following reasons for holding that the suit of the Bara Thakur of Tipperah was not maintainable. *Firstly*, that it was undisputed that the succession to the zemindari follows the succession to the Hill Tipperah Raj. *Secondly*, that the Courts in British India have no jurisdiction to decide the question as to who is entitled to succeed to a reigning foreign sovereign. The first proposition is apparently based on a statement in the plaint. The learned Counsel for the Appellant however argued that there was no admission of the kind implied in the plaint, and that the real question in dispute was whether appointment by the Raja of Tipperah of his son as the immediate successor to the Raj precluded the Courts in India from pronouncing on the validity of such appointment so far at any rate as the right to the succession of the zemindari and other immoveable properties in British India was concerned. Mr. Justice Doss was evidently in agreement with Counsel for the Appellant on this point. The effect of the Government *sanad* confirming the appointment was not decided, though Doss, J., seemed to incline in favour of the Appellant's contention on this point as well. The Court was however unanimous in holding that no declaratory decree ought to be made in this case, specially as the Maharaja himself was not a party. Counsel for the Appellant pointed out that the Appellant's application to make the Maharaja a party Defendant would in all probability have been refused by Government. The questions raised in the case are of great importance. It is understood there will be an appeal to the Privy Council. If so, the issue will be awaited with interest.

CRIMINAL CASES OF 1907.

The present Article is in continuation of the series which the Author has contributed annually for the last eight or nine years to the Calcutta Weekly Notes. It contains a *critical summary* of all the rulings reported in the four volumes of the Indian Law Reports, the Calcutta Weekly Notes and the Calcutta Law Journal of the past year together with a full commentary on the points of law involved in the decisions so reported with reference to the previous and subsequent case law. The matter is dealt with under four headings: (1) Criminal Procedure Code, (2) Penal Code, (3) Evidence Act, (4) Local and Special Acts.

I.—CRIMINAL PROCEDURE CODE.

CONSTRUCTION AND DEFINITION.—[*Construction of Acts*]. In construing a word of doubtful import the Court may have regard to considerations outside the language of the Act. (*Emperor* v. *Atmaram, 31 Bom. 480*). [*Definition*] In *Budhan* v. *Issur*, 34 Cal. 926, it was held that illegal seizure of cattle is now an offence under sec. 4 (o), and is, by virtue of the last clause of Sch. II, triable by any Magistrate. With every respect to the learned Judges who decided the case this ruling appears to be questionable. No doubt an illegal seizure is an "offence," but it only means that *compensation*, which is the only penalty under secs. 20—22 of the Cattle Trespass Act, is to be regarded as a "*punishment*" for the purposes of the definition of "offence." But the last clause of Sch. II does not apply. It refers to offences punishable with *fines* (omitting the other punishments which obviously have no relevancy on the question). Now *compensation* is not a *fine*. The former is payable to a private person, and the latter to Government. The Cattle Trespass Act itself draws a distinction between *compensation*, *fines* imposed by the pound authorities and *fines* imposed by Magistrate. The Criminal Procedure Code also draws a clear distinction between *compensation* and *fine*: see secs. 250 and 545. A compensation may be *recoverable as a fine*, *i.e.*, under sec. 386, but it is not a fine. It is, therefore, submitted with due deference, that *Shama* v. *Lechhu*, 23 Cal. 300, are *Raghu* v. *Abdul*, 23 Cal. 442, are still law.

MAGISTRATES.—A Presidency Magistrate is clearly not a "Magistrate of the first class" within sec. 6 of the Code (*Charoobala* v. *Barendra*, 27 Cal. 126, 128, 129: *Kedarnath* v. *Emperor*, 3 C. L. J. 357), but he has been held to be so for the purposes of Act XXI of 1883, sec. 111, as amended by Act X of 1902 (*Emperor* v. *Jeevanji*, 31 Bom 611, followed in *Emperor* v. *Haji*, 32 Bom 10). An Additional District Magistrate is not subordinate to the District Magistrate. There is a *lacuna* in the Code with respect to his *status* (*Prakas* v. *Emperor*, 34 Cal. 918).

ARREST.—[*By foreign police officer*]. The arrest by a Native State policeman in British India of a person suspected to have committed an offence in such State is illegal under sec. 54 of the Code (*Emperor* v. *Debi*, 29 All. 377: see *In re Mukund*, 19 Bom. 72), and the subsequent custody of a British chowkidar is also unlawful (*Emperor* v. *Debi*). [*By private person*]. A private person lawfully arresting a person for theft committed in his view may send him by a chowkidar to the police station, and the custody of the latter is then lawful (*Emperor* v. *Parsiddhan*, 29 All. 575: *see* also *Queen-Empress* v. *Potadu*, 11 Mad. 480, 481, followed in *Queen-Empress* v. *Fakira*, 17 Mad. 103 and *King-Emperor* v. *Johri*, 23 All. 266). If, however, the theft was not committed in his view his custody and that of the chowkidar would be unlawful (*Queen* v. *Bojjigan*, 5 Mad. 22: *Durga Das* v. *Queen-Empress*, 1 C. W. N. xcviii: *Kalai* v. *Kalu*, 27 Cal. 366: *King-Emperor* v. *Johri*, supra). [*By Magistrate*]. The special provision in sec. 6 of Bom. Act IV of 1887 is subject to the general provisions of secs. 65 and 105 of the Code. (*Emperor* v. *Fernad*, 31 Bom. 438).

(*To be continued.*)

E. H. MONNIER.

Reviews.

A TRIENNIAL KEY TO THE CURRENT INDEX OF INDIAN CASES (being a consolidated abridgment of the cases for 1905, 1906 and 1907). Part I, Criminal, Part II, Civil. *By T. V. Sanjiva Row, First grade Pleader, Trichinipoly. Madras. The Indian Steam Printing Works. 1908.*

We have had frequent occasion to remark on the ceaseless and always successful endeavours of Mr. Sanjiva Row to lighten the labours of legal practitioners. His Current Index, Lawyer's Companion and Lawyer's Reference bear ample testimony to this fact. The present venture shows that Mr. Sanjiva Row has not only set himself to remove "felt wants," but to provide for those in anticipation. We were only beginning to think that the Current Index might soon require consolidation and we find the very thing ready to our hand in this key. The key does not reproduce the "head notes." It refers the seeker of authorities to pages of the Current Indexes for the head notes. We note however that no attempt has been made to digest the materials. But knowing Mr. Sanjiva Row to be what he is, we feel sure he will not long leave this undone.

THE LAWYER'S COMPANION, PARTS XIX AND XX. *By T. V. Sanjiva Row Madras. M. E. Publishing House, Mount Road. 1908.*

Part XIX completes the Land Acquisition Act and commences with the Interest and the Usury Repeal Acts which take up some portion of Part XX also In part XX, the Civil Procedure Code is taken on hand, that is to say, the new Civil Procedure Code (Act V. of 1908) which is to come into operation from January next. We have not yet got to the end of sec. 9.

THE LAWYER'S REFERENCE. Civil, Part XI; Criminal, Part IV. *By Sanjiva Row. Madras. The India Steam Printing Works. 1908.*

This work is also showing commendable progress. In these parts we have reached the cases of *Jagadamba* v. *Dakhina*, 13 Cal. 308 (Civil) and *Kalil Munda* v. *King-Emperor*, 28 Cal. 797 (Criminal). The work, as we have noticed before, purports to give the life history, so to speak, of the cases referred. The author commenced with cases of the Calcutta series.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

ORDINARY ORIGINAL CIVIL JURISDICTION. Before RAMPINI, C. J. (Acting), STEPHEN and FLETCHER, JJ. IN THE MATTER OF MR. LAWRENCE WILSON, an Attorney. 15th June 1908.

Solicitor—Unprofessional conduct—Representing Plaintiff and Defendants both.

Mr. Lawrence Wilson was a solicitor practising in Calcutta under the name and style of Carruthers and Co., of which he was the sole proprietor and member. On the 17th July 1907, a suit was filed in the High Court being suit No. 533 of 1907 by one Shaikh Sulaman against Shaikh Manik Jan and seven others for setting aside two *wakfnamas*, dated respectively the 7th October 1880 and 27th September 1890, for the partition and distribution of the properties covered by the two *wakfnamas*, for accounts and other incidental reliefs. The plaint was filed by Mr. Lawrence Wilson in the name of the firm Carruthers and Co. as the Plaintiff's attorneys. On the 11th September 1907 appearance was entered on behalf of most of the Defendants by Mr. Lawrence Wilson in his own name. On the 21st November 1907, the Defendants' written statement was filed by Mr. Wilson in his own name. On the back of the written statement the following appeared over the signature of Mr. Wilson:—"Time to file the Defendants' written statement expired during the holiday but no steps have been taken by the other side." In the written statement the Defendants submitted amongst other things that the properties comprised in the 2nd *wakfnama* be divided amongst the parties in proportion to their respective shares as set forth in a schedule to the plaint but that the 1st *wakfnama* should be given effect to.

On the 10th April 1908, the suit came on for hearing before his Lordship Fletcher, J., when his Lordship discovered that the same attorney had entered appearance on both sides, one in the name of his firm and the other in his own name. His Lordship being of opinion that the Defendants had no independent advice, that the suit involved a hostile construction of the deeds of *wakfnamas* between the Plaintiff and the Defendants and that the conduct of Mr. Lawrence Wilson in acting as he did was improper, he ordered the case to stand over generally (with liberty to apply) for his Lordship to have time to call the attention of his Lordship the Chief Justice to this matter.

The matter was duly placed before his Lordship the Chief Justice who, on the 16th May 1908, directed that "the attorney in question should be called upon to show cause why he should not be dealt with under cl. 10 of the Charter." On the 8th June 1907, the rule was issued which contained a direction that a copy of the order to be served on the Advocate-General of Bengal and that notice of the order be given to the Incorporated Law Society.

The rule came on for hearing before a Special Bench consisting of their Lordships Rampini, C. J., (Acting) and Stephen and Fletcher, JJ., on the 15th June 1908. *Mr. Pugh* (with *Mr. H. Stokes*) appeared for the Incorporated Law Society, cited, *Berry* v. *Jenkins*, 3 Bing., 423 (1826), and *In re four Solicitors*, (1901) 1 Q. B., 187. *Mr. Chakravarti* for Mr. Wilson. The Hon'ble Advocate-General of Bengal (*Mr. S. P. Sinha*) was late in appearing before the Court having been called away on some public business elsewhere.

After considering the facts and the attitude of Mr. Wilson their Lordships held that acting thus he was guilty of contempt of Court, and of improper behaviour as an officer of the Court, and they directed that Mr Wilson be suspended for one year or such longer period as he shall not be able to satisfy the Court that he intended personally to carry on business for his own benefit within the limits of the Ordinary Original Civil Jurisdiction of this Court. Their Lordships further directed Mr. Wilson to pay the costs of the rule allowing separate costs to the Advocate-General and Mr. Pugh, who represented the Incorporated Law Society.

P. R. C.

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CRIMINAL REVISION No. 456 OF 1908. ROHIMUDDI HOWLADAR AND OTHERS, Petitioners *v.* THE EMPEROR at the prosecution of BOLORAM MAJHI, Opposite Party. 3rd June 1908.

Criminal Procedure Code, sec. 349—Procedure to be followed by the trying Magistrate when acting under.

The Petitioners were tried before a probationary Deputy Magistrate on charges under secs. 147 and 325, I. P. C. Processes were issued on certain of the defence witnesses but the Magistrate did not take steps to enforce their attendance. He sentenced the Petitioners to six months' rigorous imprisonment under sec. 147 and passed no separate sentence under sec 325, I. P. C. He then sent the case to the Sub-divisional Magistrate with an expression of opinion that the accused persons (the Petitioners) should be bound down under sec. 106, Cr. P. C. The Petitioners obtained this rule to set aside the conviction and sentence.

Their Lordships held

That the trying Magistrate was in error in not having the processes issued upon the defence witnesses enforced and therefore his decision must be set aside. If the trying Magistrate was of opinion that the accused ought to be bound down under

sec. 106, Cr. P. C., he should have transmitted the whole case to the Sub-divisional Magistrate in order to get the sentence passed by him. The case should therefore be sent back to the probationary Deputy Magistrate in order that he might hear the defence witnesses on whom summons had been issued. If after hearing the evidence he considers that he could not pass adequate sentence, he must then transmit the case to the proper authority, but he himself must not pass any part of the sentence.

Babu Atulya Churn Bose for the Petitioners.

No one for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 1701 OF 1906. PARIKHIT PANDA, Appellant *v.* ANANDA GHOONTIA, Respondent. Heard, 1st and 2nd June 1908. Judgment, 10th June 1908.

Jurisdiction of Civil Court—Question first raised in second appeal—Gochar *lands*—Gaontia—*Rights of parties at the time of suit to be adjudicated—Settlement record, entry in—Central Provinces Tenancy Act (XI of 1898), sec. 2 (10), Expl. II—Tenant.*

The Plaintiff, as a *gaontia* of the village, sued to eject the Defendant from certain waste lands described as *gochar* lands on the ground that the Defendant was a trespasser. The Defendant pleaded adverse possession for upwards of 12 years, and set up a tenancy of the land in question under the Plaintiff. Both the Courts below found in favour of the Plaintiff and they directed him to be put in *khas* possession of the plots in suit

In the High Court four points were raised: *first*, that the Civil Court had no jurisdiction to entertain the suit; *secondly*, that a *gaontia* in the district of Sambalpur could not eject an occupier of land through the Civil Court, but he could do so through the agency of the settlement department at the periodical quadrennial revisions of settlement; *thirdly*, that whether the Defendant paid rent or not to the Plaintiff, he was a tenant of the land and could not be ejected as being a trespasser; and, *fourthly*, that inasmuch as the Defendant was recorded and recognised by the Settlement Officer as a raiyat at the recent settlement, he could not be ejected in the suit of a *gaontia*.

The question of jurisdiction was not taken at any previous stage in the litigation. It was not taken in any of the grounds of appeal, nor any issue raised about it.

Held—If the question of jurisdiction depends for its determination upon facts, and those facts had not been found by the lower Appellate Court, or the Court of first instance, an Appellant could not ask the High Court to find them; the Appellant must substantiate his contention, if he could, on the facts already found. If he was unable to point to any facts in support of his plea, that plea must fail.

An ordinary Civil Court cannot be ousted of its jurisdiction in the absence of an express provision of law to that effect.

Gochar lands could not be classed in the same category as common lands. *Gochar* lands are lands reserved for the proprietor of a Government village in the district of Sambalpur, and common lands are property of the general body of villagers.

The Civil Courts could not be ousted of their jurisdiction in the absence of specific notifications issued by the Chief Commissioner under the Land Revenue Act.

Manbodh v. *Asai* (10 C. P. L. R. 17) referred to

The Plaintiff as *gaontia* of the village must be taken to be a proprietor of the same and entitled to bring an action in ejectment.

The Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived.

Ramanandan Chetti v. *Pattikutti Servai* (I. L. R. 21 Mad. 288, 290) referred to.

The entry in the settlement record is not conclusive: it is only a matter of presumption.

The Defendant could not be regarded as a tenant within the meaning of sec. 2 (10), Expl. II of the Central Provinces Tenancy Act (XI of 1898), which says—"the holder of a survey number in a village let in farm by Government, or held by a *gaontia* in the Sambalpur District is a tenant of the farmer or *gaontia* for the time being." The holding of a survey number must have reference to the holding when the proceedings in a Civil Court were initiated, and it could not avail the Defendant that in a subsequent settlement he was recorded as a tenant.

Babu Sarat Chunder Roy Chowdhury for the Appellant.

Babu Bepin Chunder Mullick for the Respondent.

A. T. M. *Appeal dismissed.*

High Court Notice.

The following rule passed by the High Court of Judicature at Fort William in Bengal is published for general information.

HIGH COURT, ENGLISH DEPARTMENT, (CIVIL), *The 18th June 1908.*	By order of the High Court, A. P. MUDDIMAN, *Registrar.*

It is ordered that the following amendment be made in the rules relating to the "admission of vakils in the High Court" reproduced in Chap. XVI, page 100 *et seq* of the "Rules of the High Court, Appellate Side," published in the *Calcutta Gazette* of the 19th November 1902, Part I, page 1523 *et seq* viz.

At the end of the second clause of Rule No. 11, at page 102, *insert* the following "or unless for special reasons the Court should think fit to remit any portion of the period of service."

By order of the High Court,
A. P. MUDDIMAN,
Registrar.

NATOBAR GHOSH v. THE KING-EMPEROR.

Whether that was so or not, it was clearly the duty of the Sessions Judge if that first information was properly evidence, to have placed it as a whole before the jury; if it was not evidence, it was equally his duty to have abstained from any reference to it altogether.

In my opinion, there has been material misdirection of the jury. The conviction and sentence must, therefore, be set aside and a new trial ordered.

WOODROFFE, J.—I agree.

B. C. *Retrial ordered.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 174 OF 1906.

MACLEAN, C. J.
RAMPINI, J.
BRETT, J.
MITRA, J.
DOSS, J.
1908.
Heard, 11 and 12, May.
Judgment, 21, May.

SHAMARENDRA CHANDRA DEB BARMAN, Plaintiff, Appellant,
v.
BIRENDRA KISHORE DEB BARMAN, Defendant, Respondent.

Tipperah Raj—Immoveable property in India, succession to—Jurisdiction of Court to decide—Foreign sovereign—Act of State—Appointment of Jubraj or immediate successor, contrary to alleged kulachar—*Confirmation by British Government—Suit for declaration—Right of suit—Contingent interest—Specific Relief Act (I of 1877), sec. 42—Discretion—Negative declaration.*

PER CURIAM—*The Courts in British India have no jurisdiction to decide the question as to who is entitled to succeed to the Raja of a foreign sovereign State.*

Where a suit was brought ostensibly for a declaration in regard to rights to immoveable property within British territory belonging to a foreign sovereign but with the real object of setting aside the appointment by such sovereign of his son as his immediate successor,

Held—*That the Court had no jurisdiction to go into the question of the validity of such appointment.*

A person cannot sue for a declaration of his right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for such a declaration.

A negative declaration that the Defendant had no right on the ground amongst others that the Defendant was illegitimate was, in the Court's discretion, refused, specially as the Raja who was deeply interested in the question was not made a party, the suit having been instituted against the son.

NEEL KISTO DEB BURMONO v. BEER CHUNDER THAKOOR (1) *referred to.*

BEER CHUNDER MANIKKYA v. RAJ COOMAR NOBODEEP CHUNDER DEB BURMONO (2) *followed.*

PER DOSS, J.—*When the question is one of succession to immoveable property on the demise of the owner, the fact that such owner is a foreign sovereign does not deprive the Court of its jurisdiction to decide the question; nor, in deciding such question, is the Court bound merely to register the decree of the foreign sovereign however opposed it may be to the law of the land.*

An act of state of the foreign sovereign has no operation beyond his own territory.

(1) 12 M. I. A. 523 (1869).
(2) I. L. R. 9 Cal. 535 (1883).

SHAMARENDRA CHANDRA DEB BARMAN v. BIRENDRA KISHORE DEB BARMAN.

Quære—*Whether the State in the exercise of its executive functions can settle a question of disputed succession to land forming part of its territory and thereby oust Municipal Courts of their jurisdiction to decide it, without encroaching upon its legislative functions or derogating from its legislative powers.*

This was an appeal preferred on the 17th of May 1906, against the decree of Babu Bepin Behari Mukerjee, Subordinate Judge, 1st Court of Zillah Twenty-four Pergunnahs, dated the 24th of January 1906.

The Plaintiff-Appellant instituted this suit upon the allegation that the Plaintiff was the son of the late Maharaja Beer Chunder Deb Burman Manikya Bahadur of Hill Tipperah, that the Raj family of Hill Tipperah was governed by the Hindu law as obtaining in Bengal except in so far as the general law was, as regards inheritance, modified by the *kulachar* or custom of the family by which the reigning Raja might nominate and appoint, from among the legitimate members of the Raj family, his two next successors, the first being styled Jubraj and the second Bara Thakur, that according to the said custom, the said appointments fixed irrevocably the succession in the parties nominated and the Jubraj would be indefeasibly entitled to succeed on the demise of the reigning Raja to, amongst other things, certain property within British territory specified in the schedule to the plaint and the Bara Thakur so appointed would be indefeasibly entitled to succeed to the scheduled property on the demise of the Jubraj so appointed in case the Jubraj should have succeeded as aforesaid, that the scheduled property was impartible and the right of succession thereto could not be directly or indirectly defeated, that the Maharaja in the year 1870 appointed his eldest son Radha Kishore Deb Burman the present Raja as Jubraj and in the year 1878 appointed the Plaintiff as Bara Thakur; that the scheduled property was owned and possessed by the Maharaja as a zemindar and landowner in British India; that the Maharaja died on the 11th December 1896 and in accordance with the said *kulachar* the Raja succeeded to the scheduled property. The Plaintiff further alleged that the Defendant falsely pretended and asserted that he was the legitimate son of the Raja and that he had been appointed to succeed to the Raja at his demise in respect, amongst other things, of the scheduled property and that the Defendant denied the Plaintiff's right and title to succeed thereto; that the Plaintiff denied that the Defendant was the legitimate son of the said Raja Radha Kishore Manikya and that if the Defendant was in form appointed as alleged by him, such appointment was invalid and of no effect whatever against the right and title of the Plaintiff to succeed as aforesaid.

The Plaintiff therefore prayed that it might be declared that the Plaintiff was according to the *kulachar* or custom or usage of this Raj family and by virtue of his appointment as Bara Thakur entitled to succeed to the scheduled property after the demise of the present Raja and that the Defendant had no right of succession thereto.

The Defendant in his written statement objected that the Court had no jurisdiction to entertain, try or determine this

SHAMARENDRA CHANDRA DEB BARMAN v. BIRENDRA KISHORE DEB BARMAN.

suit, that the plaint did not disclose any cause of action or right of suit against him, that the suit was defective for want of parties that the Raja ought to have been made and was a necessary party to this suit. He, further alleged, *inter alia* that the Raja was a ruler of the sovereign State of Hill Tipperah whose succession to the throne of that estate *de facto et de jure* had been recognised by the Government of British India, that as such sovereign Prince, the Raja held the scheduled property as part of his royal possessions; that the Raja's title to the throne of Hill Tipperah both without and within British Indian Territory was one and the same and the latter was an appanage to the said throne following the course of succession thereto; that the Royal family of Tipperah was governed by the Bengal School of Hindu law save in so far as that law was modified by the *kulachar* or family customs prevailing therein, and by a *kulachar* of ancient date each reigning Raja was after his accession to the throne empowered of his own absolute and free choice to nominate and appoint a member of the said family to be his own immediate successor under the title of Jubraj who, should he survive the Raja, would succeed to the crown and kingdom of Hill Tipperah and, with such kingdom to the royal possessions thereof whether situate in Hill Tipperah or British India including the said scheduled property; that in accordance with the said *kulachar* the present Raja duly appointed and constituted the Defendant who was the legitimate son of the Raja his Jubraj on 8th February 1899 and caused the appointment to be notified to the officers of the state and to be communicated to the Government of India; that the Plaintiff on or about 9th June 1899 memorialised the Government of Bengal against the Defendant's said appointment as Jubraj but without success and the Government of India also rejected the Plaintiff's memorial to them on 21st November 1902; that under the circumstances the Defendant's appointment as Jubraj could not be questioned in any Court in British India; that the Defendant denied that the existence of a Bara Thakur appointed by his predecessor in any wise interferes with or limits the powers of each reigning Raja to appoint his own Jubraj, that the practice of appointing a Bara Thakur was of recent origin and such appointment did not fix irrevocably the succession of the party so appointed; that the Plaintiff's appointment as Bara Thakur had further been cancelled by the Raja in exercise of his sovereign power by a Rubakari dated 30th June 1904 and that Plaintiff had therefore ceased to be the Bara Thakur and could not maintain the suit in that capacity; that, moreover, the British Government as paramount power had conferred a *sanad*, dated 21st June 1904, upon the Raja affirming his absolute freedom in the choice of his own Jubraj and after the receipt of the said *sanad* the said Raja had confirmed the appointment of the Defendant as Jubraj.

Upon these allegations several preliminary issues were raised of which the following are material;—

1. Had the Court at Alipur jurisdiction to entertain the suit?

2. Had the Plaintiff any cause of action?

3. Was the suit maintainable?

4. Was the Raja, the sovereign of Hill Tipperah, a necessary party to the suit; and if so, could the suit proceed in his absence?

. . . .

6. Did the Plaintiff still hold the *status* of Bara Thakur. If not, could he maintain this suit?

7. Did the rejection of Plaintiff's claim by the Government of India and the subsequent declaration of the said Government relating to the succession to the Tipperah Raj and the zemindaries appertaining thereto bar the present suit?

Of the above issues, issue No. 6 was reserved for trial with the question of *kulachar* or family custom with the consent of both parties.

The Subordinate Judge held on issues Nos. 1 and 3, that Hill Tipperah was admittedly a sovereign state, that it was the acts of the Raja of Tipperah as a sovereign state that were sought to be impugned in this suit, that such a suit was not maintainable although the Raja himself had not been made a party and no relief was asked against him. That the formal appointment of the Defendant as Jubraj had been duly proved and also the confirmation of this appointment subsequent to the Plaintiff's memorial to the Government of India; that further the scheduled property was a part of the public property of the Raj, that the plaint itself contained a distinct admission that whoever succeeds to the Raj succeeds to the zemindari as a matter of course, the latter being the public property of the Raja; that under the circumstances the present suit could not be tried by the Court.

The Subordinate Judge was further of opinion that as the Plaintiff did not seek to recover possession of any immoveable property or to enforce any lien thereon, the suit did not come under sec. 16, cl. (*d*) of the Civil Procedure Code.

On Issue No. 2, the Subordinate Judge held that no declaratory decree could be made under sec. 42, Specific Relief Act, in favour of a person claiming to be presumptive heir, that further the section refers to existing rights only and not to contingent rights.

On Issue No. 4, the Subordinate Judge held that the Raja was a necessary party.

In this view of the case he dismissed the suit with costs.

The Plaintiff appealed to the High Court.

Mr. Chuckerbutty (with him *Babus Basant Coomar Bose, Harendra Narain Mitra* and *Prokash Chandra Sarkar*) for the Appellant submitted that the only tribunal which up till now had determined the question of succession in dispute was the British Court. Government's action in the present case was a new departure. For a period of 100 years Government had stayed its hands whenever the question of a succession to the Raj arose, till the British Courts decided it one way or the other with reference to the zemindaries. But in this particular instance the Courts have been anticipated.

The Plaintiff has been practically driven to adopt the present course. The Government is not likely to grant sanction for the institution of any suit against the Raja himself. Refers to Aitchison's Treaties (Edition of 1892), p. 109; Sir

Alexander Mackenzie's North-East Frontier of Bengal, p. 272. Letter to the Resident of Tipperah, dated 29th April 1782. Letter to the Board of Revenue, dated 28th February 1791. Also Letter of Mr. MacGuire, dated 18th April 1792 and Letter to the Collector of Tipperah of 25th April 1792

There can be no question that rights to British soil can only be dealt with by British Courts. Nobody can get an appanage in British territory to his Royal possessions. In so far as he holds lands in British territory he is a subject of British Government. No judgment of any Court not a British Court, still less an act of State of a foreign sovereign can bind land in British India.

I do not overlook the gravity of the situation created. But it is of the Government's own making. Whatever may be the absurdity of the conclusion, your Lordships cannot refuse jurisdiction to determine the succession to land in British territory.

Once I am appointed Jubraj, so far as my title to land in British India is concerned it cannot be taken away. I do not, of course, question the appointment so far as it affects Hill Tipperah. The right of the Bara Thakur to be appointed Jubraj has been decided by the British Courts. No subsequent Act of State on the part of the State of Tipperah can alter the succession regarding the zemindari.

[BRETT, J.—The Courts in India might have considered the question whether in fact the Raja did exercise his power of appointment or not, but did they ever question the legality of the Raja's acts?

[*Dr. Ghose* refers to *Neel Kisto Deb Burmono* v. *Beer Chunder Thakoor* (1)].

That case does not decide that a person who claims land in British India cannot have his title decided by British Courts. *Nanabhai* v. *Shriman Goswami Giridharriji* (6).

[RAMPINI, J., refers to admission in the plaint.]

This is a pure question of law and no amount of admission in the plaint or bad drafting can affect the present question.

Whatever may be the effect of the cancellation of my appointment in Hill Tipperah, my title to land in British India must be decided by the law obtaining in British territory.

Course of previous litigation in connection with Chakla Roshanabad supports my case. *Ramgunga Deo* v. *Doorgamunee Jobraj* (7) shows Government used to stay its hand till the title to the zemindari was established in the British Courts. This decision is dated 24th March 1809. Next decision *Urgoon Manick Thakur* v. *Ramgunga Deo* (8) is dated 24th March 1815. *Ranee Soomitra* v. *Ramgunga Deo* (9). See also Letter of Commissioner to Government of Bengal, dated 7th August 1862. Courts have ostensibly only decided disputes relating to the zemindari but succession to the Raj seems always to have been regulated by the decisions as to the zemindari. See Letter, dated 29th July 1862, which anticipates embarrassment in the case of Government deciding

(1) 12 M. I. A. 523 at p. 543 (1869).
(6) I. L. R. 12 Bom. 331 (1888).
(7) 1 Sel. Rep. 270 (1809).
(8) 2 Sel. Rep. 139 (1815).
(9) 3 Sel. Rep. 40 (1820).

one way and the Court later on deciding in a different way. Letter, dated 19th September 1862, recognises "Beer Chandra as the *de facto* Raja of Tipperah, leaving him or any other to take such steps in respect to the zemindari of Roshanabad as they may think proper in their own interest." Refers to *Beer Chunder Jcobraj* v. *Neelkissen Thakur* (10) and *Neel Kisto Deb* v. *Beer Chunder* (1) which affirms the last-mentioned decision. I rely on this to show that so far as land in British India is concerned the Raja is a British subject within the jurisdiction of the British Courts. The acknowledgment of Beer Chunder as *de facto* Raja apparently did not operate as a bar to the trial of the question of succession in regard to the zemindari.

[THE CHIEF JUSTICE.—The Court has no doubt jurisdiction. But is not the Court bound to stay its hand the moment the Raja says who is to be Jubraj ?]

[MITRA, J.—In the previous cases did not both parties consent to place the matter before the British Courts ?]

Barring an act of the Indian Legislature no one can dictate to the Courts who is to be Jubraj in so far as it affects succession to the zemindari. To say that the British Courts are bound to adopt the act of the Tipperah Raj as an Act of State would be to recognise *imperium in imperio*. See Foote's Private International Law (Edition of 1904), p. 159 : No law, municipal or international, can withdraw a portion of the State's territory from the jurisdiction of its Courts. Also pp. 184, 185 : you cannot introduce a provision of foreign law for the right determination of title to British land. It must be law recognised by British Courts.

[MITRA, J.—The law here is the personal law of the Tipperah Raj family.]

But it is law that has been applied by British Courts. No law from Agartola is to apply to British India.

Wheaton's International Law (3rd edition), pp. 128 129 ; Westlake (4th edition), p. 249 ; Dicey's Conflict of Laws (Edition of 1896), p. 519.

Submits that the following propositions cannot be disputed on the authorities :

(*a*) Whatever may be the law which is to apply to British Indian soil, it is the British Indian Courts which have to apply that law and no other.

(*b*) No act of the executive or Act of State can create a law of succession. No doubt as between State and State, the Act of the Government cannot be questioned in a law Court, but with regard to the private rights of a person who holds lands as a zemindari the status of that zemindar cannot be changed by an Act of State, either by letter, *sanad* or Resolution. The Government cannot say—"From this moment I grant you immunity from the ordinary law of succession."

Then as to Chakla Roshanabad being the public land of the Raja of Tipperah, submits that land cannot be held as Crown land by a foreign sovereign. *Goswami Shri Girdharji* v. *Madhowdas* (11), *Raj Kumar Nobodip* v. *Raja Bir Chundra* (12).

(1) 12 M. I. A. 523 at p. 543 (1869).
(10) 1 W. R. 179 (1864)

(11) I. L. R. 17 Bom. 600 at pp. 613 614, 620, 623 (1893).
(12) 25 W. R. 404 at p. 406 (1876).

SHAMARENDRA CHANDRA DEB BARMAN v. BIRENDRA KISHORE DEB BARMAN.

[BRETT, J.—It means that Chakla Roshanabad becomes the property of the sovereign for the time being.]

That cannot be unless it be held that it is part of the territory of Tipperah. *Maharajah Bir Chunder* v *Ishan Chunder* (13); *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burmono* (2) is distinguishable, as a claim for maintenance is not a claim in respect of immoveable property, and I am not claiming any relief against the Raja. Refers to arguments of Mr. Phillip at p. 548; last para., p. 549. I adopt arguments Nos 1, 3, 4, 5 See judgment at pp. 550, 556. *Beer Chunder Manikya* v. *Ishan Chunder* (14). *Hajon Manick* v. *Beer Sing* (15) is not against me so far as the question of jurisdiction is concerned, but it says at p 25, a foreign prince can hold property in British India as public property. The *sanad* of 21st June 1904 cannot affect previous appointment. Cl. (4) of the *sanad* says usages of the family would prevail in matters not expressly provided for. As regards the difficulties which may possibly arise in case the Courts decide in my client's favour, the properties in British India and the Raj may very well devolve upon different persons according to different rules of succession.

I do not contend for one moment that in actions arising out of contract or tort or in connection with the moveable property of the Raja or his ambassador he can be proceeded against in British Courts. But there is absolutely no authority for holding that a foreign sovereign who chooses to acquire land in British India can claim exemption from the territorial law of British India. Suppose for instance the Government revenue of Chakla Roshanabad which is governed by Reg. I of 1793 is not paid and the zemindari is sold, would it still continue to be an appanage of Hill Tipperah.

[RAMPINI, J.—In that case it would cease to be a royal possession.]

Then I say that when a new rule of succession is introduced for the Raj in conflict with the existing rule of succession as recognised in British Courts the land within British territory equally ceases to be a royal appanage. Different rules of succession would govern the Raj and the zemindari

As to whether the suit is one for land, I submit it comes under sec. 16 (*d*) of the Civil Procedure Code. Take the case of a presumptive reversioner, for instance, who on the death of a Hindu widow, if he survives her, will be entitled to possession. He can sue for a declaration against an alienee though he has no vested interest. If such a suit does not come under sec. 16 (*d*), C. P. C., I do not know what section it comes under *Delhi & London Bank* v. *Wordie* (16), *Kellie* v. *Fraser* (17), *Kanti Chunder* v. *Kissory Mohun* (18), *Hara Lall Banerjee* v. *Nitambini Debi* (19).

Specific Relief Act, sec. 42, Ills. (*d*) and (*e*).

The position of the Plaintiff is the same as that of a Hindu reversioner when

(2) I. L. R. 9 Cal. 535 (1883).
(13) 3 C. L R. 417 (1878).
(14) I. L. R. 10 Cal. 136 (1883).
(15) I. L. R. 11 Cal. 17 (1884).

(16) I. L. R. 1 Cal 249 at p. 261 (1876).
(17) I. L. R. 2 Cal. 445 at p. 463 (1877).
(18) I. L. R. 19 Cal. 361n at p. 365n (1887).
(19) I. L. R. 29 Cal. 315 (1901).

the widow, whom he may succeed, if he survives her, makes an invalid adoption. See *Kalian Singh* v. *Sanwal Sing* (20), *Abinash Chandra Mazumdar* v. *Harinath Shaha* (21), *Puttanna* v. *Ramakrishna* (22), where the presumptive reversionary heir sues to declare a Will set up as made by the last holder to be invalid; *Greeman Singh* v. *Wahari Lall Singh* (23) was dissented from in *Gangayya* v. *Mahalakshmi* (24) and *Manmatha Nath Biswas* v. *Rohini Moni Dasi* (25).

Daniell's Chancery Practice (7th Ed.), 630, Annual Practice 1908, p. 327, Order 25, Rule 5.

At all events, I am entitled to the negative declaration even if there be any hesitation in granting the positive portion. [illegible] *Mongola Dossee* v. *Shoshee Bhoosun* (26), *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* (27).

Dr. Rash Behary Ghose (with him *Babus Dwarka Nath Chuckerbutty, Tarak Chandra Chuckerbutty, Gobinda Chandra Dey Roy, Promotha Nath Sen, Joy Gopal Ghosha, Mr. G. Sircar* and *Babu Sushil Madhub Mullick*) for the Respondent urged that the suit had been rightly dismissed because (1) it involves directly the question of right of succession to a sovereign state; (2) the Plaintiff, as alien, is seeking to set aside an act of his own sovereign done not in India but in his own territories; (3) assuming that the action was cognizable by a British Court, the Alipur Court had no jurisdiction either under sec. 16 or sec. 19, C. P. Code, to entertain it; (4) Plaintiff who at best had a mere expectation which might be defeated by his death before the Raja was not entitled to a declaration; (5) if it could be competently instituted under sec. 42, Specific Relief Act, the action must fail because the Maharaja was a necessary party, (6) even if not a necessary party he was at any rate a proper party and no Court will make a declaratory decree in the absence of all persons who ought properly to be represented in the litigation; (7) in any case the Court [illegible] not in the exercise of its discretion [illegible] to make a declaratory decree in the present instance; (8) the suit ought to be dismissed on the 7th issue though the Sub-Judge has not recorded his decision on that issue. See sec. 561, C. P. C.

The main proposition on which the Appellant rests his case is not in question. I do not deny that land does not cease to belong to the British territory because it is acquired by a foreign sovereign. The Raja of Tipperah does hold Roshanabad subject to the Municipal law of British India. The question is this: "Is any Municipal Court in British India or any country in which a civilised system of law prevails bound to determine who ought to be the ruling chief or sovereign authority in any sovereign state?" The Plaintiff invites this Court to do that. It is for the Government and the Executive Government alone to determine who would succeed to the Raj. What does the practice of the last hundred years imply? That though it rested

(20) I. L. R. 7 All. 163 (1884).
(21) 9 C. W. N. 25: s. c. I. L. R. 32 Cal. 62 at p. 65, 2nd para. (1904)
(22) I. L. R. 30 Mad. 195 at p. 196 (1906).
(23) I. L. R 8 Cal. 12 at p. 15 (1881).
(24) I. L. R. 10 Mad. 90 at p. 91 (1886)
(25) I. L. R. 27 All. 406 (1904).
(26) 12 B. L. R. App. 2 (1873).
(27) (1894) A. C. 670 at p. 683 (1894).

on the Executive Government to decide who was the *de jure* sovereign yet, having regard to the nature of the questions involved, the Government said, "you may dispute the case in the Court at Tipperah and we will accept the decision of the Court." Still it was the Executive Government which could and did recognise the *de jure* ruler of Hill Tipperah.

And then, if it went forth into the world that our Courts are only too ready to decide suits raising questions of succession to the rulership of a sovereign State, the consequence would be that there would be no end of pretenders to the rulership of sovereign States and British India would be a veritable asylum of such pretenders. *Hajon Manick* v. *Beer Sing* (15)

The ordinary rule of succession cannot apply when the land is owned by a State which never dies. The Maharaja of Tipperah might say "I am a corporation sole; succession to the land is to follow the succession to the chiefship." Serious consequences would follow if the rule were otherwise. Our Courts should act in concert with the executive Government. Suppose the Raja were to die tomorrow, the Court will at once come into collision with the executive Questions as to the right to the rulership of sovereign States should be settled, if at all, by diplomatic action.

The Court has jurisdiction but it must stay its hand as soon as it sees that the question is one of succession to the chiefship of a sovereign State. The question is not one of jurisdiction to entertain the suit but rather to deal with the question of succession to a foreign State. In *Neel Kisto Deb* v. *Beer Chunder* (1), the question could not arise as both parties were interested in getting a decision, the Government having told them to get one. *Beer Chunder* v. *Raj Coomar* (2), *Neel Kisto* v. *Beer Chunder* (1). But for the consent of both parties the Courts would not have gone into the question of title. If any objection had been taken, the act of the Court would have been *ultra vires.* The last-mentioned case is authority for the proposition that the lands in dispute are the crown lands, that is to say the possession of the sovereign of Tipperah for the time being. See also *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burmono* (2).

The whole case of the Plaintiff rests on the fact that these lands form part of Hill Tipperah. The *sanad* also says that the zemindari appertains to Hill Tipperah, *Foster* v. *Globe Venture Syndicate, Ltd.* (28) Sound policy requires that the Court should act in unison with the Government.

Furthermore, the suit being a suit for declaration, the Court is not driven to take a position in opposition to Government. The Court in its discretion may refuse to make a declaratory decree If the Plaintiff gets a decree how is he to enforce it? It was argued on behalf of the Appellant that the executive Government cannot confiscate private property or override the decision of the Courts. No such question arises. The Court would be overstepping its jurisdiction if in deciding the question of title to a plot worth Rs. 5 it went to decide the question of

(15) I. L. R. 11 Cal. 17 at p. 24 (1884).

(1) 12 M. I. A. 523 (1869).
(2) I. L. R. 9 Cal. 535 (1883).
(28) (1909) 1 Ch. 811 at p. 811 (1900).

the title to the chiefship of an independent State.

The Bombay cases lay down an elementary proposition, *viz.*, that no foreign sovereign by any Act of State or any foreign Court by any judgment of its own affect land outside its own territories. If the Maharajah of Tipperah had said I confiscate the property of my subject A. not only in Tipperah but in British India, the question of title to be decided would be a question of parcel or no parcel, but not so when the succession to the foreign State is in question. See *Beer Chunder* v. *Raj Coomar* (2).

The Alipore Court had no jurisdiction under the Civil Procedure Code to entertain the suit and the Plaintiff is not entitled to a declaration.

On his own showing Plaintiff has a contingent interest. Under sec. 6, Transfer of Property Act, such a right is not capable of assignment. Although it has been held that a suit may be instituted by a reversionary heir to question an alienation by a Hindu widow, such a person is not entitled to a declaration of his title. Courts would refuse to decide a question as to whether on the happening of an event a person would or would not be entitled to property, *Musst. Pranputtee Koer* v. *Lalla Futteh Bahadur* (5) Per Sir Barnes Peacock, C. J., approved in *Kathama Natchiar* v. *Dorasinga Tever* (4) The suits by presumptive reversionary heirs stand in a different position. *Greeman Singh* v. *Wahari Lall Singh* (23). Judgment of Mitter, J., perfectly sound.

(2) I. L. R 9 Cal 535 (1883).

(4) L. R. 2 I. A. 169 at pp. 189, 190—191 (1875).

(5) 8 Sevestre 277, 2 Hay 608 (1863).

(23) I. L. R. 8 Cal 12 at p. 15 (1887)

Madras and Allahabad High Courts have misunderstood this judgment, *Bhujendra Bhusan* v. *Trigunanath* (29), *Rani Prithipal* v. *Rani Guman Kunwar* (30).

[The Court here intimated that they would hear *Mr. Chuckerbutty* in reply.]

Mr. Chuckerbutty.—Dr. Ghose admits the lower Court has jurisdiction. Dr. Ghose cannot ask this Court to decide the 7th issue under sec. 561, C. P. C. Asks for remand on the question of the effect of appointment by the Raja of Hill Tipperah as affecting land in British India.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The Plaintiff seeks in this suit for a declaration that he is according to the *kulachar*, custom or usuage of the Tipperah Raj family, and by virtue of the appointment referred to in his plaint, entitled to the succession to the scheduled property from and after the demise of the present Raja of Tipperah, and that the Defendant has no right of succession thereto. That is the object of the suit.

The property scheduled to the plaint lies within British territory: and, part of such property consists of a house and lands in the Ballygunj Circular Road known as "Green Park" within the local limits of the Alipur Court.

The Plaintiff is a son of the late Raja of Hill Tipperah. According to his case, the Raj family of Hill Tipperah of which the Raja is the head, is governed by the Hindu law as obtaining in Bengal, except in so far as that law is modified

(29) I. L. R. 8 Cal. 761 at p. 765 (1882.

(30) L. R. 17 I. A. 107 (1890).

by the custom of the family, by which the reigning Raja may nominate and appoint from amongst the legitimate members of the Raj family his two next successors, the first successor being styled Jubraj and the second successor being styled Bara Thakur. The Plaintiff's case is that, according to the said custom, the said appointments fix irrevocably the succession in the parties nominated, and the Jubraj so appointed is indefeasibly entitled to succeed, on the demise of the reigning Raja who appointed him, to amongst other things, the scheduled property; and the Bara Thakur so appointed is indefeasibly entitled to succeed to such property on the demise of the Jubraj. It is undisputed that the scheduled property follows the succession to the Hill Tipperah Raj, or, as the Defendant puts it, forms part of their royal possession and the right and title to such property follows the possession of and succession to the throne, and is enjoyed by one and the same title.

In the year 1870 the late Rajah appointed his eldest son Raja Radhakishore Deb Burman, the present Raja, Jubraj, and in the year 1878 appointed the Plaintiff Bara Thakur. The late Raja died on the 11th of December 1896: and, the present Raja succeeded to the throne of Hill Tipperah as also to the scheduled property. It appears that, by an instrument under his sign manual and the seal of his state, dated the 8th of February 1895, the Raja appointed and constituted the present Defendant his Jubraj, and caused the said appointment to be notified to the officers of the State for their information and guidance, nd to be communicated to the Government of India. The Plaintiff objected to this appointment: and challenges its validity, alleging that the Defendant is illegitimate. It appears that on the 9th of June 1899 he memorialized the Government of Bengal against such appointment, but unsuccessfully The Government of Bengal rejected the Plaintiff's memorial. In these circumstances the Plaintiff instituted the present suit on the 9th of March 1904 in the Subordinate Judge's Court at Alipur and asked for the declaration I have stated.

The defence is that the present Raja is the Ruler of the Sovereign State of Hill Tipperah whose succession to that State *de facto et de jure* has been recognized by the Government of British India, and that as such Sovereign Prince, the said Raja holds and by right of his succession to the throne of the said State, enjoys, as part of his royal possessions, the properties specified and described in the schedule to the plaint, the said Raja's title to the throne of Hill Tipperah and to his royal possession both without and within British Indian Territory being one and the same, and the latter an appanage to the said throne following the course of succession thereto. The Defendant also alleges, and this is not disputed, that the British Government has, as paramount power, conferred a *sanad* upon the present Raja affirming his absolute freedom in the choice of his own Jubraj or successor to the Raj and zemindaries and other property in British India which appertain thereto and are held therewith, and that after the receipt of the *sanad* the said Raja has by a Rubakari, dated the 22nd of July 1904, confirmed the appointment

of the Defendant as his Jubraj or immediate successor. The Defendant's case further is that, each reigning Raja is, after his succession to the throne, empowered of his own absolute and free choice to nominate and appoint a member of the royal family to be his own immediate successor under the title and designation of Jubraj, who, on such nomination and appointment, becomes entitled to and does, if alive on the death of the Raja by whom he was so appointed, succeed to the Crown and Kingdom of Hill Tipperah, and, with such kingdom, to the royal possessions thereof, whether situate in Hill Tipperah or British India, including the scheduled property. There appears to be no doubt even upon the Plaintiff's own plaint that the scheduled property forms part of the royal possessions of the Hill Tipperah Raj and follows the succession to the Raj. It is further alleged by the Defendant, though it has not been proved, that the Raja in the exercise of his sovereign rights, on the 30th of June 1900, for reasons of state, cancelled the appointment of the Plaintiff as Bara Thakur.

The Subordinate Judge has dismissed the suit, holding in effect that it is not competent for him to go into the question of the rights of succession in the Hill Tipperah Raj. The Plaintiff has appealed. It is not disputed by the Defendant that the scheduled property by reason of its being situated within British Territory is subject to its Territorial Law affecting the same. But his contention is that the Courts in British India connot go into the question of the right of succession to the Raj. Although the prayer of the plaint is as I have stated, the real object of the suit is to set aside the appointment by the present Raja, dated the 8th of February 1899, of the Defendant as his Jubraj. It is difficult to see how such a question can be dealt with by the Subordinate Judge at Alipur or by any Court in British India. The appointment of the Defendant was an Act of State by a Sovereign Prince, and when it is once established in this suit that this appointment has been made, it is difficult to see how the lower Court could have gone into the question of the validity of that appointment, and, least of all, in the absence of the Raja who is not a party to the suit, and who is most interested in maintaining the validity of the appointment of his son, the Defendant, as Jubraj. If he had been made a party to the suit he would presumably have demurred to the jurisdiction. In our opinion the Court at Alipur had no jurisdiction to decide who is the Jubraj of the Foreign State of Hill Tipperah. It has not been disputed that Hill Tipperah is a sovereign State, in that it governs itself without dependence on any foreign power. The right of the Raja to appoint the Defendant has been recognized by the *sanad* of the Viceroy and Governor General of India, dated the 21st of June 1904, in which it was declared that the Chief of the Hill Tipperah State for the time being might, from time to time, and at any time, nominate and constitute any male member of the family descended through males from him or any male ancestor of his, to be his Jubraj or successor to the chiefship. No doubt in several cases and reference may be made

especially to the case of *Neel Kisto Deb Burmono* v *Beer Chunder Thakoor* (1) the parties interested did, at the instance of the Government of India, leave it to the British Courts to decide from time to time the question of the right of succession to this Raj. But in all these cases the parties interested submitted to the jurisdiction of the Court, and the question of jurisdiction was apparently never raised. In the case of *Neel Kisto Deb Burmono* v. *Beer Chunder Thakoor* (1), their lordships of the Judicial Committee, say this (page 534-535): "The Rajah of Tipperah though in respect to these lands subject to the laws and Courts of British India, is in fact an independent prince with a considerable territory known as the Tipperah Hills, and as the title to the zemindari and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the *musnud* or throne of the independent principality. The Respondent, Beer Chunder Thakur, has been acknowledged by the British Government as *de facto* sovereign of Tipperah, but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the throne, and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to lands within the jurisdiction of the Indian Courts." And later on at page 543 they say this: "This contest is in truth a contest as to the title to reign; a matter, rather of state policy than one proper for judicial decision."

That case is no authority for the proposition that if the question of jurisdiction is raised, the Courts in British India have any right to decide the question as to who is entitled to succeed to the Raja of a foreign sovereign State. In the case of *Beer Chunder Manikkya* v. *Raj Coomar Nobodeep Chunder Deb Burmono* (2), the Judges say, "We further observe that for our Courts to entertain the Plaintiff's suit and declare him Jubraj, would, if operative at all, have the effect of annulling the Maharaja's appointment of his own son as Jubraj; but this appointment was an act of sovereignty performed by the Maharaja in his own territory, and, as such, it clearly cannot be questioned or set aside by the Courts of British India Under the circumstances we do not think that this claim could be entertained by our Courts."

As has already been pointed out, the real object of this suit is to set aside the appointment by the present Raja of the Defendant, his son, as Jubraj and successor, and the question here is practically the same as that which was dealt with in the case last cited. The passage quoted applies to the present case and we adopt it.

For these reasons the appeal must fail.

Apart however from this, there are other difficulties in the path of the Appellant. It is contended for the Respondent that no such declaration as is asked for can properly be made under sec. 42 of the Specific Relief Act. The Plaintiff has no present interest; he may never have any interest in the Raj or the property. Even assuming the appointment of the Defendant as Jubraj to

(1) 12 M. I. A. 523 (1869).

(2) I. L. R. 9 Cal 535 (1883).

SHAMARENDRA CHANDRA DEB BARMAN v. BIRENDRA KISHORE DEB BARMAN.

be invalid, the Plaintiff's interest in the Raj and in the scheduled property is contingent upon his surviving the present Raja: and, it has not been seriously pressed that he is entitled to the affirmative portion of the declaration sought. But it is contended that he is entitled to the negative portion, namely, that the Defendant has no right of succession to the scheduled property. If the view expressed above that the Court has no jurisdiction to go into the question of the succession to the Raj be sound, it is scarcely necessary to discuss this point. In our opinion a person cannot sue for a declaration of his right unless he has an existing right, and a mere contingent right which may never ripen into an actual existing right is not sufficient to ground an action for such a declaration. As regards that part of the declaration that, "the Defendant has no right of succession thereto," the Plaintiff's case is that the Defendant is illegitimate, and so could not be properly appointed Jubraj. We do not think that a declaration, dependent upon such an issue ought to be now made at the instance of the Plaintiff who, should he die during the life of the present Raja, could gain no advantage, even if the issue were decided in his favour: and, in the exercise of the judicial discretion which is vested in the Court under the section, we should not be disposed to make any such declaration: nor do we think that such a declaration can properly be made in the absence of the Raja, who is deeply interested in the question. But this question really becomes immaterial in view of the opinion expressed above upon the question of jurisdiction.

The appeal is dismissed with costs.

RAMPINI, J.—I agree.

BRETT, J.—I agree.

MITRA, J.—I agree with the learned Chief Justice.

DOSS, J.—The points in controversy between the parties are chiefly questions of law of unusual importance, and somewhat difficult to solve, but the facts which raise them are few and undisputed, and they lie in a narrow compass.

Chakla Roshanabad lying on the eastern border of Eastern Bengal and comprising an area of 589 square miles is held by the Raja of Hill Tipperah as an ordinary zemindari under British Government, paying a certain amount of revenue fixed at the time of the Permanent Settlement of Bengal. (See Aitchison's Treaties, Ed. 1876, Vol I, p. 108; Hunter's Statistical Account, Vol. VII, p. 460). The Raja also owns a residental house in the suburbs of Calcutta.

The Raj family of Hill Tipperah is governed by Hindu law, except in so far as that law, as regards inheritance, is modified by the *kulachar* or family custom, under which the reigning Raja nominates and appoints from among the legitimate members of his family his two next successors, the first being styled Jubraj, and the second Bara Thakur.

In accordance with this custom Maharaja Bir Chandra Deb Burman in the year 1870 appointed his eldest son Radha Kishore Deb Burman as Jubraj and in the year 1878 his second son, the Plaintiff, as Bara Thakur.

On the death of Maharaja Bir Chundra Deb Burman, Radha Kishore Deb Burman, the Jubraj, became the Raja, and he on the 8th February 1899, under

Rubakari of that date, appointed the Defendant Birendra Kishore Deb Burman as Jubraj Thereupon the present Plaintiff submitted a memorial to the Government of India, claiming that the nomination of Defendant as Jubraj was illegal, and that he himself should be promoted to that rank. This memorial was rejected by Government and its order was communicated to the present Raja on the 8th December 1902.

On the 9th March 1904, Plaintiff brought the present suit, alleging that the Defendant is not the legitimate son of the Raja and submitting that the appointment of the Defendant as Jubraj (a fact which he denied) if made, is invalid, and asked for a declaration that according to the *kulachar* or custom of this Raj family, and by virtue of his appointment as Bara Thakur, Plaintiff is entitled to the succession to the scheduled properties (these being properties situated in British India and referred to above) from and after the demise of the Raja, and that the Defendant has no right of succession thereto.

On the 21st of June 1904 (*i.e.*, more than three months after the institution of this suit), the Government of India granted a *sanad* to the present Raja with the object, as therein stated, of removing all doubts as to the rule of succession to the chiefship of the State of Hill Tipperah, and the ownership of the zemindaries and the other property in British India, appertaining thereto, and declaring, *inter alia.* "That the Chief of the said State for the time being may, from time to time, and any time, nominate and constitute, any male member of the said family, descended through males from him, or any male ancestor of his, to be his Jubraj or successor to the said chiefship."

Upon receipt of this *sanad*, the Raja, on the 22nd July 1904, confirmed the appointment of Defendant as Jubraj, *i e.*, as his successor. The Court below has held that as the scheduled properties, even if situated in British India, form the public property of a foreign sovereign, the Courts in British India have no jurisdiction to entertain this suit. It has further held that the suit cannot proceed in the absence of the Raja, and that the Plaintiff is not entitled to a declaration of the nature he has asked for. It has accordingly dismissed the present suit without trying the other issues raised in the case.

From this judgment the Plaintiff has appealed

It has not been disputed by the learned vakil for the Respondent that the Municipal Courts have jurisdiction to entertain a suit in regard to land situated in British India, even if it be owned by a foreign sovereign, as the property of the State of which he is the sovereign. The law on this point is too firmly settled to be questioned now. See *The Charkieh* (3); Hall's International Law, 5th Ed , p 171 and the authorities cited therein, Bar's Private International Law translated by Gillespie (2nd Ed.), pp. 910 and 1113

But it has been contended that, even supposing that the Municipal Courts have jurisdiction in a case of this kind, yet when the question is one of succession to the property on the demise of the owner, such owner being a foreign sover-

(3) L. R 4 Ad and Ecc. 59 at p. 97 (1873).

eign, the law which the Courts must administer and give effect to, in order to determine who the next successor is, is the foreign law (the law regulating succession to the chiefship of the foreign state), *qua* foreign law. I confess I feel some difficulty in following this argument. When the question relates to title to immoveable property (and succession is only a mode of acquiring title) the only law which the Municipal Courts can administer is the *lex situs*, and in all the decided cases relating to succession to Chakla Roshanabad ever since 1809, the Courts in British India (if I have been able to rightly apprehend the judgment of the Privy Council in *Neel Kisto Deb Burman* v. *Beer Chandra Thakoor* (1), have invariably administered the personal law of the Hindus modified by *kulachar* or custom of the Raj family of Hill Tipperah, just as in the case of other impartible zemindaries situated in British India (similarly governed in matters of succession by local or family custom), not as a law of the foreign State but as a branch of the laws in British India, albeit that custom derived its force and validity as such law by virtue of judicial authentication. But even assuming that this contention is correct, it does not help the Respondent in this case, because it does not follow from it that in a case of disputed succession, the Municipal Courts are not to administer the law and determine who has the preferential right to succeed, according to that law, but merely to register the decree, so to speak, of the foreign sovereign, however opposed to such law in any individual case the decree might be; and indeed nothing short of this, as it seems to me, would meet the exigencies of this contention. The appointment of the Defendant as Jubraj by the reigning Raja cannot be placed on a higher footing than a decree by him to that effect, for if it be regarded as an Act of State exercised by the Raja, its operation cannot be extended beyond the limits of Hill Tipperah.

It has next been contended that by reason of the rejection by Government of the memorial of the Plaintiff and the grant of the *sanad* after suit, prescribing the mode of future succession to the chiefship of the State and the ownership of the zemindaries and the other property in British India, the Courts in British India are precluded from adjudicating the validity or otherwise of the appointment of Defendant as Jubraj or rather as the next successor to the ownership of the zemindaries or other property in British India, as well in a properly framed suit asking for appropriate consequential relief to which the Plaintiff might otherwise be legitimately entitled, *e.g.*, in a suit in ejectment, as in a suit for a mere declaratory decree.

To my mind, this contention raises a serious question of constitutional law, namely, whether the State, in the exercise of its executive functions, can settle a question of disputed succession to land forming part of its territory, and thereby oust the Municipal Courts of their jurisdiction to decide it, without encroaching upon its legislative functions, or derogating from its legislative powers.

But as the determination of this question is not absolutely essential to the decision of this case, I abstain from

(1) 12 M. I. A. 523 (1869).

discussing, or expressing any opinion on it. I rest my judgment in the present case on the sole ground that, regard being had to its nature, Plaintiff is not entitled to the declaration asked for

The declaration asked for in this case is divisible into two parts. In the first part, the Plaintiff asks for an affirmative declaration that he is entitled to the succession to the scheduled properties after the death of the Raja. In other words he asks for a declaration, not of an existing right but of a *spes successionis*, the chance or possibility of acquiring a right in future. Courts will not grant such a declaration. See *Kathama Natchiar* v *Dorasinga Tever* (4), *Musst. Pranputtse Koer* v. *Lalla Fatteh Bahadur* (5).

In the second part, the Plaintiff asks for a negative declaration that the Defendant has no right of succession to the scheduled properties, and that by reason of his illegitimacy. I am of opinion that besides the reason stated above, there are grave objections to the Court granting such a declaration either.

In this view it is unnecessary to discuss the other point taken on behalf of the Respondent that the Raja of Hill Tipperah is at any rate a proper, if not a necessary, party to the present suit and that it ought to fail on that account.

For the foregoing reasons I am of opinion that the appeal should be dismissed.

N. G. *Appeal dismissed.*

(4) L. R. 2 I. A. 169 (1875).

(5) 8 Sevestre 277 ; 2 Hay 608 (1863)

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 35 OF 1906.

CASPERSZ, J.
COXE, J.
1908.
Heard, 11, 12 and 13, May.
Judgment, 13, May.

KRISHNENDRA NATH SARKAR and others, Defendants, Appellants,
v.
DEBENDRA NATH SARKAR, Plaintiff, Respondent.

Family arrangement—Consideration—Hindu Law—Agreement amongst co-parceners not to partition, to what extent binding.

Persons jointly entitled to lands may, as amongst themselves, come to an agreement as to the manner in which they will mutually enjoy the property, and an agreement between the members of a Hindu family not to come to partition may be binding on the immediate parties thereto.

RAM DHONE GHOSE *v.* ANUND CHUNDER GHOSE (4) *followed.*

SRI MOHAN THAKUR *v.* W. O. MACGREGOR (2) *distinguished.*

A family arrangement may be such as the Court will uphold although there are no rights in dispute, and if sufficient motive for the arrangement is proved, the Court will not consider the quantum *of the consideration too nicely.*

WILLIAMS *v.* WILLIAMS (6) *followed.*

Where in return for binding themselves not to sue for partition, the parties obtained a right to take advances from family funds in excess of what might be due to them at the time, and also obtained a right to pre-empt any share which the

(2) I. L. R. 28 Cal. 769 (1901).

(4) 2 Hyde 97 (1864).

(6) L R Ch. App. Vol. II, 294 (1866-7).

other members of the family might wish to sell,

Held—*That the arrangement was for consideration.*

This was an appeal preferred on the 7th of February 1906, against the decree of Babu Chandra Nath Ghose, Subordinate Judge of Zillah Pubna and Bogra, dated the 6th September 1905.

The material facts will appear from the judgment of Caspersz, J.

Babus Harendra Narayan Mitter and *Preo Sankar Mozumdar* for the Appellants.

Babus Tara Kishore Chowdhury and *Debendra Nath Bagchi* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

CASPERSZ, J.—This is an appeal in a suit for partition. The Plaintiff is the brother's son of the Defendants. The property was derived from Biswa Nath Sarkar, grandfather of the Plaintiff and father of the Defendants. Biswa Nath executed three Wills. Plaintiff's father Brojendra Nath Sirkar executed one Will. The parties to this litigation executed an *ekrarnamah* on the 26th Falgoon 1301, B. S. This appeal is primarily concerned with the legal effect of these several documents.

The Subordinate Judge has given the Plaintiff a decree for partition; and in his decision, on the 11th and 14th issues framed in the suit giving rise to the present appeal, he has referred to his judgment in another suit, between the parties, in which the uncles sued their nephew to recover Rs. 2,225 being one-fourth share, after certain deductions, on account of certain expenses incurred by the uncles. The two suits were tried together, and two judgments were passed on one and the same day, *viz*, the 6th September 1905. The suit of the uncles has been decreed in part, and there is no appeal from that decree.

The contentions raised on behalf of the uncles, Defendants, in the present appeal are these: *first*, that having regard to the three Wills of Biswa Nath Sirkar, as also to the Will of Brojendra Nath Sirkar, the Plaintiff (nephew of the Defendants) cannot maintain an action for partition, and that, at any rate, no action can lie in view of the *ekrarnamah*, dated 26th Falgoon 1301, B. S.; *secondly*, that the expenses incurred by the Defendants in erecting certain *ijmali*, houses, and repairing certain *ijmali* properties, and effecting certain improvements, should be borne by the Plaintiff to the extent of his share, and that there should be a direction to the Commissioner to take into account such amounts and improvements, and, *thirdly*, that certain *shivatter* lands ought not to be brought within the scope of the partition, inasmuch as the second Defendant Jogendra held them, as a *jotedar* in his own right.

With regard to the first contention, it is necessary to construe the three Wills of Biswa Nath Sirkar; but we need not burden this judgment with any detailed examination of the various clauses, because the whole matter came before this Court and subsequently went up to their Lordships of the Judicial Committee in the case of *Raikishori Dassi* v. *Debendra Nath Sirkar* (1). At page 414

(1) I. L. R. 15 Cal. 409 (1887).

of the report, the judgment of this Court, so far as it relates to the matter now in controversy, was set forth. The judgment of Tottenham and Field, JJ., also appears on pages 39 to 46 of the paper-book. In the opinion of the learned Judges, the provision in the Will, that the descendants of the testator "shall not be able to break down the common cutchery and bring the same into their own possession," is a restriction upon partition the right to which, according to the law administered in these provinces, must be regarded as an essential element of ownership, and that, therefore "that restriction was void," and so the provisions in the Will to that extent could not be given effect to. This decision was upheld on appeal by the Judicial Committee. The same remarks will have application to the Will of the Plaintiff's father; that Will, also, cannot stand in the way of a partition of the joint family property. We have no hesitation in deciding the fifth issue in favour of the Plaintiff in the way that the Subordinate Judge has decided it.

But the real difficulty in the way of a partition is the *ekrarnamah*, dated 26th Falgun 1301.

The Subordinate Judge has held that the *ekrarnamah* does not operate to preclude the Plaintiff from suing for partition; he relies on the case of *Sri Mohan Thakur* v. *W. O. MacGregor* (2), in which the learned Judges followed the earlier case of *Radhanath Mukerjee* v. *Tarrucknath Mukerjee* (3), and he also relied on the provisions of sec. 28 of the Indian Contract Act. In the opinion of the Subordinate Judge, there was not sufficient consideration for the parties to enter into the agreement embodied in the *ekrarnamah* which prescribes certain rules for the management of the joint estate.

The first clause of the agreement recites that, "in accordance with the Wills of the late Biswa Nath Sirkar and the late Brojendra Nath Sirkar, respectively, it is our duty to maintain the joint character of our estate and to keep up the *deb sheba* and the *athiti sheba* established and set up by them, and the rites and ceremonies observed by them as well as other rights and ceremonies. According to the Wills executed by them, we have so long been entitled to all the properties left by them by living in joint mess. Of late, it being inconvenient to continue joint in mess, on account of domestic quarrels, we make the following rules with respect to the enjoyment of the profits of the aforesaid joint estate."

The 9th clause provides that "the realisation of rents, &c., from the tenants of joint estate, will be made jointly under the supervision of the manager of the joint estate. None of us shall be able to realise the rents, etc., rately."

The 11th clause says that—"If any one of the co-sharers has to perform *annaprasan* and marriage, etc., ceremonies and other obligations that cannot be further deferred, he would be able to take an advance, from the joint funds (till) a sum not exceeding Rs. 200, on account of *annaprasan*, etc., ceremonies and a sum not exceeding Rs. 1,000 on ccount of marriage, etc., ceremonies.

(2) I. L. R. 28 Cal. 769 (1901).
(3) 3 C. W. N 126 (1875).

KRISHNENDRA NATH SARKAR *v.* DEBENDRA NATH SARKAR.

Afterwards, on adjustment of accounts at the close of the year, he shall get the residue of his profits after deducting the said amount. If, for any reason, it be not paid up in full within a year, it will have to be taken gradually. But that amount is not to be deducted from the monthly allowance of Rs. 75."

The 15th clause goes on to say that—"we shall not be able to get the joint immoveable properties partitioned in several shares except enjoying the profits of the said properties in the manner mentioned above. And if any one of us, co-sharers, should let his share in the immoveable properties in *putni* settlement, or sell it, or make any other kind of permanent settlement to any third party except to any one of us, co-sharers, who may be willing to take it on payment of the said amount of consideration as the general public would offer to pay."

The 16th clause binds the parties to these rules, and provides that they will not be able to alter them except with the consent of all their successors.

The learned vakil for the Defendants has called our attention to various authorities beginning with the case of *Ram Dhone Ghose* v. *Anund Chunder* (4). The general effect of the reported cases is given at pages 657 and 658 of the 7th edition of Mr. Mayne's Work on Hindu Law and Usage, (para. 486). The learned commentator there states—that "an agreement between the members of a Hindu family not to come to a partition might be binding upon themselves."

The learned vakil for the Plaintiff Respondent has relied on the case of *Sri Mohan* v. *MacGregor* (2).

The short question is whether we can follow the authority of *Ram Dhone Ghose* v. *Anund Chunder Ghose* (4).

After the best consideration we have been able to give to this matter, we think that we ought to follow *Ram Dhone Ghose* v. *Anund Chunder Ghose* (4). There, the judgment of Levinge, J., was affirmed on appeal by Norman, C. J. The learned Chief Justice observes, at page 102 of the report, that the agreement then in question, which we may observe was an agreement on the same lines as the one between the parties to the present litigation, "might be treated as an agreement binding the parties to it as to the manner in which they are mutually to enjoy the joint property and that persons jointly entitled to lands, may, as amongst themselves, come to an agreement as to the manner in which they will mutually enjoy the property, and that such an agreement will be binding upon all the immediate parties thereto. To that extent, the agreement may operate, even if it contemplate a further object to which the Court would not give effect, because the good part can be separated from the bad." In none of the subsequent cases to which we have been referred, has this decision been either doubted or reversed.

In *Rajender Dutt* v. *Sham Chund Mitter* (5), Mr Justice Wilson expressly stated (p. 117) that "in *Ram Dhone Ghose* v. *Anund Chunder Ghose* (4), it was held that a contract similar to

(4) 2 Hyde 97 (1864).

(2) I. L. R. 28 Cal. 769 (1901).
(4) 2 Hyde 97 (1864).
(5) I. L. R. 6 Cal. 106 (1880)

KRISHNENDRA NATH SARKAR *v.* DEBENDRA NATH SARKAR.

the present was binding on the parties to it.

No doubt, in *Sri Mohan Thakur* v. *W. O. MacGregor* (2), the Judges discussed a hypothetical case (p. 786) ,and observed: "suppose there was a covenant between the parties that they should remain joint for the full term of seven years for which the manager was appointed, is it not competent to any one of the parties to withdraw from that covenant and to claim a portion? Though it may be said that it is competent to parties to enter into an agreement not to divide their joint properties for a limited period of time and not in perpetuity yet such an agreement must be for sufficient consideration. See *Radhanath Mukerjee* v. *Tarucknath Mukerjee* (3)." Then the Judges went on to find that there was no consideration in that case for the agreement, though there was a good consideration for the appointment of MacGregor as manager.

It will be observed that, the earlier cases, and specially the case of *Ram Dhone Ghose* v. *Anund Chunder Ghose* (4), were not considered in *Sri Mohan Thakur* v. *MacGregor* (2), and we think that the agreement we are now discussing is altogether different from the one there considered. The parties to that litigation appointed a certain gentleman to be the manager of their properties for seven years, and so far as we can see from their mutual stipulations, that appointment did not constitute any consideration for the agreement arrived at. On the other hand, the *ekrarnamah*, the principle clauses of which we have quoted, does appear to us to be one with consideration on both sides; and in another view of the matter, it constitutes what is known to the English law as a family arrangement in which the *quantum* of consideration should not be too nicely scrutinised.

In the 11th clause of the agreement, there is a provision for advances of money to any one of the co-sharers, and in the 15th clause there is a provision for pre-emption; and the general effect of the *ekrarnamah* appears to us to remove it from the category of merely voluntary agreements. The parties were quarrelling, and made an arrangement to their mutual benefit as it seemed to them, and an arrangement of that sort ought not to be lightly disregarded.

In *Williams* v. *Williams* (6), which is cited in the notes to the leading-case of *Stapilton* v. *Stapilton* (7) in the judgment of Lord Chelmsford, L. C., we find the following passage:—"If, therefore, there had been no consideration for the Appellant's promise to share the freehold property with his brother, I should have been disposed to hold that he could not be bound by it. But it appears to me that there is quite sufficient consideration to prevent its being a mere voluntary agreement and that the Court will not be disposed to scan with much nicety the amount of the consideration (p. 300). The judgment of Turner, L. J., (p. 304) carries the matter even further: "It was strongly argued for the Appellant that this case does not fall within the range of those authorities, that those

(2) I. L. R. 28 Cal. 769 (1901).
(3) 3 C. W. N. 126 (1875).
(4) 2 Hyde 97 (1864).

(6) L. R. Ch. App. Vol. II, 294 (1866-7).
(7) 1 W. & T. Leading Cas. 223 (1739).

KRISHNENDRA NATH SARKAR DEBENDRA NATH SARKAR.

cases extend no further than, to arrangements for the settlement of doubtful or disputed rights, but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much further than is contended for on the part of the Appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates, upon an arrangement between the father and the eldest son on his attaining twenty one may well be considered as a branch of their cases and certainly this Court does not in such cases inquire into the *quantum* of consideration." *Williams* v. *Williams* (6) is an authority entitled to the greatest respect and regard being had to the unqualified rule laid down in *Ramdhone Ghose* v. *Anund Chunder Ghose* (4), we think that the *ekrarnamah* embodying, as it did, ample consideration for the agreement arrived at, does bar the Plaintiff's suit for partition.

The learned vakil for the Plaintiff has cited sec. 23 of the Contract Act instead of sec. 28 upon which the Subordinate Judge placed reliance. Sec. 23 is to the effect that the consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law.

Can it be said that an agreement not to partition during the life-time of the parties to it, or until they mutually agree to set aside that agreement, is contrary to the provisions of Hindu Law? We think not. No doubt, on the cases cited, if the agreement had been one preventing the partition in perpetuity, it would have infringed the inherent right of every co-parcener to apply for a partition of the joint state; but here there was no such perpetual arrangement and, apart from any question whether the restriction would bind other persons, there is ample authority for holding that it does bind the actual parties who arrived at that arrangement in their own interests There is, therefore, no force in the contention of the learned vakil based on sec. 23 of the Contract Act.

In these views, it becomes unnecessary to consider the other questions raised in this appeal. The appeal must be allowed and the Plaintiff's suit dismissed with costs in both Courts.

COXE, J.—I agree that the *ekrarnamah* of the 26th Falgun 1301 precludes the Plaintiff from suing for partition in this case.

The Plaintiff and the Defendants in this case entered into a formal contract that they would enjoy their joint property in a certain way and would not sue for partition. If the Plaintiff desires the Court to hold that this contract is not binding upon him, it is incumbent, I think, on him to show that it comes under some specific provisions of the Contract Act invalidating contracts. It is attacked under the Contract Act on two grounds; firstly, on the ground that it defeats the provision of Hindu Law, and, secondly, on the ground that it was made without consideration.

(4) 2 Hyde 97 (1864).
(6) L. R. Ch. App. Vol. II, 294 (1866-7).

KRISHNENDRA NATH SARKAR v. DEBENDRA NATH SARKAR.

As to the first ground, it is said that it is an inherent right of every co-parcener under Hindu law to claim a separation of his share and that that right is defeated by a contract of this nature. In the words of Phear, J., in *Radhanath Mukerjee* v. *Tarucknath Mukerjee* (3) "it is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of property which they possess; for instance, in this particular case, to say that the joint property shall remain the joint property of the joint family in perpetuity but shall not possess the incident which the law of the country attaches to property in such condition namely that every independent parcener is entitled at any time to have his share divided off from the rest."

Now, if the parties to this case were purchasers from the parties to the contract or their heirs, no doubt under the provisions of sec. 11 of the Transfer of Property Act, 1882 and sec. 125 of the Indian Succession Act, 1865, the contract would not be binding upon them. But when the parties before the Court are themselves the contracting parties, I do not see how any provision of Hindu law is defeated by the contract. The parties can surely bind themselves personally not to sue for partition. To quote again from Phear, J., "no doubt any one member of the family, and therefore all might for sufficient considerations bind themselves to forego their rights for a specified time and definite purposes by a contract which could be enforced against them personally." If then such a contract for a specified time does not offend against Hindu law, I do not see how a contract under which the contractor bound himself personally not to sue for partition at any time could be said to defeat the provision of that law.

(3) 3 C. W. N. 126 (1875).

The second ground on which the contract is attacked is the want of consideration. As to that, it is laid down in *Williams* v. *Williams* (6) which, my learned brother has quoted "that a family arrangement may be such as the Court will uphold although there are no rights in dispute; and if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration." In such cases the Court will not weigh too nicely the amount of consideration for the contract. In this case, I consider that there is a certain amount of consideration. The Plaintiff, in return for binding himself not to sue for partition, obtained a right to advances from family funds in excess of what may have been due to him at the time; and he also obtained a right to pre-empt any share which the other members of the family might wish to sell. This consideration, however small, is sufficient, I think, to validate the contract.

I agree that the appeal should be decreed and the Plaintiff's suit dismissed with costs.

N. G. *Appeal allowed.*

(6) L. R. Ch. App. Vol. II, 294 (1866-7).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1870 OF 1906.

MACLEAN, C. J. Doss, J. 1908. Heard, 22 and 23, April. Judgment, 23, April.

UPENDRA NATH SAHU and ors., Plaintiffs, Appellants, *v.* HARI DAS MUKHERJEE and anr., Defendants, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 310A—Decree attached by two persons—Sale by one attaching creditor—Deposit to set aside sale—Title to deposit.

Defendant No. 1 obtained two decrees against Defendant No. 2; Plaintiffs also obtained a decree against Defendant No. 2 who had obtained a decree against a third person; Defendant No. 1 attached that decree and was substituted for Defendant No. 2 on the 16th July 1904; Plaintiffs also attached that decree and were substituted in place of Defendant No. 2 on the 18th November 1904. Then at the instance of Defendant No. 1 (in execution of the attached decree) properties were sold and the sale was set aside by a deposit under sec. 310A, C. P. C.,

Held—*That upon the terms of sec. 310A, C. P. C, both Plantiffs and Defendant No. 1 were entitled to the money deposted.*

This was an appeal preferred on the 12th of November 1906, against the decree of Babu Annoda Prosad Bagchi, Additional Subordinate Judge, 2nd Court of Zillah 24-Pergunnahs, dated the 26th of July 1906, affirming the decree of Babu Punkoja Kumar Chatterjee, Munsif, 3rd Court at Alipur, dated the 28th of February 1906.

The facts of the case appear from the following portion of the judgment of the lower Appellate Court :—

The Defendant No. 1 got a decree against Defendant No. 2 in the Court of the Munsif of Ranaghat.

In execution of that decree he got attached a decree for money obtained by Defendant No. 2 against third parties in the Court of the Subordinate Judge, second Court, Alipur.

The attachment was effected, under sec. 273, Civil Procedure Code.

The Defendant No. 1 applied for execution of the attached decree in the Court of the second Subordinate Judge of Alipur. He was allowed to do so, and his name was substituted for that of the Defendant No. 2 on 16th July 1904.

This execution case was numbered as No. 128 of 1904. Attachment of immoveable properties of judgment-debtors was effected in August 1904, and sale was fixed for 12th September 1904.

After repeated adjournments, sale was held on 28th March 1905, and this sale was set aside under sec. 310A, the judgment-debtors depositing the decree debt, with compensation, on 25th April 1905.

The Plaintiff secured a decree under sec. 90 of the Transfer of Property Act against the Defendant No. 2 in the Court of the second Subordinate Judge of Alipur and in execution thereof, he also applied for the attachment of the same decree obtained by Defendant No. 2. He applied on 18th November 1904. And he appears to have been allowed to execute this decree. His name was also substituted in place of Defendant No. 2, in the execution of the decree obtained by Defendant No. 2 (No. 196 of 1904).

After the judgment-debtors of Defendant No. 2 deposited the money due from them under sec. 310A, the Plaintiff

THE Calcutta Weekly Notes.

Vol. XII.] MONDAY, JULY 6, 1908. [No. 34

Contents.

NOTES

The following constitution of Benches and distribution of business amongst them have taken effect from 1st of July last :—

PRESIDENCY GROUP AND PRIVY COUNCIL DEPARTMENT.—Mr. Justice Coxe and Mr. Justice Doss.

RAJSHAHYE GROUP.—Mr. Justice Stephen and Mr. Justice Holmwood.

PATNA GROUP.—Mr. Justice Mitra and Mr. Justice Bell.

BURDWAN GROUP.—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

CRIMINAL BUSINESS.—Mr. Justice Brett and Mr. Justice Ryves.

CRIMINAL SESSIONS —The Acting Chief Justice.

ORIGINAL SIDE.—As before.

THE RECENT APPOINTMENT OF MR. ABDUL RAHIM, M.A., Bar at-Law, as a Judge of the Madras High Court has given great public satisfaction. Mr. Rahim is a distinguished graduate of the Calcutta University. He is one of the few men at the Bar who has not put forward all his talent and energy for attaining professional prosperity but has maintained the habit of a scholar and has made the study of Arabic and the Mahomedan law from its fountain heads as his chief leisure hour occupation. From the early part of his career at the Bar, he has enjoyed a good practice before the Criminal and Revisional Bench of the High Court. As a Presidency Magistrate, he won the golden opinion of the profession and the public as being an unbiassed and upright judge, and it was but natural that his popularity with the Police suffered in consequence in no inconsiderable degree. In private life he is always very simple and unassuming. But on the Magisterial Bench he was invariably independent and always keen on doing justice. He is now in his prime of life and we can safely predict that he will prove an industrious, able and in every way a very successful Judge at Madras. We only regret that what has been a gain to Madras is a loss to us.

A DIVISIONAL BENCH OF THE HIGH COURT OF BOMBAY (Chandavarkar and Knight, JJ.) in an elaborate judgment in the case of *In re Lachmidas Lalji*, reported at p. 184 of the April number of I. L R. 32 Bom., dissents from the Calcutta Full Bench case of *Begu Singh* v. *Emperor*, I. L. R. 34 Cal. 551 : s c. 11 C. W. N. 568. The question before the Bombay High Court was whether the District Judge had jurisdiction to pass an order under sec. 476, Cr. P. C, when the Subordinate Judge in a proceeding before whom the alleged offence was committed refused to sanction prosecution of the alleged offender. Their Lordships Chandavarkar and Knight, JJ., held that the District Judge had jurisdiction to pass such an order. Their Lordships disagreed with the view of the Calcutta Full Bench that the word "Court" in sec. 476, Cr. P. C, has a restricted meaning and held that it has the same meaning which the word "Court" has in sec. 195, Cr. P. C. At p. 189 of the report Chandavarkar, J., observes "sec. 476, cls. 1 and 2, therefore, define the form, scope and nature of the complaint mentioned in cls. (*b*) and (*c*) of sec. 195. And the two clauses of the former section must be read with the two clauses of the latter, when any question about a prosecution started upon the complaint of a Court arises."

IF THEY MUST BE SO READ, IT FOLLOWS THAT THE power under sec. 476 may be exercised either by the Judge, who tried the case, at the trial of which the alleged offence was committed, or by the Judge to whom he is subordinate. And "if having regard to the plain language of cls. (*b*) and (*c*) of sec. 195, the latter can exercise the power under sec. 476 though the trial of the case was not before him, why should the Legislature be held to have intended that a successor of the former Judge on the same complaint

shall not similarly exercise the same power." Sec. 476, according to this view, merely prescribes the mode in which a Court is to prefer a complaint, as the ordinary mode of preferring a complaint may not be convenient to a Court of Justice. The decision of the Calcutta Full Bench, it is said, did not fully consider the relation between secs. 195 and 476, Cr. P. C. Referring to this, Chandavarkar, J., pointed out that there is a close relation between the two sections "Cls. (*b*) and (*c*) of sec. 195 empower a Court to initiate a prosecution of its own motion by means of its own complaint. How that complaint may be preferred is not stated in that section, but it is stated in sec. 476, cl. 1, because cl. (2) of this section says that the proceedings adopted by a Court under cl. 1 shall be treated as being in the nature of a complaint.

AS TO THE REASONING OF THE CALCUTTA HIGH Court that the powers exercisable under sec. 476 are summary and must be exercised at or immediately after the close of the trial of a case, Mr. Justice Chandavarkar observes "with great respect we fail to find anything in the language of sec. 476 which makes it incumbent upon a Court acting under it to exercise the power within any period or at any particular time. Such a construction necessitates the importing into the section of words which are not there; and for which there is no necessary implication from the language used by the Legislature Another ground of the Full Bench is that "if months after trial" of a case before a Court that Court may act under sec. 476 it is difficult to appreciate the necessity of sec. 195. "The necessity," according to the Bombay High Court, "is this. An offence may be committed in the course of a trial before a judge, and no one may know anything about it. It may be discovered long after the trial has ended, the judge or his successor may come to know of it in the course of some other trial or in some other way. No private party may think it worth his while then to apply for a sanction to prosecute; and yet in the interests of public justice it may become necessary that there should be a prosecution. In such cases sec. 476, as distinguished from sec. 195, becomes useful."

WE NEED NOT MAKE FURTHER QUOTATIONS FROM the judgment of their Lordships of the Bombay High Court. Suffice it to say that the judgment is a powerful criticism of the reasonings on which the decision in the Full Bench case of *Begu Singh* v. *The Emperor* is based and is in agreement with the views of the learned Judges of the Calcutta High Court (Rampini and Gupta, JJ.), who made the reference to the Full Bench.

IT IS NOTICEABLE, HOWEVER, THAT THIS CRITICISM is based almost wholly upon the language of certain sections of the Criminal Procedure Code. There can be no doubt that ordinarily the plain meaning of the provisions of the Code should be given effect to, irrespective of all considerations as to whether such a course is likely to further the ends of justice or otherwise. Judging however from the difference of opinion that has arisen as to the interpretation of sec. 476 of the Code of Criminal Procedure as evidenced by the two cases above cited as also the recent Madras case, *In re Pahimatullah Saheb*, 17 M. L. J. 584 (where the majority seems to approve of the Calcutta decision), it is clear that the "plain meaning" of that section is not easily discernible, and under the cirumstances it is permissible to consider whether the one or the other view of the section is more in consonance with accepted ideas of fairness and justice.

NOW IT IS TO BE OBSERVED THAT WHEN A COURT OF Justice sets the criminal law in motion against a person under sec. 476, C Cr. P., such person is necessarily precluded from prosecuting any one for instituting a false charge, should the charge turn out to be a groundless one, or seeking his remedy in a civil action. He is thus deprived of a valuable safe-guard against the reckless and unwarrantable institution of criminal prosecutions.

IN SUCH CIRCUMSTANCES, IT DOES NOT SEEM TO BE unreasonable to insist that the power of instituting prosecutions under sec. 476, Code of Criminal Procedure should be restricted to the judge who has tried the case in the course of which the offence appears to have been committed or has been brought to his notice and has thus had an opportunity of satisfying himself by personal observation as to the propriety of instituting proceedings. To take an instance, a successor of the trying judge or the judge sitting in appeal from him is evidently not in a position to order the prosecution for perjury of a witness who may have deposed at the trial unless the whole case is again threshed out before him. In this way the restriction of the power of ordering prosecution under sec. 476 of the Criminal Procedure Code to the trying judge has the effect of reducing to a minimum the chances of the institution of groundless prosecutions for which no one can be called to account in case the prosecution should fail.

THE ABSENCE OF AN APPEAL FROM AN ORDER UNDER sec. 476 points strongly towards the same conclusions. We cannot therefore commit ourselves to the view propounded by the Bombay High Court, that sec. 476 merely "prescribes the mode in which a Court is to prefer a complaint, as the ordinary mode of preferring a complaint may not be convenient to a Court of Justice." It would be more in conso-

nance with the spirit of the law to hold that the section has in view the safe-guarding of the rights of an accused person quite as much as looking into the convenience of judges. We are far from convinced that the relation between sec. 195 and sec. 476, C. Cr. P, was not fully considered by the Calcutta Full Bench. It would rather appear that the otherwise well-reasoned judgment of Chandavarkar, J., does not take sufficiently into account the difference between the two sections. The difference is this: In the case of a proceeding under sec. 195, C. Cr. P., there is the applicant who holds himself out as responsible for starting a criminal prosecution whilst a prosecution, under sec. 476 is the result of a judicial proceeding initiated by the judge himself and for which no one can be held responsible in the end. The decision of the Calcutta Full Bench seems to be based on broad considerations of justice and may be justified on that ground alone.

CRIMINAL CASES OF 1907.

(*Continued from* p. *clxxvii*.)

Security to keep the peace on conviction — [*Offences*]. Sec. 106 clearly requires (i) an *accusation* of certain offences and (ii) a *conviction* of such offences. Hence where there is neither accusation or conviction but a *finding* in the judgment it is difficult to see how such finding by itself can support an order under the section. The finding may be of facts which constitute an offence falling within the section, but, nevertheless, the accused must be *charged with, and convicted of*, such offence before an order can be passed. It is remarkable that most of the Calcutta decisions on the point have overlooked this view. Thus it has been held that on conviction under sec. 143, I. P. C., an order under sec. 106 is justifiable if there is a finding of facts involving a breach of the peace or an evident intention of committing the same (*26 Cal. 576 : 27 Cal. 983 : 5 C. W. N. 250* : and the recent cases of *Bepin* v. *Pranakul*, 11 C. W. N. 176, and *Golam* v. *Sukur*, 11 C. W. N. cciv), though in some cases the true view has been recognized (*1 C. W. N. 186, 187 : 25 Cal. 628 : 3 Shome Cr. 33*). In *Kishore* v. *King-Emperor*, 8 C. W. N. 517, curiously, both views were enunciated at the same time, *viz.*, that a *finding* of *criminal intimidation* without a *conviction* therefor was not sufficient, but that a *finding in other cases* was sufficient. The section, however, does not draw any distinction between criminal intimidation and the other offences mentioned therein, so far as the necessity of an accusation and conviction is concerned. The very recent case of *Raj Narain* v. *Bhagabat*, 35 Cal. 315, does not refer to *findings* as sufficient, but the same Bench held in *Chandra* v. *Emperor*, 7 C. L. J. 172, that a finding of force being employed or that there were armed men present would support an order. In *Bepin* v. *Pranakul*, 11 C. W. N. 176, it was held that where the *evidence* showed an armed assembly and an intention to take forcible possession which might lead to a breach of the peace, the order was right as falling within the words "*assembling armed men*, etc." These words are vague, what offence is thereby indicated? The expression is "*assembling*" not "*assembly* of." The latter would point to the offences under secs. 144, 148, I. P. C. The former seems to point to the offences under sec. 150, I. P. C. But the Courts have decided that a conviction under sec. 144, I. P. C. (*5 C. W. N. 250*) or even under sec. 143, coupled with a *finding* that a number of armed men took forcible possession of a hut, justified the order (*Bepin* v. *Pranakul*, 11 C. W. N. 176). But the Madras High Court has not adopted the Calcutta view: see *26 Mad. 469 : 29 Mad 190, 192*. [*Improper orders*]. Where the order would prevent the exercise of one's legal rights (*Nanda* v. *Emperor*, 11 C. W. N. 1128), or aggression and encroachment by the opposite party (*Nahar* v. *Emperor*, 11 C. W. N. 840), it is bad. In the case of disputed title the other side should also be bound down under sec. 107 (*Bepin* v. *Pranakul*, 11 C. W. N. 176: but cf. *Bibee* v. *Umatul*, 11 C. W. N. 121).

Sec. 106 (3)—[*Order by Appellate Court*]. An order under sec. 106 (3) cannot be made by an Appellate Court unless the trying Magistrate is one of a class specified in cl. (*1*) (*Muthiah* v. *Emperor*, 29 Mad 190, followed in *Paramasiva* v. *Emperor*, 30 Mad. 18, and *Emperor* v. *Momin*, 35 Cal. 434, and, *dubitante*, in *Dorasami* v. *Emperor*, 30 Mad. 182).

Security to keep the peace.—[*General Principles*]. The preventive jurisdiction under sec. 107 must be exercised with caution. If there is a dispute as to a right, and the matter is not quite patent, the Magistrate should ascertain the rights of the parties and the party in the wrong should be bound down: but if their rights are doubtful, both parties should be bound down (*Dindayal* v. *Emperor*, 34 Cal. 935 : *see* also *6 All. 26, 29 : 19 W. R. Cr. 47*). [*Wrongful act*]. The landlord's party should not alone be bound down in a dispute relating to the right of toll and anchorage for use by the opposite party of the foreshore of a river (*34 Cal. 935*). It is unfair to bind down only the tenants while the dispute with their landlord has not been settled and it is not established that the latter was in peaceful possession (*Maigh* v. *Ambica*, 5 C. L. J. 448). An order under sec. 107 may be passed if, on the facts before the Magistrate, one of two parties, who had applied for registration as proprietor, was out of possession and was trying to get possession by unlawful means likely to cause a breach of the peace (*Bibee* v. *Umatul*, 11 C. W. N. 121).

Security for good behaviour.—[*Initiation of proceedings*]. Proceedings under sec. 110 should not be initiated on an indefinite charge after a prosecution on a definite charge under the Penal Code has failed (*Alep* v. *King-Emperor*, 11 C. W. N. 413: *Kismat*

v. *Emperor*, 11 C. W. N. 129) or on evidence given but disbelieved at the trial (*11 C. W. N. 129*). [*Habit*]. Evidence of acts of misconduct years ago is admissible to prove the formation of the habit, but is not sufficient, unless there is evidence of misconduct within a year or so before the proceedings (*Wahid Ali* v. *Emperor*, 11 C. W. N. 789). [*Reputation, meaning of*]. Evidence of rumour is not evidence of repute. A man's general reputation is the reputation he has in the place where he lives amongst all the townsmen. If he is looked on by his fellow townsmen, *whether they know him or not*, as of good repute it is strong evidence of the fact: if the townsmen *who know him* look upon him as a bad man, that is also evidence of that fact (*Rai Ishri* v. *Queen-Empress*, 23 Cal. 621 : *see* also *Ketaboi* v. *Queen Empress*, 27 Cal 993, 995). But a man may have a good reputation in his own town and a bad one in another place, and evidence of such reputation would be enough to bring the case under the section (*Chintamon* v. *Emperor*, 35 Cal. 243). [*Proper witnesses*]. A man's fellow townsmen are the best witnesses (*23 Cal. 621 · 27 Cal. 993, 995*). If he is a well-known resident in the city his fellow citizens, though not living in his immediate neighbourhood, are competent witnesses to prove his general repute (*Wahid* v. *Emperor*, 11 C. W. N. 789). But evidence of witnesses from villages distant from his home, where certain dacoities had occurred, *as to his character in connection with the dacoities*, is admissible as evidence of his general repute (*Chintamon* v. *Emperor*, 35 Cal. 243).

[*Character of evidence.*] (i). It is not sufficient that witnesses should depose that they have heard that a person is a habitual thief, when they themselves have *no personal knowledge* of, or acquaintance with, him and cannot name their informants (*Kalai* v. *Emperor*, 29 Cal. 779, 781). Statements by witnesses of things they have heard from other people are not evidence of repute (*Rai Ishri* v. *Queen-Empress*, 23 Cal. 621, 629). Mere statements of suspicion or impression, when no sufficient reason is given therefor is not sufficient (*Alep* v. *King-Emperor*, 11 C. W. N. 413).

(ii). Evidence of suspicion, *since the dacoities* which were the subject of an abortive prosecution therefor, is not sufficient (*Kismat* v. *Emperor*, 11 C. W. N. 129). There must be evidence of misconduct *within a year and so before* the proceedings (*Wahid* v. *Emperor*, 11 C. W. N. 789).

(iii). *Mere association* with bad characters is not sufficient unless it is one to commit theft or dacoity (*Nilkamal* v *Emperor*, 6 C. L. J. 711; *Queen-Empress* v. *Rahim*, 29 All. 206, 207; see *Emperor* v. *Purshottam*, 26 Bom. 418, 421, 422) But evidence of association at various times, and especially in most cases shortly before and near the place of a dacoity, with bad characters who were always suspected of being concerned with such dacoities, and many of whom were, during the period of association, convicted of thefts and dacoities or bound down under sec. 110, is sufficient (*Chintamon* v. *Emperor*, 35 Cal. 243),

(iv). The evidence must be such as would lead to a *reasonable and definite ground* for the conclusion that the accused is an habitual thief (*Gholam* v. *Emperor*, 8 C. W. N. 543, 544). The facts that a landlord has tenants of bad character, that he lends them money as tenants, and that he settles disputes with the thief and his victim, are not enough (*Nilkamal* v. *Emperor*, 6 C. L. J. 711).

(v). *Evidence of repute* is not admissible under sec. 110, cl. (*f*) (*Kalai* v. *Emperor*, 29 Cal. 779; *Akhoy* v. *Queen-Empress*, 5 C. W. N. 549; *Wahid* v. *Emperor*, 11 C. W. N. 789). There must be proof of *specific acts* to the knowledge of the witness (*29 Cal. 779, 780*). A man of desperate and dangerous character means one reckless of the safety of the person or the property of his neighbours. (*Wahid* v. *Emperor*, supra: *see* also *Akhoy* v. *Emperor*, supra).

(*To be continued.*)

E. H. Monnier.

Review.

Law and Practice in Divorce and other Matrimonial Causes. *By W. J. Dixon, B. A, L. L. M., Trin. Hall, Camb. of the Inner Temple and the Oxford Circuit. Fourth Edition, London. Butterworth & Co, 11 and 12 Bell Yard, Temple Bar. Law Publishers. 1908.*

The object of this work is, as the author himself states, "to render his labours of assistance to the profession." There is consequently no lengthy discussion on any of the great many controversial topics which have arisen, specially, in connection with questions of domicil and jurisdiction, But all the reported cases up to date will be found noted in their appropriate places. The "Law" on the subject is summed up within 75 pages. But the "Practice" takes up 275 pages. In addition to these there are the Statutes, Rules and Regulations, an Appendix of forms and a table of cases and an exhaustive subject index. The present edition, we have no doubt, will prove as useful and popular as its predecessors.

Notes of Cases.

PRIVY COUNCIL.

[Appeal from Bombay.]

Lord Macnaghten.
Lord James of Hereford.
Lord Atkinson.
Sir Andrew Scoble.
Sir Arthur Wilson.
1908
Heard, 12th May.
Judgment, 29th May.

Kaikhusru Aderji Ghaswalla and others,
v.
The Secretary of State for India in Council.

Special leave—Interlocutary order—Leave by con-

sent—Civil Procedure Code (Act XIV of 1882), sec. 575.

This was an application for special leave to appeal against an order of the High Court of Bombay. The litigation related to a plot of land situated in the cantonments of Poona, and the dispute was between the Appellants and the Secretary of State for India in Council who sued the Appellants in ejectment, the Appellants contended that they were the owners of the plot and a house situated on that plot. The Government contended that in consequence of certain Rules, which were confirmed about the year 1816, all land within the limits of the Poona cantonment belonged to the Government, and all persons in possession were licensees from the Government, subject to ejectment at the will of the Government upon payment of compensation for buildings erected on the land. The Court of first instance, that of the District Judge at Poona decided in favour of the Appellants. The case went on appeal to a Division Bench of the High Court of Bombay, consisting of Mr. Justice Russell and Mr. Justice Batty, and they differed in opinion. Mr. Justice Batty was of opinion that the judgment of the District Judge was right; Mr. Justice Russell was of opinion that it was erroneous. Mr. Justice Batty wrote his judgment, and then took leave and left Bombay. The judgment was actually delivered by Mr. Justice Russell, who, said, in view of this difference of opinion, that he would refer the case to a third Judge. The Appellants took exception to this order of reference on the ground that under sec. 575 of the Civil Procedure Code, upon this difference of opinion, there was automatically a decree dismissing the appeal and in favour of the present Appellants. Further, that Mr. Justice Russell could not make the order of reference without consulting Mr. Justice Batty. The Appellants appealed against that order of reference to another Division Bench of the High Court and they held that there was no doubt that the order of reference was *ultra vires*. It was not warranted by the Code, and not warranted by the Letters Patent; but they thought that under the circumstances of this case this appeal had better be heard by two other Judges with the consequence that the judgments of Mr. Justice Russell and Mr. Justice Batty went for nothing. Against this order the present Appellant desired to appeal to His Majesty in Council, and hence this petition.

Mr. DeGruyther, K. C., after reading sec 575, C. P. C., and its proviso submitted that the construction which had been invariably placed by the High Court of Bombay upon the section was this that a reference can only be made by the two Judges. On the grammatical construction of the section it seems perfectly plain that if the Judges differ the appeal may be referred obviously by the Judges composing the Bench. Mr. Justice Russell however made this order of reference obviously without consulting Mr. Justice Batty, or Mr. Justice Batty knowing anything about it. The result, if the order of reference be bad, would be that the judgment of the District Judge would prevail. The final order of the High Court he submitted was thus unquestionably *ultra vires*. One Division Bench of the High Court in Bombay had no jurisdiction to interfere with the judgment of another Bench of the High Court, and the proper order surely ought to have been to direct Mr. Justice Russell to make a decree in accordance with sec. 575 dismissing the appeal. The High Court of Bombay were of opinion that if they should give leave at the present time it would involve an enormous amount of expense and subsequent litigation; and they said the order which they have made was not final, and when the Court would make a decree, that decree might be appealed against to His Majesty in Council, and in the course of the hearing of that appeal the validity or the present order might be challenged. Surely if we are reduced first of all to the expense, at Bombay, of a re-hearing of the whole appeal, and then we come before your Lordships and your Lordships agree with the application I am advancing, namely, that this fresh Division Bench was constituted wholly without jurisdiction, the result would be again that Mr. Justice Russell would be directed to make a decree confirming the first Court's order in consequence of the difference of opinion.

SIR ARTHUR WILSON.—Or to wait till Mr. Justice Batty came back.

Mr. DeGruyther.—Yes. I made a proposition when we served a copy of this petition upon the Solicitors to the India Office, and it is this, and it seems to me it is a course which can well be adopted, and will certainly save trouble and expense. Whatever happens in India one side or the other will appeal to His Majesty in Council, the amount being above the appealable value. The questions involved being important to the Government the Government will certainly appeal if the decree is against them. Equally my client has shown his present desire that whatever happens he also would like the matter decided by the Judicial Committee. Consequently I made this proposal that we should have leave to appeal from the order as it now stands, that is the order against us. The record will be printed; it will be sent over in its entirety—of course the expense of printing we shall have to incur and we shall have to give security for costs—and the appeal from the order should be treated before your Lordships as an appeal from what would be the automatic decree passed under section 575. It seems to me that such a course would save an infinity of trouble and an enormous amount of expense.

LORD MACNAGHTEN.—What is said on behalf of the Secretary of State?

Mr. DeGruyther.—We wished the Secretary of State to appear, but I understand from the Solicitors on my side that the Solicitor to the India Office does not propose to oppose this application at all; at any

rate they do not intend to appear but to leave the matter entirely in your Lordships' hands. I think there would be no doubt, if that course were adopted, all possible expense would be saved.

SIR ANDREW SCOBLE.—Is there any practice by which a Junior Judge withdraws his judgment in a case of this kind?

Mr. DeGruyther.—I think not.

LORD MACNAGHTEN.—Have any rules been made under this section?

Mr. DeGruyther.—Not that I am aware of. In the proceedings there is no reference to any such rules.

SIR ANDREW SCOBLE.—Mr. Justice Batty was the junior Judge, was he not?

Mr. DeGruyther.—Yes.

LORD ATKINSON.—How, in the absence of the other parties can we treat an appeal which one side says is interlocutory as an appeal on the merits? That can only be done by consent.

Mr. DeGruyther.—By consent, that is so.

LORD MACNAGHTEN.—I understand substantially they do not oppose. They may be treated almost for the purpose as consenting.

Mr. DeGruyther.—I think if your Lordships will grant us leave to appeal against this order there is no doubt the Secretary of State would consent to the appeal itself being treated as an appeal from the original judgment of the High Court, and consequently as finally determining the rights of the parties. That would have to be done by consent. It was for that reason we specially gave notice on the solicitor to the India Office, but even if the consent were not given at the present moment I do not suppose for a moment, having regard to the advantages to all parties which would accrue, that the Secretary of State will not consent at a later stage. I think if your Lordships, having regard to the importance of the question gave us leave to appeal from the order, the Secretary of State would consent to treat the appeal as an appeal from the final judgment.

LORD JAMES OF HEREFORD.—We must have that consent.

LORD ATKINSON.—It would relieve the Board from difficulty if somebody on behalf of the Secretary of State would come and formally consent.

SIR ARTHUR WILSON.—Either consent or refuse.

Mr. DeGruyther.—Would your Lordships allow this matter to be placed in another list, or without that, the Registrar might communicate with the India Office and obtain consent.

LORD MACNAGHTEN.—I understand the Registrar has communicated with the India Office, and they have no instructions. Whom will they receive the instructions from?

Mr. DeGruyther.—I assume the legal adviser to the India Office. We offered to place all the papers we had, the judgments and so on, at the disposal of the Office, and we are ready to do that now.

LORD MACNAGHTEN.—It had better stand for another day, and some further communications shall be made to the India Office.

Mr. DeGruyther.—If your Lordships pleases. I think the suggestion I put into this petition is one which probably is reasonable.

LORD MACNAGHTEN.—It seems a very reasonable suggestion to make for the purpose of avoiding expense.

Mr. DeGruyther.—It would certainly save a very great deal of expense.

LORD MACNAGHTEN.—Perhaps you will mention it again another day.

Mr. DeGruyther.—Should I be presuming if I suggested that if the Secretary of State did consent your Lordships would adopt the course I have suggested?

LORD MACNAGHTEN.—Yes.

[The matter was again taken up on the 29th May 1908. *Present* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, SIR HENRY DE VILLIERS, SIR ARTHUR WILSON].

LORD MACNAGHTEN.—You are very much where you were?

Mr. DeGruyther.—Yes. I understand that the India Office say they are not prepared to consent to treat the present application as an application for leave to appeal from the order of Mr. Justice Russell.

LORD MACNAGHTEN.—Then I am afraid we cannot help you.

Mr. DeGruyther.—In regard to the final hearing, but not in regard to giving us leave to appeal from the order.

LORD MACNAGHTEN.—From the interlocutory judgment? It is interlocutory.

Mr. DeGruyther.—It is final in the sense that it is incapable of being re-considered at all except by appeal to your Lordships' Board.

SIR ARTHUR WILSON.—That does not dispose of the merits of the case.

Mr. DeGruyther.—It does not dispose of the merits of the case, but so far as the effect of the order is concerned it will be this. The High Court by the order from which we desire to appeal had directed that this appeal should be re-heard by another Bench of the High Court. Now it is clear on the Code that the procedure is *ultra vires*; that is without jurisdiction. If the appeal be now heard by this fresh Bench as constituted the order made by them will be absolutely of no avail to either party because if a fresh Bench so constituted was not constituted in accordance with law, the only order which your Lordships would then make on appeal would be to set aside the order made by the fresh Bench, and then we should be left in exactly the same position that we are now in, namely, that the two judgments of the Courts would stand, and I assume the only direction your Lordships would give would be ordering that a decree be drawn up in accordance with the judgment of the Court of first instance, which

would be affirmed in consequence of the difference of opinion of the two Judges. If your Lordships give us leave to appeal now and hold that the fresh order of the High Court directing a re-hearing of the appeal is *ultra vires* as we submit, the result would be the same and your Lordships would direct that the order made by Mr. Justice Russell should stand as an order affirming the judgment of the District Judge. If your Lordships give us leave to appeal it seems to me, on this state of facts, the India Office would be well advised to allow the hearing of that to be treated as a hearing on the merits.

LORD MACNAGHTEN.—If they consent of course we will do it. But an appeal to this Board is not a wholly inexpensive proceeding. I am afraid we cannot give you leave unless you persuade the India Office.

Mr. DeGruyther.—The expense of the hearing would be practically nominal in comparison to the expense of a re-hearing before a Court not properly constituted, with the appeal from the order against the constitution of the Court and the result of that appeal being to place us exactly in the same position that we are now in.

LORD MACNAGHTEN.—I admit that. Of course if you can persuade the India Office—possibly they may consent, if not now, they may consent when they hear again from India—then we can do it, but I am afraid we cannot now. Probably the best thing will be not to dismiss the petition but let it stand over.

Mr. DeGruyther.—I think at present from the letter received from the India Office they are not quite aware in India of the exact position of affairs, because they say in their letters they are not prepared to consent to this as an application for special leave to appeal from the judgment of Mr. Justice Russell. Of course it is not that.

LORD MACNAGHTEN.—Well, if you can persuade them that will be the best thing.

LORD ATKINSON.—They should be fully informed of the exact position in which the litigation stands.

Mr. DeGruyther.—We have informed the India Office here, but they desired to communicate with India, and have communicated by cable, and received a Code answer, which they say they understand to mean that the consent could not be delivered. Perhaps if your Lordships will allow me I may read the letter.

LORD MACNAGHTEN.—I do not think that is necessary.

LORD ATKINSON.—They should be fully informed exactly of the position.

Mr. DeGruyther.—Certainly.

J. H. W. A. *Petition to stand over.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CRIMINAL REVISION No. 291 OF 1908 SHEIKH JIGIR, Petitioner *v.* THE EMPEROR at the prosecution of JUSAN BIBI 2nd June 1908.

Separate sentences under sec. 457 and sec. 354, I. P. C.—Illegality—Enhancement of sentence.

The Petitioner was convicted under sec. 457, I. P. C., of house-breaking by night with intent to commit an offence. He was also convicted in the same trial for assaulting a woman with intent to outrage her modesty On the 1st charge he received one year's and on the second, six months' rigorous imprisonment, the two sentences to run consecutively. The rule was issued on the ground that the separate sentences were not sustainable.

Their Lordships observed :

"This rule has been granted on the ground that the intention with which the accused broke into the house by night was an intention to commit the offence of which he has been convicted under sec. 354. This is an illegality and the two sentences cannot stand together. We therefore set aside the sentence under sec. 354, I. P. C."

"There is a second rule in this case to show cause why the sentence passed upon the Petitioner under sec. 457, I. P. C, should not be enhanced. On looking at the offence that was committed it appears that it was obviously a serious one. The accused broke into the house in the absence of its owner and with a good deal of brutal violence took part in pulling the owner's wife out of her house and pulling off her clothes . . . . . .

Under these circumstances we enhance the Petitioner's sentence under sec. 457, I. P. C, to the term of eighteen months' rigorous imprisonment."

Babu Upendra Narain Mukherjee for the Petitioner.

No one for the Crown

CIVIL APPELLATE JURISDICTION. Before COXE and RYVES, JJ. APPEAL FROM APPELLATE DECREE No. 411 OF 1907. RAHIMUDDIN SARKAR, Defendant, Appellant *v.* JAGAT KISHORE ACHARJA, Plaintiff, Respondent. 12th June 1908.

Bengal Tenancy Act, sec. 106, applicability of—Proceedings commenced before amendment—Raiyat *at fixed rate.*

The Appellant was recorded as a *raiyat* at fixed rates in the record-of-rights prepared by the Settlement Officer of Mymensingh in 1896. The landlord Respondent put in a petition under sec. 106 of the unamended Bengal Tenancy Act asking that the

entry might be corrected. This was in 1897. The proceedings were greatly delayed for some unknown reason and on the 11th July 1900, that is to say, after the passing of the Amending Act of 1898 the case was referred to the Civil Court under the proviso to sec. 106 of the Act as amended. The case was disposed of by the Munsif in 1906 and the landlord's suit was dismissed. The Subordinate Judge on appeal by the landlord decreed the suit and gave the landlord a declaration that the disputed land was not held in *mokurari jama*, but at a rent which was liable to enhancement. He dismissed the cross objection as to jurisdiction.

The Defendant appealed to the High Court and contended (1) that inasmuch as the proceedings were initiated under the Bengal Tenancy Act before it was amended the Settlement Officer acted without jurisdiction in referring it to the Civil Court under the proviso to sec. 106 of the Act as amended, and (2) that the Subordinate Judge was wrong on the merits in declining to find that the Defendant was a *raiyat* at fixed rates.

Held—That sec. 8 of the Bengal General Clauses Act of 1899 could not apply to the Amending Act of 1898 which was passed before it. Sec. 4 of Act V (B. C) of 1867 was applicable. The proviso to sec. 106 of the Bengal Tenancy Act as amended applies to the proceedings, which were instituted before the section was amended.

The Subordinate Judge found that the *kabuliyat* on which the Defendant relied was not genuine, that his own conduct was inconsistent with the theory that he was anything more than an ordinary *raiyat* with occupancy rights that he failed to prove that his rent was invariable and with respect to the fact that he had erected permanent buildings on his land without objection by the landlord, that that fact was quite consistent with the supposition that he was an ordinary *raiyat* with right of occupancy.

Held—That the Defendant was not a *raiyat* at fixed rates.

Nabu Mondul v. *Cholim Mullick*, I. L. R 25 Cal. 196, explained and distinguished.

Babu Harendra Narayan Mitter for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Satis Chunder Ghose* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 955 OF 1906 ESHAN CHUNDER SAMANTA AND ORS., Appellants *v.* NILMONY SINGH AND ORS, Respondents. Heard, 3rd and 4th June 1908. Judgment, 10th June 1908.

Declaration, suit for—Dams, right to put up—Limitation Act (XV of 1877), Sch. II, Art. 47—Custom—Riparian owners—Extraordinary user—Arrangement.

The suit was filed by the Plaintiffs for themselves and other inhabitants of the place to have it declared that they have a right to irrigate their village lands from the water of the river Banka by putting up dams therein. The Defendants were inhabitants of certain villages lower down the stream of the said river, and they on the 21st July 1902, with the assistance of the Police cut the Plaintiffs' dam. The Plaintiffs admitted in their plaint that the Defendants had a right to take some water, but the allegation was that the Defendants' supply must be regulated by the outlets left by the Plaintiffs.

The suit was based on a three-fold right founded on (1) prescription, (2) custom, and (3) vicinity.

The Court of first instance decreed the suit and found in Plaintiffs' favour on their three fold rights. The District Judge, on appeal, dismissed the suit. He relied, for the most part on the provisions of Art. 47, Sch. II of the Limitation Act, as barring the Plaintiffs because they had not instituted their suit within three years from the 13th August 1879 when the Joint Magistrate passed an order, under sec 532 of the Code of Criminal Procedure (Act X of 1872) adverse to the claims of the villagers up the stream of the river Banka and consequently in favour of the villagers represented by the Defendants in the present litigation.

On appeal to the High Court it was contended *inter alia* that Art. 47, Sch. II of the Limitation Act, had no application, and that the Plaintiffs should be allowed to take as much water as was reasonable for the irrigation of their lands.

Held—That as the present suit was not one to recover any property but for a declaration of Plaintiffs' right to put up dams and to irrigate their lands by means of such dams, Art. 47 had no application to the case.

If the Plaintiffs relied on custom, they must prove that it was ancient, continuous, peaceable, reasonable, certain, compulsory and consistent with other customs regarding the right to irrigate from the river Banka.

As the Plaintiffs claimed a right to the extraordinary use of water, they should not interfere with the right of the lower riparian owners *Miner* v. *Gilmore*, 12 Moo P C. 156, *Swindoes Waterworks Company &c.* v. *Canal Navigation Company*, L. R 7 H. L. 697, *MacCartney* v. *Londonderry Company*, L. R A. C. (1904) 301, referred to. Any such interference would be unreasonable and inconsistent with the rights of others. It can be allowed only in pursuance of some arrangement arrived at between the parties interested.

Kalu Khabir v. *Jan Meah*, I. L. R. 29 Cal 100 (110), referred to.

Babu Jyoti Prosad Sarbadhicary for the Appellants.

Babu Nalini Ranjan Chatterji for the Respondents.

A. T. M. *Appeal dismissed.*

UPENDRA NATH SAHU v. HARI DAS MUKHERJEE

applied for a rateable distribution of the "assets" under the provisions of sec. 295 of the Code. His application was refused, and the amount due to Defendant No. 1 was subsequently paid out to him.

The Plaintiff thereupon instituted this suit for a "refund" of the "assets" wrongly paid out.

The Munsif held that money deposited, under sec. 310A was not "assets" within the meaning of sec. 295, and that Plaintiff had no cause of action, and he dismissed the suit.

The Plaintiff appealed.

He contended that the money deposited represented in this case the "decree attached," and that he, and Defendant No. 1 having attached the decree before such conversion, they were both entitled to share this money.

The appeal was dismissed. Hence this second appeal.

Babus Ram Chandra Majumdar and *Kurunamoy Bose* for the Appellants.

Babu Sib Chandra Palit for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—In this case Defendant No. 1 had obtained two decrees against Defendant No. 2 for about 2,000 rupees. The present Plaintiffs also obtained a decree against Defendant No. 2. Defendant No. 2 had obtained a decree against a third party. Defendant No. 1 attached that decree, and, accepting the language of both Courts, he was substituted for Defendant No. 2 on the 16th of July 1904, and I understand that in the execution proceeding he was entered as the decree-holder. Then the Plaintiffs also attached the decree which Defendant No. 2 had obtained against the third party, and, they apparently were substituted in the place of Defendant No. 2 on the 18th of November 1904. Then at the instance of Defendant No. 1 that is to say in execution of the attached decree, the properties of the judgment-debtors, who I see were named "Brojendra Nath Mondal and others" were brought to sale. An application was then made under sec. 310A of the Code of Civil Procedure to set aside the sale, upon the money provided for by that section being deposited in Court. That was done and the question is, as between the present Plaintiffs and Defendant No. 1, who is entitled to that money. I think the question depends upon the terms of sec. 310A, which provides for the payment of such money "to the decree-holder." The question is who is the decree-holder. The Respondent says he is the sole decree-holder and entitled to the money deposited. In the first instance Defendant No. 2 was undoubtedly the decree-holder, but it is said for the Defendant No. 1 that he was substituted in the execution proceedings for Defendant No. 2, he became the sole decree-holder, and under this section entitled to the whole of the money deposited. But the Plaintiffs were also substituted as decree-holders and in these circumstances it is difficult to see why Defendant No. 1 is any more the decree-holder than the Plaintiff. As I have pointed out, the real decree-holder was Defendant No. 2, but the money could not be paid to him by reason of the attachments. I think the proper view is that

the Plaintiffs and Defendant No. 1, in the events which happened, stood in the shoes of the decree-holder, Defendant No. 2 and were the decree-holders within the meaning of sec. 310A. In that view the Plaintiffs were as much the decree-holder as Defendant No. 1 and are entitled to a share of the money deposited under sec. 310A. What that share would properly be, whether a *pro rata* share or equal share, we have not heard discussed. That has not been dealt with by either Court. But as the learned vakil for the Appellant has left it to us to say how this money ought to be divided between the Plaintiffs and Defendant No. 1 and as the learned vakil for Defendant No. 1 proposes that three-fifths of it should go to the Plaintiffs and the remaining two-fifths to Defendant No. 1, we will make an end of the matter by ordering the sum to be divided in that way.

As regards costs, we think the proper order to make is that the Appellants have the costs of this appeal and that each party pay their own costs in the Courts below.

DOSS, J.—I agree.

S. C. S. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD MACNAGHTEN.
LORD JAMES OF HEREFORD.
LORD ATKINSON.
SIR ARTHUR SCOBLE.
SIR ARTHUR WILSON.

1908.
Heard, 12, May.
Judgment, 3, June.

DEBENDRA NATH DUTT, Defendant, Appellant,
v.
THE ADMINISTRATOR-GENERAL OF BENGAL and others, Plaintiffs, Respondents.

Administration bond—Sureties' liability—Letters of administration, obtained by fraud—Effect—Misappropriation by grantee—Sureties not parties to fraud—Revocation of grant.

Although letters of administration have been obtained by fraud, so long as the grant remains unrevoked, the grantee to all intents and purposes remains the administrator, and he alone represents the estate, and his receipts are valid discharges for all monies received by him as administrator.

For his acts and defaults as administrator, his sureties, though themselves not parties to the fraud or cognisant of it, are liable.

This was an appeal by the Defendant, Debendra Nath Dutt, from a decree of the High Court of Judicature at Fort William in Bengal (Appellate Jurisdiction) dated the 23rd March 1906, affirming a decree, dated the 29th March 1905, of Sale, J., of the same Court sitting on the Original Side of the said Court.

The facts of the case are as follows:—

On the 31st of August 1898, one Edmund Craster Craster died in England. At the time of his death he had in the hands of his Calcutta agents, Messrs. D. L. Cowie & Co., 86½ shares of the Bank of Bengal of Rs. 500 each

and Rs. 9,600 or thereabouts in cash. After his death the firm of Messrs. D. L. Cowie & Co. continued to collect the dividends on the said stock until the granting of the letters of administration hereinafter referred to.

These Indian assets would appear to have been overlooked by the representatives of Edmund Craster Craster in England during four years subsequent to 1898 and in or about July 1902 Ernest Hardwicke Cowie who was then regarded as a man of high probity and position and was a member of the firm of Messrs. Sanderson & Co., solicitors of the Government of India in Calcutta and was in charge of the business of D. L. Cowie & Co., merchants and agents conspired with one Smalley *alias* Williams to defraud the representatives of Edmund Craster Craster, and upon the 23rd of July 1902 Cowie swore a false affidavit to the effect that he was applying as the constituted attorney of Henry Craster Craster, the only son and next-of-kin of deceased Edmund Craster Craster, for letters of administration to the property and credits of the deceased abovenamed purporting to set forth in Ex. A thereto the said property and credits. There was no such person as Henry Craster Craster.

In or about the month of July 1902 Cowie by fraudulently representing that he was the attorney of the said Henry Craster Craster, only son and next-of-kin of the said Edmund Craster Craster deceased and that the deceased had died intestate persuaded the Appellant to sign and the Appellant on or about the 15th of August 1902 did sign and enter into an administration bond bearing that date to the Honourable Sir Francis William Maclean, K. C. I. E., Chief Justice of the High Court of Judicature at Fort William in Bengal. The Appellant received for so doing the sum of Rs. 200 and apparently had no knowledge or suspicion whatever of the fraud sought to be committed by Cowie.

On the 29th day of July 1902 Cowie applied for letters of administration of Edmund Craster Craster's estate and produced in support of his application the affidavit above referred to and a document purporting to be a power-of-attorney duly executed by Henry Craster Craster which was in fact signed in that name by the said Smalley. Cowie filed the said affidavit and with this false evidence he deceived both the Court and the Appellant and an order granting letters of administration to Cowie was made upon the 29th of July 1902 and the said letters of administration were issued on the 15th of August 1902 and Cowie then gave the bond with two sureties of whom the Appellant was one. The Appellant's liability upon this bond was the subject of this appeal.

The administration bond was in the following terms:—"Know all men by these presents that we Ernest Hardwicke Cowie of No. 30/2, Dalhousie Square, Attorney-at-law and one of the constituted Attorneys of Henry Craster, the only son of Edmund Craster Craster, deceased, and Debendra Nath Dutt of No. 18, Tamer's Lane in Calcutta aforesaid, and Banku Behary Banerjee of No. 81, Baranussee Ghose's Street in Calcutta aforesaid, are held and firmly bound unto the Hon'ble Sir Francis William Maclean, K. C. I. E., Chief Justice

of the High Court of Judicature at Fort William in Bengal, in the sum of Rupees one lac thirty-one thousand nine hundred and twenty-two and four annas of good and lawful money to be paid to the said Hon'ble Sir Francis William Maclean, or the Chief Justice of the said High Court for the time being for which payment we do hereby bind ourselves, and each and every of us binds himself for the whole, our and each and every of our heirs, executors, and administrators, unto the said Hon'ble Sir Francis William Maclean, his executors, administrators, or assigns firmly by these presents. Sealed with our seals, dated the fifteenth day of August in the year of our Lord one thousand nine hundred and two. The condition of the above written obligation is such, that if the above bounden Ernest Hardwicke Cowie, the administrator of the property and credits of Edmund Craster Craster deceased, do make or cause to be made a full and true inventory of all the estate of the said deceased, which has or shall come to the hands, possession, or knowledge of him the said Ernest Hardwicke Cowie or into the hands or possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the Registry of the said High Court, at or before the fifteenth day of February next, ensuing, or within such further time as the Court may from time to time appoint: And the same estate, and all the other estate of the said deceased at the time of his death, which, at any time after, shall come to hands or possession of the said Ernest ke Cowie, or of any other person for him do administer according to law: And further do make, or cause to be made, a true and just account of his said administration at or before the fifteenth day of August which will be in the year of our Lord one thousand nine hundred and three, or within such further time as the Court may from time to time appoint: And all the rest and residue of the said estate which shall be found remaining upon the said administration account, the same being first examined and allowed of by the said High Court of Judicature, shall deliver and pay unto such person or persons respectively as shall be lawfully entitled to such residue: And if it shall hereafter appear that any last Will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, and if the above bounden Ernest Hardwicke Cowie being thereunto required, do render deliver the letters of administration to him granted (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect, else to remain in full force and virtue." The bond was signed by Cowie, the Appellant and his co-Defendant Banku Behary Banerjee respectively.

By means of the letters of administration thus obtained, Cowie got possession of the said property and assets of the deceased Edmund Craster Craster. He sold the said 86½ shares of the Bank of Bengal in open market and purported to transfer them and he received therefor Rs. 1,05,595. He converted the said assets and kept for his own use the proceeds of the said shares.

Edmund Craster Craster at the time of his death had in fact left a Will, dated the 4th of January 1898 and on the 27th of October 1898 the said Will was duly proved in the Principal Registry of the High Court of Justice in England by Thomas Henry Craster and Robert Conway Dobbs, two of the executors therein appointed. The said executors after making inquiries and after the receipt of letters from Cowie, dated 3rd September 1903 and 29th October 1903 respectively wrote a letter, dated the 29th of December 1903 to the Administrator-General of Bengal informing him that a fraud had been perpetrated and they asked him to undertake the administration of the Indian estate of the said deceased and to recover all the assets possible.

On the 28th of April 1904 upon the petition of the Administrator-General of Bengal the grant of letters of administration to the said Cowie was revoked and cancelled and upon the same day letters of administration of the property and credits of the said deceased (with a copy of the Will annexed) were granted the said Administrator General of Bengal and criminal proceedings were subsequently instituted by him against Cowie and Smalley.

On the 17th of May 1904 a letter was written on behalf of the Administrator-General of Bengal to the Appellant informing him of the fraud which had been committed and demanding payment of the full amount of the loss to the estate of the said Edmund Craster Craster and which it was alleged the Appellant was liable to make good under the said bond, dated the 15th of August 1902.

Upon the petition of the Administrator-General an order was made by Sir Francis William Maclean, Chief Justice at Fort William in Bengal, dated the 26th of May 1904, directing the Registrar of the said Court to assign the said administration bond of the 15th of August 1902 to the Administrator-General of Bengal for the time being and by an indenture, dated the 10th of June 1904, made between the Registrar and the Administrator-General the said bond was assigned by the Registrar to the Administrator-General of Bengal (as administrator of the property and credits of Edmund Craster Craster deceased) and his successors in that office absolutely.

On the 21st of June 1904 the Administrator-General filed a plaint against Cowie and the Appellant and one Banku Behary Banerjee who was also a surety under the said bond claiming thereunder against the three Defendants the sum of Rs. 1,31,922-4 with interest. The Appellant filed written statements on his own behalf, dated the 24th of August 1904 and the 11th of February 1905 respectively, and the Defendant Banku Behary Banerjee filed written statements on his behalf, dated the 27th of August 1904 and the 21st of February 1905. The Defendant Cowie did not file any written statement whatsoever. The action was tried in the High Court of Judicature at Fort William in Bengal before the Honourable Mr. Justice Sale upon the 11th of January 1905 and upon subsequent days and evidence both oral and documentary of the facts hereinbefore set out was given on behalf of the Plaintiff and the Defendants.

Upon the 28th and 29th of March

1905 the Honourable Mr. Justice Sale gave judgment against the Appellant and the Defendant Banku Behary Banerjee for the sum of Rs. 1,07,159-9 and costs.

The Appellant preferred an appeal from the said decision.

On or about the 23rd of March 1906 the said appeal was heard before a Court consisting of Sir Francis William Maclean, K. C. I. E., Chief Justice, Harington, Stephen, Mitra and Geidt, JJ. On the 23rd of March 1906 the said Court delivered judgment dismissing the appeal.

The Appellate judgment will be found reported in 10 C. W. N. 673.

The present appeal was preferred *inter alia* on the grounds, that the bond was void owing to it having been entered into by the Court and the sureties under a mutual mistake of fact, *viz*, the authority of Cowie as attorney of the next-of-kin to apply for and receive a grant of letters of administration; that the sureties only warranted the due administration of a person so authorised by the next-of-kin and not by a person not so authorised; that the Court by granting letters of administration to the said Cowie represented to the sureties that he was the duly authorised attorney of the next-of-kin of the deceased and the person entitled to have such letters of administration granted to him and was the administrator and the Appellant would not have entered into the bond but for such representation; that the 86½ shares in the Bank of Bengal were still assets of the estate of the deceased as Cowie could not give a good title to the purchasers thereof and that the sale of the said shares was a fraudulent conversion thereof by Cowie and not having been adopted by the executors of the deceased the proceeds of the sale are not recoverable by the Administrator-General of Bengal; that the executors of the deceased by their delay in not informing the sureties that a fraud had been committed were guilty of laches whereby the position of the Appellant had been prejudiced; that the said bond was not given to a Judge of the District Court as provided by the Indian Succession Act, sec. 256; that the assignment of the bond to the Administrator-General of Bengal was void, and that the reasons given by Mr. Justice Harington and Mr. Justice Stephen were right.

Lord Robert Cecil, K. C. (with him *Mr. Boydell Houghton* for the Appellant) stated that the question was what was the true meaning and construction of the bond. Cited *Ellis* v. *Ellis* (1), *Holland* v. *Lea* (2). Sec. 20, Indian Contract Act. Bond entered into by mistake. *Kepp* v. *Wiggett* (3).

Mr. Simon, K. C. (with him *Mr. Sargent*) for the Respondent read from Mitra, J.'s judgment pp. 151 and 152. He urged, *firstly*, that a mere mistake does not *ipso facto* avoid a contract, *secondly*, that in case of discovery of Will after administration in part a good discharge can be given. See sec. 242, Indian Succession Act. *Lester* v. *Gooch* (4). The bond provides for two classes of duties, one what the administration must do and the other upon Will being found.

Mr. Sargent, on the same side, relied on sec. 243, Indian Succession Act.

(1) (1905) 1 Ch. 613.
(2) 9 Ex. 430; 23 L. J. Ex. 122 (1854).
(3) 4 C. B. 678; 14 Jur. 1137 (1847).
(4) 17 W. R. (Eng.) 139 (1868).

DEBENDRA NATH DUTT *v.* THE ADMINISTRATOR-GENERAL OF BENGAL.

Lord Robert Cecil, K. C. in reply. The nature of the guarantee is in question. What was it? The guarantee was not for the general honesty of Cowie but for the due administration of the estate. Effect of last clause only limited to the case of last Will and not to anything else. Reads sec. 234, Indian Succession Act, also sec. 262.

Their LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is an appeal from the High Court of Judicature at Fort William in Bengal.

The Appellant, Debendra Nath Dutt, was one of two sureties in a bond conditioned for the due administration by Earnest Hardwicke Cowie, a solicitor in Calcutta, of the estate of a retired Indian civil servant named Craster. Mr. Craster died in England in August 1898, leaving a Will which was duly proved here in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. The Indian assets escaped the notice of the executors and remained unclaimed and outstanding. On the 29th of July 1902, Cowie, who is stated in the printed cases to have been one of the solicitors to the Government, and who certainly was then in good credit, obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next-of-kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on the 15th of August 1902, on the production of a bond in the usual form executed by Cowie and the two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By these means Cowie obtained possession of the bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was not discovered till the end of 1903 or the beginning of 1904. Cowie then absconded. He was apprehended, tried, and convicted. The grant of administration in his favour was cancelled, and in May 1904 letters of administration with a copy of the Will annexed were granted to the Administrator-General of Bengal. The bond of the 15th of August 1902 was then assigned to the Administrator-General, and he brought this suit against Cowie and Cowie's sureties. Cowie made no defence. The suit was heard by Sale, J. That learned Judge pronounced a decree in favour of the Administrator-General, the result of which, so far as regards the sureties, was that they were ordered to pay to the Administrator a sum equal to the amount of the proceeds of the bank shares misappropriated by Cowie together with interest and costs. Both the sureties appealed to the High Court. But that Court in its Appellate Jurisdiction by a majority affirmed the order of Sale, J. and dismissed the appeal with costs.

The case of the Appellant Dutt, who alone has appealed to His Majesty, as presented to this Board was that the letters of administration granted to Cowie, having been annulled by the Court on the ground of fraud, must be regarded as a mere nullity from the beginning: that Cowie, therefore, never was Administrator and that the bond, so far as the

sureties were concerned, was void and of no effect; for the sureties undertook to be responsible for a real Administrator, not for a person assuming to act in a capacity which he never possessed and which the Court could not have conferred upon him. The case was argued very ably by the learned counsel for the Appellant who said everything that could be said on his behalf. But there is really no substance in the Appellant's contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie, although a rogue and an impostor, was to all intents and purposes Administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges for all moneys received by him as Administrator. As Administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as Administrator the Appellant and his co-surety became and must remain responsible.

Their Lordships are therefore of opinion that Maclean, C. J. and the learned Judges who concurred with him were perfectly right, and they will humbly advise His Majesty that the appeal must be dismissed.

The Appellant will pay the costs of the appeal.

Solicitors: *Messrs. Vallance & Vallance* for the Appellant.

Solicitors: *Messrs. Wade & Lyall* for the Respondents.

J. H. W. A. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION]

APPEAL FROM ORIGINAL DECREE No. 180 OF 1907.

CASPERSZ, J. COXE, J. 1908. Heard, 18 and 19, May. Judgment, 29, May.	PROMOTHA NATH ROY and anr., Defendants Nos. 1 & 2, Appellants, *v.* NAGENDRABALA CHAUDHRANI, Plaintiff, Respondent.

Hindu Law—Dayabhaga—Will—Widow when merely entitled to maintenance, if can contest validity of grant to Thakurs—Maintenance, right to and amount, if can be limited by Will—Residence, restriction as to place of—"Just cause" for disregarding restriction—Concubines, objection to living in the same house with—Uninhabitable house.

Where a testator died leaving a widow and an adopted son,

Held—*That the widow could ask for a construction of the Will only in so far as it affected her claim to maintenance and not of the whole Will.*

BRINDA CHAUDHRAIN *v.* RADHIKA CHAUDHRAIN (6), GARABINI DASSI *v.* PRATAP CHANDRA SHAHA (7) *referred to.*

That she had no locus standi *to question the validity of certain provisions in the Will relating to the establishment and maintenance of certain Thakurs.*

A widow cannot be deprived of her right to maintenance by any provision in a Dayabhaga Will.

PER CASPERSZ, J.—*The amount of maintenance fixed by the testator when it is not a nominal amount and not contrary to any provision of Hindu law, cannot be varied by Court.*

(6) I. L. R. 11 Cal. 492 (1885).
(7) 4 C. N. W. 602 (1900).

PROMOTHA NATH ROY v. NAGENDRABALA CHAUDHRANI.

PER COXE, J.—*The husband has no right to reduce the amount of a chaste widow's maintenance below the proper provision, which has to be calculated on* (i) *the value of the estate,* (ii) *the position and status of the deceased husband and the widow. Great weight should, however, be attached to a statement in the husband's Will as to the amount, not as a legal limitation to the widow's right but as evidence of what in the husband's estimate a lady in the position of his widow should need. But a husband may within limits lay down that his widow shall forfeit her maintenance if she does not live in the family house,*

PER CASPERSZ, J.—*A Hindu widow is not obliged to live a life of asceticism. She is bound to perform various religious, social and domestic ceremonies. She is not entitled to a bare subsistence or a starving allowance.*

Where the Will provided that the widow was to receive Rs. 125 a month as maintenance provided she lived either in his house at Madhupur or his house at Benares and it was found that testator's concubines lived in the Benares house and the Madhupur house was uninhabitable, and the widow proposed to live with the adopted son in Calcutta,

Held (per curiam)—*That she had just cause for refusing to live in the Madhupur or Benares house, and a sum of Rs. 320 a month was a proper allowance for her maintenance under the circumstances—and the said amount should be made a charge upon the estate.*

Semble—*Gifts to idols which are to be established after the testator's death are bad in law.*

UPENDRA LALL BORAL v. HEM CHANDRA BORAL (1), ROJOMOYEE DASSEE v. TROYLUCKHO MOHINEY DASSEE (3), NAGENDRA NANDINI DASSI v. RAJA BENOY KRISHNA DEB (4), DOORGA PROSAD DASS v. SHEO PROSHAD PANDAH (5) *relied on.*

This was an appeal preferred on the 16th of May 1907, against the decree of Babu K. C. Mukerjee, Subordinate Judge of Zillah Rungpur, dated the 8th of April 1907.

The facts of the case material to this report will appear from the judgment.

Dr. Rash Behari Ghose, Babus Dwarka Nath Chuckerbutty, Promotha Nath Sen and *Harish Chandra Roy* for the Appellant.

Mr. B. Chakravarti, Babus Nil Madhub Bose, Surendra Nath Roy, Provash Chandra Mitter and *Sushil Madhab Mullik* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

CASPERSZ, J.—Dakshina Mohan Roy Chaudhuri, a Hindu governed by the Dayabhaga law, executed a Will, on the 5th November 1895, and a codicil to the same dated the 3rd July 1897. He died on the 22nd March 1898 leaving him surviving his widow Srimati Nagendra Bala Chaudhurani and an adopted son Dakshaja Mohan Roy Chaudhuri whom he had adopted on the date on which the codicil was executed. The widow contested the probate proceedings,

(1) 2 C. W. N. 295: s. c. I. L. R. 25 Cal. 405 (1897).

(3) 6 C. W. N. 267: s. c. I. L. R. 29 Cal. 260 (273) (1901).

(4) 7 C. W. N. 121: s. c. I. L. R. 30 Cal. 521 (1902).

(5) 7 C. L. R. 278 (1880).

but, in the end, probate was granted to the executors. She then instituted the suit giving rise to the present appeal for a construction of the Will of Dakshina Mohan Roy Chaudhuri, alleging that she was beneficially interested in the Will and that certain of its provisions were invalid, inoperative, and ineffective.

The Subordinate Judge gave the Plaintiff a modified decree. The surviving executor and the adopted son appealed to this Court. But, on the conclusion of the argument for the executor, the adopted son was, on his application and without opposition, transferred to the category of Respondents, and learned counsel on his behalf has argued in support of the finding of the Subordinate Judge with regard to the disposition creating certain *debutter* property.

The Subordinate Judge has increased the Plaintiff's maintenance from Rs 125, the monthly sum mentioned in the Will, to Rs. 500 per mensem. He has declared the provisions of the Will dedicating certain properties to the worship of idols to be established at Benares to be invalid. He has, also, declared, that the Plaintiff shall not forfeit her right to maintenance for not living at Benares or at the family dwelling-house at Madhupur in the District of Rungpur, and he has construed the Will in other respects as appears from the decree framed in accordance with his judgment.

The executor Promotha Nath Roy is now the sole Appellant, and Dr. Rash Behari Ghose has argued on his behalf that the provisions of cl. 5 of the Will, regarding the establishment of the Thakuranis and a Thakur at Benares, are valid according to Hindu law, and that the Plaintiff, being entitled to maintenance only and being a stranger to the estate which, on an intestacy, would go to the adopted son, is not competent to raise any question as to the validity of the *debutter*. It is, also, urged that unless the widow lives at Benares or at Madhupur she will not be entitled to any maintenance and that she must be limited to the monthly sum of Rs. 125 mentioned in the Will of the testator.

The only clauses in the Will calling for attention in the present appeal are the 5th and 14th clauses. In the 5th clause the testator says—"I have an intention to establish at Benares, after my name, the deities Dakshina-Kali, Tara, Bhubaneshwari, Thakuranis and Dakshineshwar Siva Thakur. During my life-time I shall establish and consecrate the aforesaid Thakur and Thakuranis, construct temples for them, and make provisions for their *sheba* (service) and worship. Should I happen to die, which God forbid, without having in my life time established the said Thakuranis, in that case, as soon as possible after my death, my begotten son, if any, living, and in his default, my adopted son, or if there be any son living a minor, or in the absence of any begotten or adopted son, the executor of this Will and, in his default, the person who may, according to the directions made below, be appointed administrator by the Judge of the District of Rungpur, for the time being, shall from the income of any property other than the *debutter* property cause the aforesaid Thakur and Thakuranis to be established and consecrated

PROMOTHA NATH ROY v. NAGENDRABALA CHAUDHRANI.

and temples to be constructed for them, and consecrated at a cost not exceeding Rs. 7,000 and the immoveable properties mentioned in the schedule given in the foot of this Will, shall be dedicated to and set apart for the said Dakshineshwar Siva Thakur and Dakshina-Kali, Tara and Bhubaneshwari Thakuranis to meet the expenses of their *sheba* (service) and worship, and, after my death the aforesaid properties shall be the absolute *debutter* properties of the said Thakur and Thakuranis and with the profits of the same the expenses of the daily and periodical worships, services and offering and other necessary expenses in connection with the same, and the expenses of the repairs of the Thakurbaris and of the construction of new houses, when necessary, shall continue to be defrayed, but on no account there shall be daily given less than 30 seers of rice and *upakarani* suitable to the same, and the religious mendicants, beggars, poor Brahmins and Baisnabs will be fed with the *prasad* of the offerings so made. No *shebait*, and none of my heirs and representatives shall be able to create any incumbrance over or to make any transfer or make *putni*, or any other kind of permanent settlement or any *ijara* settlement for more than 10 years, or do any acts injurious to the profits of the aforesaid *debutter* property and should he do so, it shall not stand valid."

It is obvious that the Thakurs and Thakuranis had no material existence, by the names mentioned in the Will, at the time of the testator's death. They were not personified or visualized, and if the case of *Upendra Lall Boral* v. *Hem Chandra Boral* (1) was correctly decided, the gift or dedication of properties in favour of these deities was certainly invalid. It was there observed :—"If there was a gift to the idol, it was bad because there was no idol in existence at the time of his death; if there was a power to make such a gift the power was ineffective because, on the authority of *Bai Motibahoo* v. *Bai Mamoobai* (2), we think that a "power must be to convey to a person, who was in existence, either actual or in contemplation of law, at the death of the testator, and the idol to which the dedication is sought to have been made was not then in existence." The learned Judges then proceeded to say—"the deity, no doubt, is always in existence, but there could be no gift to the deity as such, and there was no personification of the deity to whom the gift could have been made or who was capable of taking it." The same point was similarly decided by Mr. Justice Stanley in *Rojomoyee Dassee* v. *Troyluckho Mohiney Dassee* (3) and by Mr. Justice Stephen in *Nagendra Nandini Dassi* v. *Raja Benoy Krishna Deb* (4). If it were necessary to decide the point; we should be disposed to accept the view of law which has prevailed since the earlier case of *Doorga Prosad Dass* v. *Sheo Proshad Pandah* (5), cited in the judgment of Mr. Justice Stanley. But, in our opinion,

(1) 2 C. W. N. 295 : s. c. I. L. R. 25 Cal. 405 (1897).
(2) 1 C. W. N. 366 : s. c. I. L. R. 21 Bom. 709 ; L. R. 24 I. A. 93 (1897).
(3) 6 C. W. N. 267 : s. c. I. L. R. 29 Cal. 260 (273) (1901).
(4) 7 C. W. N. 121 : s. c. I. L. R. 30 Cal. 521 (1902).
(5) 7 C. L. R. 278 (1880).

PROMOTHA NATH ROY v. NAGENDRABALA CHAUDHRANI.

the widow is not competent to raise such a question, or to have a construction of the entire Will. The 5th clause, of which she seeks construction, does not militate against her interest which is restricted to maintenance on the conditions specified in the 14th clause of the Will. In this view we are supported by the decision in *Brinda Chaudhrain v. Radhika Chaudhrain* (6), where it was said that a widow is entitled to maintenance and to bring a suit to have her maintenance made a charge upon the estate of her deceased husband. This case was distinguished by Banerjee and Stephen, JJ, in *Garabini Dassi* v. *Pratap Chandra Shaha* (7). But the learned Judges thought that they were entitled to look at the provisions of the Will of the adopted son of the widow's husband in order to see if it really affected the right of the widow to maintenance, and, looking at the Will, they said that it did not affect her right in any way whatever. It follows, in our opinion, that the widow's interest must be restricted to her claim for maintenance, and that other questions regarding the construction of the Will must be dealt with between the executor representing the estate and the adopted son who is beneficiary under the Will. The adopted son, Dakshaja Mohan Roy Chaudhuri, never sought to have construction of the Will of Dakshina Mohan Roy Chaudhuri. He is not entitled, in his new capacity as Respondent, to have construction as against the executor who was a co-Defendant in the suit as originally brought by the widow. The contrary view would enlarge the scope of the present litigation which, as we have said, must be restricted to the interest of the widow only.

Coming, then, to the question of maintenance and residence we observe that the 14th clause of the Will of Dakshina Mohan Roy Chaudhuri was based on the assumption that his widow would adopt a son in accordance with the authority delegated to her by the second clause of the Will. He having himself taken a son in adoption, by his codicil of later date, the 14th clause must be read subject to the codicil wherein he declared that "should the aforesaid Will, made by me, contain any provisions contrary to this codicil, they shall be inoperative and the provisions of the codicil shall prevail."

The 14th clause consists of four parts: (1) "if, after my death, my wife, the said Nagendra Bala Chaudhurani, resides in my house at Madhupur or in my house at Benares, she shall, so long as she lives, get from my estate, an allowance of Rs. 125 a month for her maintenance and for doing religious or pious acts; (2) except receiving that fixed allowance, she shall have no right to the *debutter* or other properties left by me, nor shall she be able to interfere with the same in any way: (3) If, instead of residing in my house at Madhupur or in my house at Benares, she resides at Calcutta or elsewhere, and does not adopt a son according to the directions contained in para. 2 of this Will, or does not live a chaste life, she shall not get the aforesaid allowance, or any assistance or benefit from my estate: (4) If there be any disagreement between

(6) I. L. R. 11 Cal. 492 (1885).
(7) 4 C. W. N. 602 (1900).

my said wife and my begotten son or adopted son, and if my wife like to live separately, in that case, if she lives at Benares she shall get two rooms either on the first floor or the second floor of my Benares house to live in, and, if she resides in my Madhupur house, she shall construct four thatched huts within the compound of that house, which is surrounded by walls on all sides and live in the same and she shall get from my estate reasonable expenses for the construction and repairs of those huts."

The first sentence confers an absolute right to receive Rs. 125 a month provided the widow resides in the testator's house at Madhupur or in his house at Benares. The second sentence takes away all right to the *debutter* and other properties, and we may observe that it precludes her from seeking a construction of the 5th clause as we have already held. The third sentence has ceased to be operative because the testator, himself adopted a son and the widow cannot be visited with any penalty for omitting to comply with the wishes of her husband. The fourth sentence, also, appears to be inapplicable to the present circumstances. There is no disagreement between the widow, and Dakshaja Mohan Roy Chaudhuri. But this sentence is important as showing that the testator desired his widow and adopted son to live in the same house either at Benares or at Madhupur, and effect should be given to this very proper intention on the part of the testator when the question of his widow's residence comes to be settled.

It is unnecessary to consider the precise meaning of the term "residence" whether exclusive residence or the occasional use of the testator's house would be sufficient compliance with the provisions of the 14th clause: See *Ganendro Mohun Tagore* v. *Juttendra Mohan Tagore* (8). On the facts, we agree with the Subordinate Judge in thinking that there is "just cause" for the widow not to reside at Benares or at Madhupur. The testator's concubines are living in the Benares house, and the Madhupur house is not fit for human habitation owing to the earthquake of 1897. One of the concubines is an old woman with a family, the other is a *kaharin*, and no Hindu lady could live in the same premises with such persons consistently with her position and dignity.

The most difficult question, however, is whether the widow can challenge the express provisions for her maintenance. It is unnecessary, for the purpose of the present litigation, to consider whether she could challenge the Will if no maintenance at all had been allowed to her. It has been held in *Debendra Coomar* v. *Brojendra Coomar* (9) that a Hindu in Bengal may by Will exclude his widow from her right to a share in his property on partition between her sons and grandsons. But this is not the case here. Again, the right of a widow to maintenance cannot be excluded by implication. This, also, is not the case here. As Mr. Mayne observes in his treatise on Hindu Law and Usage, 7th Ed., p. 628, the right of a widow to her maintenance arises by marriage. It seems, therefore, contrary to principle to hold that by devising property to another the husband can

(8) L. R. 1 I. A. 387 (394) (1874)
(9) I. L. R. 17 Cal. 886 (1890).

PROMOTHA NATH ROY v. NAGENDRABALA CHAUDHRANI.

authorise that other to hold it free from the claim which neither he himself nor his heir could have resisted: and it seems, on the authorities, that a widow cannot be deprived of her right to maintenance by any provisions in a Dayabhaga Will.

But, in our opinion, these larger questions do not properly arise in the present case. Here there is a Will of which probate has been granted, and we have to construe that Will and not to make a new Will for Dakshina Mohan Roy Chaudhuri. The conclusion cannot, in our opinion, be resisted that the amount of maintenance fixed by the testator himself, which is not a nominal amount, and which is not contrary to any provision of Hindu law, cannot be varied by the Court. But, I think that this Court is at liberty, in effectuating the wishes of the testator, to place a reasonable construction on the 14th clause of the Will by compensating the widow for her inability to reside at Benares or at Madhupur. She cannot reside at either of those places owing to no fault of her own. The executor might no doubt make arrangements for the widow's residence. But this would be an unsatisfactory solution of the difficulty, regard being had to the persistent litigation which has been going on, and it would probably result in further disagreement. Moreover, the 14th clause does not contemplate that the widow should reside at Benares or at Madhupur apart from the adopted son, and, as the adopted son Dakshaja Mohun is living in Calcutta, the widow may reasonably ask to be allowed to live near him. What, then, would be a proper monthly sum to be paid to the widow to enable her to comply with the intentions of her late husband? The sum of Rs. 125 per mensem is obviously inadequate. It was raised to Rs. 320 by an order of this Court during the probate proceedings, and, in the absence of any thing to the contrary, that sum commends itself to us as adequate. From the deposition of Kumar Chandra Kishore Roy it appears that his mother received Rs. 50 a month, but she had not to pay house rent, wages of servants, and boarding expenses (p. 232 of the paper-book). The witness Bepin Chandra Roy Chowdhury deposed that his mother received, besides maintenance whatever was needed at any time. There is abundant authority to show that a Hindu lady, in the position of the Respondent, Nagendra Bala Chowdhurani, is not obliged to live a life of asceticism. She is bound to perform various religious, social and domestic ceremonies, she is not entitled to bare subsistence or a starving allowance. The Subordinate Judge has fixed a monthly allowance of Rs. 500 which he arrived at on a consideration of certain reported cases where there were no Wills in the way fettering the discretion of the Court. If there had been no Will in the present case, we would not have interfered with the discretion of the Court below though, to a certain extent, the Subordinate Judge is wrong in taking into consideration the wants of the widow's father and other relations. He has allowed Rs. 50 on that account and, in any event, this part of his judgment could not be sustained.

In our opinion, the proper amount to be paid to the Respondent Nagendra

PROMOTHA NATH ROY *v.* NAGENDRABALA CHAUDHRANI.

Bala Chowdhurani is Rs. 320 per mensem, the excess over the sum of Rs. 125 allowed by her husband being, in our opinion, due to her as compensation for her proved inability to reside at Benares or at Madhupur.

The decree of the Court below will be varied in accordance with our observations. The findings of the Subordinate Judge with regard to the *debutter* property and the other like provisions in the Will must be expunged. The result is that Nagendra Bala Chaudhurani will receive her maintenance and compensation from the 18th November 1905 at the rate of Rs. 320 per month during her life-time from the estate of the late Dakshina Mohun Roy Chaudhuri, by whomsoever represented, that she shall not forfeit her right to that monthly sum for not living in the house at Benares or at Madhupur, and that she will have a charge upon the estate for the said monthly sum so decreed. The costs of the appeal will come out of the estate.

COXE, J.—I agree that the allowance of Rs. 320 is suitable, that the widow has just cause for not living at Madhupur and Benares and that she has no *locus standi* for contesting the grant to the Thakurs in this suit. But I am not prepared to admit the proposition that a Hindu husband has the power of limiting the amount of his widow's maintenance by Will. No authority has been shown us for this proposition and though there is no direct authority against it there is a considerable amount of indirect authority. It is well settled that the husband cannot deprive a chaste widow of maintenance altogether and the question arises whether this is because the Hindu law directs that he shall provide for her maintenance or because her right of maintenance is a right paramount or superior to his power of testamentary disposition. It appears to me that the balance of authority is in favour of the latter view. It was laid down in *Jama* v. *Machul Sahu* (10) which was followed in *Becha* v. *Mothina* (11) that a husband could not deprive his widow of maintenance altogether and the ground assigned was that the wife is in a subordinate sense a co-owner with her husband in the whole of his property. Babu Golap Chandra Sarkar in his work on Hindu law states that there cannot be any doubt that under Hindu law a widow's maintenance is a legal charge on the husband's estate and though this cannot be said to be a correct statement of the law if it means that it is a charge that binds the property in the hands of persons who have purchased it honestly without notice and without any attempt to defraud the widow of her rights, still there are numerous cases that lay down that in the hands of heirs, and of purchasers colluding with heirs to defeat the widow's rights, the property is charged with the widow's maintenance. I may refer for example to the remarks of Wilson, J, in *Sorolah Dossee* v. *Bhooban Mohun Neogi* (12).

If then a husband cannot deprive a widow of maintenance, because she is in a subordinate sense a co-owner with him in the property and her right to maintenance is in a limited way a charge on the property, it seems logically to follow

(10) I. L. R. 2 All. 315 (1879).
(11) I. L. R. 23 All. 86 (1900).
(12) I. L. R. 15 Cal. 292 (1888).

PROMOTHA NATH ROY v. NAGENDRABALA CHAUDHRANI.

that he cannot limit its amount. It seems illogical to say that when the question is whether the husband can deprive his widow of maintenance, her right to maintenance is superior to his power of testamentary disposition; but that when the question is how much the widow ought to have his power of testamentary disposition is superior to her right to maintenance.

It is true, of course, that a husband can within limits lay down that his widow shall forfeit her maintenance if she does not live in the family house. This certainly, at first sight, seems to make her rights subject to his power of disposition. In the Calcutta cases on this point the question was whether the widow forfeited her rights under the Will on a breach of the condition, and the question whether she forfeited her rights under the law outside the Will does not seem to have been considered. But in the Bombay cases it was decided that she forfeited her rights altogether. At the same time it must be remembered that in the eyes of Hindus the family house is undoubtedly the proper place for the widow to reside, and the special right given to the husband to insist on her living there need not necessarily be regarded as making the right to maintenance entirely subject to the husband's power of disposition.

It is true, too, that a husband can by Will deprive his widow of a right to a share on partition [*Debendra Coomar Roy* v. *Brojendra Coomar Roy* (9)]. But, that is quite a different thing to depriving her of maintenance and, in the case quoted, the latter right was admitted. I cannot, therefore, agree that a Hindu husband has the right to reduce the amount of a chaste widow's maintenance below the proper provision. That provision has to be calculated on (*i*) the value of the estate and, (*ii*) the position and status of the deceased husband and the widow [*Sm. Nittokissoree Dossee* v. *Jogendro Nath Mullick* (13)]. I agree, however, that in calculating the amount due on the second consideration great weight should be attached to a statement in the husband's Will, not as being a legal limitation of the widow's right, but as evidence as to what a lady in the position of his widow should need. And I think the learned Subordinate Judge has not given sufficient consideration in this case to the husband's estimate of his widow's needs. I think the allowance of Rs. 320 sanctioned by the Court of Wards which usually makes careful enquiries into matters of this kind as reasonable allowance and may be granted.

It follows from the above remarks that in my opinion the widow's rights are not in any way affected by the attempted grant to the Thakurs and that she has no *locus standi* for questioning those grants in this suit.

N. G. *Decree modified.*

(9) I. L. R. 17 Cal. 886 (1890)

(13) L. R. 5 I. A. 55 (1878).

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 596 AND 659 OF 1907.

MACLEAN, C. J.
DOSS, J.
1908.
6, May.

HARI CHARAN SANT, Defendant, Appellant,
v.
KAILASH CHANDRA BHUYAN, Plaintiff, Respondent.

Malicious prosecution—Suit for damages—Prosecution started by Police upon information from Defendant—Real prosecutor liable.

A private individual upon whose information to the Police a prosecution was started cannot escape liability for damages for malicious prosecution by urging that the Police and not he prosecuted if it appears that he himself was the real prosecutor.

BHUL CHAND PATRO *v.* PALUN BAS (1) *followed.*

FITZ JOHN *v.* MACKINDER (2) *referred to.*

These were appeals preferred on the 3rd of April 1907, against the decrees of Babu Annoda Proead Bagchi, Subordinate Judge, 3rd Court of Zillah 24-Pergunnahs, dated the 18th of December 1906, modifying the decree of Babu Pankaja Kumar Chatterjee, Munsif, 3rd Court at Alipur, dated the 17th of May 1906.

These two appeals arose out of two suits brought by two brothers Shyama Charan Bhuyan and Kailash Chandra Bhuyan for damages for malicious prosecution.

The Defendant in each case, one Hari Charan Sant, appears to have lodged information against the two brothers with the Police alleging that they had committed criminal breach of trust in respect of five bags of paddy worth about Rs. 14. The offence being cognisable, the Police took cognisance of it and later on sent it up before the Magistrate, who however acquitted the accused.

The latter thereupon instituted the present suits. The lower Appellate Court found that the Defendant "started the prosecution and supported it by concoction of false evidence" that there was ill-feeling between the parties, that the complaint was false, that there was no reasonable or probable cause for instituting the proceeding and they had been instituted maliciously.

The Subordinate Judge allowed Rs. 45 to the Plaintiff in each case as damages with costs and interests.

The Defendant preferred these second appeals.

Babu Shibo Prosanno Bhattacharjee and *Gopal Chandra Mittra* for the Appellant.

Mr. G. Sarkar for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C J.—This is an action for malicious prosecution. The Defendant, it appears, gave information to the Police, upon which the Plaintiff was arrested and brought before the Magistrate and subsequently acquitted. The case comes before us on second appeal, and we must take the findings of the Judge in the Court below as binding us. That Court has decided against the Appellant and decreed a very small amount of damages. The Appellant appeals: and, he says that the action would not lie, that he

(1) 12 C. W. N. 818n (1903).
(2) 9 Com. Bench Rep N. S. 505 at p. 533 (1861).

HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN.

was not the prosecutor but that the Police were the prosecutors. Now, what are the findings of the Court below? There are findings of malice, findings of want of reasonable and probable cause for the institution of the criminal case. The Judge also finds, "The Defendant did not only lodge the complaint before the Police but did virtually fabricate false evidence to procure the Plaintiff's conviction." The Defendant did actually appoint a mukhtear to prosecute the Plaintiff. The *mukhtearnamah* shows for what object the mukhtear was appointed. It was clearly stated in it that the mukhtear was to 'prosecute,' and the evidence is that the mukhtear did actually cross-examine the defence witnesses before the Magistrate: and as stated before the Magistrate treated the Defendant as the virtual prosecutor." I think upon these findings it is clear that the Defendant was the real and virtual prosecutor. The case is identical with an unreported case decided by a Division Bench of this Court (Mr. Justice Banerjea and Mr. Justice Geidt) on the 9th of January 1903, [*Bhul Chand Patro* v. *Palun Bas* (1)] and in the judgment in that case some English authorities are referred to, which support the view of the present lower Appellate Court. I might almost avail myself of the language of Chief Justice Cockburn in the case of *Fitz John* v. *Mackinder* (2), where he

(1) CIVIL APPELLATE JURISDICTION.

No. 1228 OF 1900.

BANERJEA, J.
GEIDT, J.
1903.
9, January

BHUL CHAND PATRO, Defendant, Appellant,

PALUN BAS, Plaintiff, Respondent.

Malicious prosecution—Suit for damages—Information to Police—Informant engaging pleader to prosecute—Reasonable and probable cause—Conviction of Plaintiff by Court of first instance if conclusive.

Where a person gives false information to the Police he cannot escape liability for the natural and intended consequences of the act merely because there was a subsequent investigation and the prosecution was set in motion by the Police. When further he is found to have conducted the prosecution by engaging a pleader and a mukhtear it cannot be urged that the Police and not he was responsible for the prosecution.

A person cannot be held liable for damages for malicious prosecution if it is not found that there was want of reasonable and probable cause or that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause for the prosecution.

The fact that the Plaintiff was convicted by the Court of first instance and was only acquitted on appeal ought to be considered in determining whether there was reasonable or probable cause, but it cannot be regarded as conclusive in favour of the Defendant.

This was an appeal preferred on the 12th of July 1900, against the decree of Babu Jogendra Nath Rai, Additional Subordinate Judge of Zillah 24-Pergunnahs, dated the 4th of June 1900, modifying the decree of Babu Amrita Lal Mukherjee, Munsif of Alipore, dated the 7th of December 1899.

Dr. Ashutosh Mukherjee and *Babu Biraj Mohun Majumdar* for the Appellant.

Babus Mohendra Nath Roy and *Dasarathi Sanyal* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In this appeal, which arises out of a suit for damages for malicious prosecution, two questions arise for determination, *first*, whether the lower Appellate Court was right in giving the Plaintiff a decree, without coming to any express finding

(2) 9 Com. Bench Rep. N. S. 505 at p. 533 (1861).

HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN.

says, "I can only say that in my opinion it would be a lamentable reproach to our law if a claim for redress for so grievous a wrong could be defeated by legal difficulties of a purely technical character." I think in this case it would be

that there was a want of reasonable and probable cause for the prosecution; and, *second*, whether the Court of Appeal below was right in giving the Plaintiff a decree for damages for malicious prosecution against the Defendant, when the Defendant did not institute the prosecution by any complaint made before the Magistrate but merely gave information to the Police against the Plaintiff.

With reference to the first point it is argued by the learned wakil for the Defendant-Appellant, that although the lower Appellate Court has found that the Plaintiff was innocent, and his innocence was pronounced by the Appellate Criminal Court, and although the lower Appellate Court has further found that the Defendant was actuated by malice, there is no finding in the judgment of the lower Appellate Court that there was a want of reasonable and probable cause for the prosecution, which is one of the ingredients necessary to be established before a decree for damages for malicious prosecution, can be obtained. The contention is so far correct, that there must be a finding that there was a want of reasonable and probable cause for the prosecution; or, to quote from the judgment of Lord Justice Bowen in the case of *Abrath* v. *The North Eastern Railway Company* (3) which was affirmed by the House of Lords "that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause."

Now, in the present case although there is an absence of any categorical statement as to there being no reasonable and probable cause for the prosecution, we think that there are statements in the judgment of the lower Appellate Court substantially to the effect "that the circumstances of the case were such as to be in the eyes of the Judge inconsistent with the existence of reasonable and probable cause."

Those circumstances, as expressly found by the Judge, are that, at the time of the commission of the alleged offence, with which the Plaintiff was charged he was not at home, and furthermore that the Defendant was also not at home when the occurrence is said to have taken place, the place of the occurrence being the Defendant's home It is further found that the Defendant made false statements before the Criminal Court and was influenced by vindictive motives to make the false statements. It may well be said that nothing more was needed to show that the circumstances were such as to be inconsistent with the existence of reasonable and probable cause. Indeed, the circumstances found by the lower Appellate Court preclude the existence of any reasonable and probable cause.

The first question raised before us must therefore be answered against the Appellant. It was argued that the fact of the Plaintiff having been convicted by the first Court would point to the existence of reasonable and probable cause and that the lower Appellate Court has omitted to consider that fact, and further that it was a fact which required the very strongest evidence to the contrary to make out the absence of reasonable and probable cause. And in support of this contention the cases of *Jadubar Singh* v. *Sheosaran Singh* (4) and *Parimi Bapirazu* v. *Bellam-konda Chinna Venkayya* (5) were cited. No doubt, the circumstance of the first Court having convicted the Plaintiff was a strong circumstance in the case; but it cannot be conclusive upon the point, though one of the two cases cited seems to go, perhaps, quite as far as that. It was, however, conceded in the argument that it be cannot carried so far. The question is whether this fact was considered by the lower Appellate Court, or altogether escaped its attention. We think it was considered by the lower Appellate Court, when the Subordinate Judge at the outset says that it was proved by the evidence of the Plaintiff's wit-

(3) L. R. 11 Q. B. D. 440: on appeal L. R. 11 App. Cas. 247 (1886).

(4) I. L. R. 21 All. 26 (1879).

(5) 3 Mad. H. C. Rep. 238 (1866).

lamentable, if taking the facts as found, it were held that the Plaintiff had no redress.

The appeals, therefore, fail and must be dismissed with costs.

DOSS, J.—I agree.

N. G. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER

No. 478 OF 1906.

MACLEAN, C. J. COXE, J. 1908. 17, January.	HAFIZUDDIN MONDOL, Defendant, Appellant, *v.* JADU NATH SAHA and ors., Plaintiffs, Respondents.

Principal and agent—Suit for accounts—Contract in writing registered—Hypothecation of property—Suit to enforce charge—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 89, 116, 132.

Where a gomastha hypothecated certain properties to secure moneys that might be found due from him upon taking accounts,

Held—*That a suit by the principal in which he not only asked for accounts but also sought to enforce the charge created in his favour, fell within Art. 132 of Sch. II of the Limitation Act and was*

---

nesses that he was innocent; and this was also found by the Appellate Criminal Court.

Then, as to the second question, the judgment of the lower Appellate Court does not, except incidentally, and so far as we gather from the following passages in his judgment, say that the Defendant instituted the prosecution. In one place the Subordinate Judge observes: "There was a dispute between the parties, the Defendant charged the Plaintiff with looting and other offences before the Criminal Court;" and he further says:—"The Defendant made a false statement before the Criminal Court and he was influenced by vindictive motive to make the false charge." But the facts as found by the Munsif, whose findings have been affirmed by the lower Appellate Court, were that the prosecution arose out of the information given by the Defendant before the Police under sec. 154 of the Code of Criminal Procedure. The offence was a cognizable offence. The Police upon information made investigation and sent a report in A form against the present Plaintiff; and that led to the prosecution of the Plaintiff before the Magistrate, which was conducted by the Defendant by engaging a pleader and a mukhtear. That being so, we do not see how the Defendant can avoid responsibility, although the Police might have investigated the matter and accepted his information as correct, and sent up a report stating that the case was a true one. We were referred to the case of *Lock* v. *Ashton* (6) as authority for the proposition that the party who makes a complaint is not necessarily responsible for every consequence that follows upon such complaint. That may be quite true, but we think that by giving to the Police information which is false, but which the Police is led to believe to be true, and so to act upon it, the Defendant cannot avoid his responsibility for those consequences which were among the natural and intended consequences of giving the false information, merely because there was a subsequent investigation and the prosecution was set in motion by the Police. Then, we have the additional fact that the Defendant conducted the case by engaging pleaders and mukhtears. There can be no manner of doubt, then, as to his being responsible for the prosecution and to his being liable for damages for malicious prosecution; as has been well put by Sir F. Pollock in his "Law of Torts" (sixth edition, p. 219). "A party who sets the law in motion without making the act his own is not necessarily free from liability," and the case of *Fitz John* v. *Mackinder* (2) is authority in support of the view we take.

The contentions urged before us therefore fail, and this appeal must be dismissed with costs.

(6) 12 Q. B. 871; 18 L. J. Q. B 76 (1848)

(2) 9 Com. Bench Rep. 605 at p. 621 (1861).

HAFIZUDDIN MONDOL *v.* JADU NATH SAHA.

not governed by either Art. 89 or Art. 116 of the said schedule.

Semble—*A suit by a principal against his agent for accounts is not "a suit for compensation for breach of a contract in writing registered," when the contract between the parties is embodied in a registered document, and Art. 89 and not Art. 116 of Sch. II of the Limitation Act should govern such a suit.*

MOTILAL BOSE *v.* AMIN CHAND CHATTOPADHY (5), *doubted.*

ASHGAR ALI KHAN *v.* KHURSHED ALI KHAN (1), JOGENDRA NATH ROY *v.* DEB NATH CHATTERJEE (2), MADHUB CHUNDER CHUCKERBUTTI *v.* DEBENDRA NATH DEY (3) *followed.*

This was an appeal preferred on the 28th of February 1906, against an order of Babu Bepin Behary Chatterjee, Subordinate Judge of Zillah Murshidabad, dated the 26th of January 1906.

The facts of the case material to this report will appear from the judgment.

Babu Ram Chunder Majumdar for the Appellant.

Babu Tarak Chander Chuckerbutty for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is a suit for accounts by the executors of the estate of a deceased principal against his *gomastha*, who was Defendant No. 1 and his surety, Defendant No. 2. The Subordinate Judge dismissed the suit on the ground that it was barred by limitation, holding that Art. 89 of the second schedule to the Limitation Act applied. The Officiating District Judge reversed that decision, holding that the case fell within Art. 116. There seems to be some difference of judicial opinion upon the question as to which article does apply. In the Privy Council case of *Asghar Ali Khan* v. *Khurshed Ali Khan* (1), the Judicial Committee held that in a case of this nature Art. 89 applied and that the expression "moveable property" in that article included money. The same view was followed by this Court in the case of *Jogendra Nath Roy* v. *Deb Nath Chatterjee* (2). The same view was also adopted in the case of *Madhub Chunder Chuckerbutti* v. *Debendra Nath Dey* (3) and in the case of *Sib Chander Roy* v. *Chunder Narain Mukerjee* (4). In this case, however, it appears that the contract under which the *gomastha* was appointed *gomastha*, is a registered document. The argument is that as it is a registered document, the case falls within Art. 116 of the second schedule to the Limitation Act: and, the Respondent relied upon a decision of a Division Bench of this Court also, *Motilal Bose* v. *Amin Chand Chattopadhy* (5), which laid down that where the contract between the parties is under a registered document, the case is governed by Art. 116 and not by Art. 89. Had the matter rested there, my own view would have been that Art. 89 applied and not Art. 116. Art. 89 expressly applies to the

(1) I. L. R 24 All. 27 (1901).
(2) 8 C. W. N. 113 (1903).
(3) 1 C. L. J 147 (1901).
(5) 1 C. L. J. 211 (1902).

(1) I. L. R. 24 All. 27 (1901).
(2) 8 C. W N. 113 (1903).
(3) 1 C. L. J. 147 (1901).
(4) 1 C. L. J. 232 (1905).
(5) 1 C. L. J. 211 (1902).

HAFIZUDDIN MONDOL *v.* JADU NATH SAHA.

case of a principal suing his agent for an account, whilst Art. 116 applies to a suit "for compensation for the breach of a contract in writing registered." To ascertain which article of the schedule applies, it is important to see what is the relief which the Plaintiff claimed. Now he is not seeking here for compensation or damages for the breach of the contract entered into by the *gomastha* to furnish accounts as he contracted to do, but he is asking for an account simply upon the footing of principal and agent. And, as I have said, if the matter had rested there, I should have been disposed to say that Art. 89 and not Art. 116 applied. But the matter does not rest there: and, there is to my mind a very important point which has not been noticed by either Court. Both Defendants Nos. 1 and 2 hypothecated certain properties, to secure the moneys due from the agent by two documents, a security *kabuliyat* and a *zaminnamah*, and charged those properties with the payment of what might be found due on taking such accounts and by the third prayer of his plaint, the Plaintiff asked that in the event of Defendants Nos. 1 and 2 failing to pay within the time fixed by Court, the money which might be found due to the Plaintiff at the time of *nikas* (that is, the accounts) an order might be passed directing recovery thereof from the property pledged by them and on its proving insufficient from the person and other properties of Defendants Nos. 1 and 2. "The result is that this suit is not merely a suit for an account, but is a suit to enforce in the Plaintiffs' favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts. That seems to me to be a case which falls within Art. 132 of the second schedule to the Limitation Act, which enacts that in a suit to enforce payment of money charged upon immoveable property, the period of limitation is twelve years from the time when the money sued for becomes due. The agent was dismissed at the commencement of Aghran 1308, the suit was instituted on the 16th December 1904. Looking, therefore, at what is actually claimed by the Plaintiff in the suit, I think we cannot properly say that the case falls within Art. 89 to which I have referred. The appeal, therefore, must be dismissed with costs.

The Respondent has not filed any cross-objection, but is satisfied with the accounts which have been directed by the decree of the lower Appellate Court, which apparently are for the years 1306, 1307 and 1308 only.

We fix the hearing fee at four gold mohurs.

COXE, J.—I agree.

N. G. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 393 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard,
30, April.
Judgment,
4, May.

GIRIDHARI MARWARI, Petitioner,
THE EMPEROR, Opposite Party.

Further enquiry—Criminal Procedure Code (Act V of 1898), sec. 437—Notice to the accused—Forgery—Sanction of the Civil Court to prosecute—Proceedings under the Registra-

GIRIDHARI MARWARI v. THE EMPEROR.

tion Act arising out of the same transaction, if good without sanction.

The accused was placed on his trial for offences under secs. 423, 467, 471, I. P. C. and sec. 82, Indian Registration Act, on the allegation that he had abetted the fabrication of a forged bond, but was discharged. The District Magistrate under sec. 437, Cr. P. C., directed a further inquiry into the case, but before the proceeding under sec. 437 commenced, a Civil Court had decided that the bond was a forged one.

Held—*That the case against the accused cannot proceed as regards the charge of forgery or abetment of forgery without the sanction of the Civil Court.*

That with regard to the charges under sec. 423, I. P. C. and sec. 82 of the Indian Registration Act, which did not require any sanction, the accused should not be prosecuted till the Civil Court sanctioned his prosecution for forgery, as it was not desirable that the case should proceed against him piecemeal.

That an order for further inquiry under sec. 437, Cr. P. C., without giving a previous notice to the accused to show cause against the application for further inquiry must be set aside.

HARIDAS SANYAL v. SARITULLA (1), WAHED ALI v. EMPEROR (2) *followed.*

This was a rule granted on the 16th of March 1908, against an order of Mr. F. F. Lyall, District Magistrate of Bhagalpur, dated the 22nd of February 1908, directing further enquiry into the case.

The facts of the case material to the report are briefly these :—

The Petitioner was alleged to have abetted the fabrication of a forged bond and was placed on his trial along with some others before Babu Bepin Behari Mukherjee, Deputy Magistrate of Bhagalpur, for offences under secs. 423, 467 and 471 &c. of the Indian Penal Code, but was discharged. On an application made to the District Magistrate for further enquiry, the District Magistrate directed a further enquiry without however stating any reasons for his order and without giving any notice to the Petitioner of the application for further enquiry and affording him an opportunity to show cause against the said application. The High Court in revision set aside the order of the District Magistrate for further enquiry. On this another application was made on behalf of the Crown to the District Magistrate for ordering a further enquiry into the case and it was alleged in the application that the Petitioner was a resident of Rajputana and was likely to abscond if he came to know that the case against him was going to be revived. It appears that in the meantime the question of the genuineness of the bond alleged to have been fabricated was tried by a Civil Court which held it to be a forgery. The District Magistrate ordered a further inquiry but refrained from giving a previous notice to the Petitioner of the application for further inquiry on the ground that the Petitioner would abscond if he did get such a notice. The order of the District Magistrate was in these terms.

"I have been shown by the public prosecutor a certified copy of the Civil Court's judgment in title Suit No. 289 of 1907 which declares the bond in question to have been a forged one and the

(1) I. L. R. 15 Cal. 608 (1888).
(2) I. L. R. 32 Cal. 1090 (1905)

GIRIDHARI MARWARI v. THE EMPEROR.

four accused to have made themselves amenable under criminal law.

"The Honourable High Court's order that the Civil Court should have an opportunity of determining whether the document was a forged one has now been complied with and in the course of the trial the accused appeared and hotly contested the case. I therefore hold that the further order of their Lordships that the accused should be given an opportunity of saying anything they wished against this further enquiry has practically, so far as equity demands, been complied with. In the light of the public prosecutor's allegation that two of the accused who are residents of Rajputana are likely to abscond, any further notice is likely to frustrate justice, and I therefore under sec. 437 order a further enquiry into the original complaint, and at the same time I order that warrants without bail for the arrest of the accused be issued and that they be produced before Moulvi Karam Hossain to whom the case is made over for disposal."

The Petitioner again moved the High Court for setting aside the order of the District Magistrate and obtained the present Rule. The two principal questions raised on behalf of the Petitioner were that the order for further inquiry was bad as it was passed without giving any notice to the accused, and that no order for further inquiry could be passed against the Petitioner without the previous sanction of the Civil Court which found the bond to be a forged one.

Babus Dasarathi Sanyal and *Sures Chandra Mukherjee* for the Petitioner.

Mr. Sinha for the Crown.

The JUDGMENT of THE COURT was as follows:—

This is a rule to show cause why an order for further enquiry made by the Magistrate of Bhagalpur on the 22nd February last should not be set aside.

The Petitioner is alleged to have abetted the fabrication of a forged bond and to have committed various cognate offences. This case was enquired into by a Deputy Magistrate who, on the 27th August 1906, discharged him. The District Magistrate then ordered a further enquiry into the case to be made. This order was set aside by this Court on the 4th December 1906. The order of this Court was that the order of the District Magistrate directing a further enquiry could not be supported, inasmuch as "it merely states, that a further enquiry is ordered but it gives no reasons whatever on the part of the District Magistrate for differing from the view taken of the case by the Subordinate Magistrate. Moreover it appears in the case that the order was passed by the Magistrate without giving any notice to the accused of the application. We think that certainly in a case of this sort the Magistrate before he passed any order directing a further enquiry ought to have issued a notice to the accused and to have heard what he had to say in opposition to the application" Now the District Magistrate has on the 22nd February last again ordered a further enquiry to be made into the case against the Petitioner, again omitting to giving him a notice or calling upon him to show cause why this order should not be made.

Again the propriety of the order is impugned on two grounds, (1) that the

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JULY 13, 1908. [No. 35

Contents.

NOTES

IT IS, NO DOUBT, TRUE THAT THE LEGAL TRAINING OF lawyers in this country leaves much to be desired. But the scheme that has been presented by the Vice-Chancellor of the Calcutta University is not only not calculated to impart sound legal training but is open to very serious objections in many other ways. The scheme of legal study finds but a small place in the Vice-Chancellor's scheme and the major portion of his long minute is devoted to a special pleading for securing a monopoly for the teaching of law for the college he proposes to establish and maintain chiefly out of the fees realized from the students. Although this college will be established on behalf of the University yet the principle on which it will be financed is the same as that on which the existing colleges are maintained, namely, from the fees of the students. The Vice Chanceller, therefore, finds it essential to recommend to the University that the law classes in the existing colleges should be disaffiliated.

THE REASONS THAT HE ADVANCES FOR THIS EXTRAordinary recommendation are mainly two. *First*, some colleges need not maintain their law classes because their law classes do not leave them any surplus. *Secondly*, that a college of which the law classes leave a surplus and which surplus goes to meet some of the burdens imposed by the new University regulations in respect of the arts and science classes of the college, should be disaffiliated for that reason. The Vice Chancellor, no doubt, mentions some defects in discipline such as late attendance and the like which are common to all the colleges. But it is not said that such irregularities in attendance were unknown in Government Colleges when they had a monopoly of the law classes and that such irregularities, if they still exist in private colleges, are irremediable. Reformation and not disaffiliation of colleges is the method followed by the University authorities in all other countries for remedying defects in their system. We do not think it is at all proper or dignified for the University authorities either to secure a monopoly in any branch of study or to enter into rivalry with the affiliated colleges in any sphere of their work.

THE CALCUTTA UNIVERSITY OUGHT TO FOLLOW IN this respect the example of the time-honoured English Universities. The one aim and object of their existence is to help the colleges in all possible ways and not to help them out of existence one by one in a summary manner. The principle followed at Oxford and Cambridge is absolutely the sound principal. For if the University, which is the supervising authority, arrogates to itself the functions of colleges, it descends to the position of a rival, and as such disqualifies itself for its legitimate functions of supervision.

MONOPOLY IN MATTERS EDUCATIONAL IS NOT LESS prejudicial to progress than in matters industrial or commercial. The Inns of Court, which have enjoyed such monopoly for centuries, have successfully resisted public and professional opinion up till lately in discharging their obligations in respect of legal education. We have no doubt whatever that the grant of a monopoly to one particular institution will prove prejudicial to the interests of legal education in these Provinces in various ways. The first effect of the monopoly will be the raising of college fees, as is already proposed by the Vice-Chancellor, and will require students from distant parts of the Province to come and reside in Calcutta for qualifying and offering themselves for the law examination of the University. Then Dr. Mukerjee says that University Law College will only

accommodate 300 students. If it secures the monopoly of law teaching what will happen to the remaining of the 700 graduates who ordinarily study law at the Calcutta University? If the scheme has been devised for restricting the growth of the lawyer class in India, we are sure, the hopes of the framers of the scheme will be frustrated. Supposing the Senate sanctions the monopoly we may safely surmise what will happen. The first result of the University restriction will naturally be that the candidates for the pleadership examination will increase and non-graduate pleaders will partly replace the graduate pleaders in the mofussil. This surely will not be a desirable state of things. Next many of the graduates who are refused admission in the University Law College will go to England, Scotland and Ireland and get themselves qualified as barristers or advocates and return to India and join the High Court and the mofussil Courts and take the place of pleaders and vakils. The only result of the restriction will be that the vakils' profession will be doomed. These in themselves are reasons enough for condemning such centralization and monopoly. But there are other reasons besides.

The Government colleges enjoyed at one time the monopoly for teaching law. In its earlier days, the premier Government college, the Presidency College, was manned by professors of ability. But like all institutions which enjoy a monopoly the efficiency of its law classes gradually deteriorated. The law professorships came to be regarded as sinecure appointments for providing some needy or favourite gentlemen from the Bar. The lectures degenerated into a matter of form and attendance at these lectures naturally became very lax. These professors used to be paid Rs. 70/ a month for one lecture a day. With monopoly and with such handsome salary and light work, if it was found that the efficiency of Government law classes could not be maintained, we cannot at all comprehend how the Vice-Chancellor proposes to maintain the efficiency of his college by getting men mostly at Rs. 150 a head and making them work two to three hours a day and to sweat over 40 exercises at home during the week. No practising lawyer will agree to give two hours of his time during any part of the day and correct exercises at night for Rs 150 a month. Failures or do nothings of the legal profession may be available for this model college, but how the cause of legal education will be advanced by such teachers we fail to comprehend. This being the only specialty and point of difference between the existing colleges and the proposed college, it is evident that the scheme stands self-condemned.

The Vice-Chancellor speaks of the system of legal education prevalent in the University of Tokio and the like, about which little is known in this country and of which he himself, we presume, possesses no personal or practical knowledge. No one will therefore take him seriously when he vaguely alludes to such systems in support of his scheme. But it is evident from his observations in the minute that the tutorial system which he proposes to introduce is borrowed from some hearsay report of the tutorial system that obtains at the English Universities. It will therefore be both useful and instructive to offer a sketch of the English system of legal education.

None of the Oxford or Cambridge colleges enjoys the monopoly of legal education. Undergraduates from every college are entitled to go up for the university law examination. There is usually a law tutor at each college who guides the legal studies of the law students. It is not incumbent on every college to maintain a staff of law professors, or deliver courses of lecture on every legal subject comprised in the examination course, or to maintain any law library or even to keep the ordinary books of reference. The University law professors or readers or college tutors lecture on different legal subjects by arrangement amongst them. The tutor of a college asks his pupils to attend lectures at different colleges on one or more subjects that he is asked to study during any particular term. He is not worried about the percentage of attendance at these lectures. An undergraduate at Oxford has to go to his tutor all by himself once for an hour in the week or it may be twice with an essay on a subject on which he is attending lectures and which he has been asked to study from different books named by the tutor.

It is to be mentioned that no fees are ordinarily charged for attendance at the lectures but undergraduates have to pay fees to the college for the services of the tutor. Ordinarily the tutor only directs and the pupil studies for himself. It is no part of the duty of the tutor to coach him for examination subjects. The undergraduate goes to the University Library or to some college library where law books are specially kept, such as at All Soul's in Oxford, for consulting the books and writing out his essay. The essay is taken to the tutor on an appointed day in the week The tutor reads it in the presence of his pupil, points out the errors, offers suggestions and explains his difficulties. The tutor has no more worrying duties to perform. The tutor is not required to take a crowd of students to the University or other law library and to waste either his own or the student's time by random discussion of specific cases. All that he is anxious about is that the student should grasp the leading principles of law in the course of his study at the University. He expects that for qualifying himself for the profession of law the student must work in a lawyer's chamber after he has got a good grounding in the legal principles at the University. The University

authorities do not attempt to do the impossible. They consider it no part of their duty to turn out fullfledged lawyers from their tutorial chambers or out of their lecture halls. It is superfluous to say that the law tutors are often distinguished scholars of the university who are provided with residence and are handsomely paid by the colleges, which they can very well afford to do because they have not got to maintain a whole host of them as is insisted on by the new University regulations here. It should be mentioned here that for special coaching the students have to pay extra fees. If a student can get on without a coach, at Oxford it is not incumbent on him to take one. The policy of the English universities is to guide the students and give him opportunities for study. Libraries and laboratories and even the services of distinguished professors are provided by the universities for helping the colleges and the undergraduates. Why cannot the Calcutta University do the same?

IN CONCLUDING THIS BRIEF SKETCH OF THE ENGLISH University system of legal training we should mention that the university men who intend to practice law often get themselves apprenticed to solicitors' firms for a time and learn all about ordinary drafting work and the institution of suits and other incidental matters and later on they work at barristers' chambers where they receive the training of a practical lawyer. The Bar Council in England has in their last report recommended chamber work with a practising member of the profession as a necessary condition for qualifying oneself as a barrister. This shows conclusively that the eminent men of the English Bar are also of opinion that for practical training a lawyer must work with a man in practice. It will be well if the Calcutta University will confine itself to the preliminary training of lawyers and leave their practical training to the practice and profession of law. If the High Court would make it a rule that every pleader should be articled with a practising lawyer for two years before commencing practice that will be productive of much better results than the cramming of students with case law as is contemplated in the Vice Chancellor's scheme.

CRIMINAL CASES OF 1907.

(Continued from p. clxxxiii.)

PROCEDURE UNDER CHAP. VIII.—[*Notice*]. A notice issued with reference to sec. 110 (*e*) is not a sufficient preliminary to proceedings under sec. 107 (*Krishnaswami* v. *Vana*, 30 Mad. 282. [*Bail*]. A condition not to realize rents by force nor to commit a breach of the peace is bad (*Bibee* v. *Umatul*, 11 C. W. N. 121). [*Enquiry*]. Sec. 256 does not apply to an enquiry under sec. 117 (*Chintamon* v. *Emperor*, 35 Cal. 243). This is extremely questionable. It is based on the view that no charge is required under sec. 117. But in summary trials no charge need be framed, and if this view were correct sec. 256 would not apply to such trials. Sec. 257 applies (*Emperor* v. *Purshottam*, 26 Bom. 418, 420: *Wahid Ali* v. *Emperor*, 11 C. W. N. 798. *See* also *35 Cal. 243*). The law as to joinder of charges under sec. 233 *et seq.* does not apply to an enquiry under sec. 110 (*Wahid Ali* v. *Emperor*, supra). Two opposite parties cannot be joined together on one trial under sec. 107 (*Kamal* v. *Emperor*, 11 C. W. N. 472. *See* also *8 C. W. N. 180* and cf. *9 C. W. N. 898*). An order without formal evidence taken is bad (*Prathipati* v. *Emperor*, 30 Mad. 330). See *5 Bom. H. C. R. 106*, and *Ibid 1*.

CANCELLATION OF BOND.—Sec. 125 empowers the District Magistrate to cancel a bond on a ground other than that it is no longer necessary. [*Nabu* v. *Emperor*, 34 Cal. 1 (F. B.)] The case of *Banka* v. *Janmejoy*, 32 Cal. 948, which was in accord with *Re Kassim*, 10 C. L R 335, 336 and *Sheo* v. *Nilkanth*, 13 W. R. Cr. 44, and was unanswerable in its argument is now overruled by the Full Bench ruling.

PUBLIC NUISANCE.—[*Claim of right*]. When a claim of title to the disputed land is raised, the Magistrate is bound first to come to a finding whether the claim is *bonâ fide* or not before referring the parties to a civil suit (*Ajimuddi* v. *Chapdal*, 11 C. W. N. xxvi: see also *23 Cal. 499: 26 Cal. 869: 3 C. W. N. 345: 4 C. W. N. 596: 22 All. 267, 268: 7 C. W. N. 117: 31 Cal. 979*), and he cannot, without determining this question, proceed to decide whether or not the pathway is public (*7 C. W. N. 117: 28 All. 98*), or whether the claim is barred by limitation (*Kamini* v *Emperor*, 35 Cal. 283), or refer the matter to the jury (*26 Cal. 869: 3 C. W. N. 345: 4 C. W. N 596: 31 Cal. 979*). In *Mukunda* v. *Haribole*, 2 C W. N. 554, 556, it was held, curiously enough, following *15 Cal. 564* and *17 Cal. 862*, which rulings form of the basis of the above decisions *also*, that the Court must first find whether the road is public, and then the question of *bonâ fides*. The case in *10 C. W. N. 845, 847*, also takes the same view: and *see* also *Ramanath* v. *Jaladhar*, 3 C. L J. 360. The claim of title must be *bonâ fide* and not a mere pretence to oust the Magistrate's jurisdiction (*15 Cal. 564, 571: 17 Cal. 562, 565: 25 Cal. 278: 28 All. 98, 99*). There must be some show of reason in the claim, a fair ground or honest belief (*15 Cal. 564, 571, 572: 28 All. 98, 99*). It is a question of fact (*1 C. L. J. 434*). The existence of an intention to resort to a Civil Court is one test of *bonâ fides* (*15 Cal 564, 573*). As an instance of the absence of *bonâ fides*, see *28 All. 159*. It is for the Magistrate to say whether the claim is *bonâ fide* or not (*15 Cal. 564, 571: 17 Cal. 562, 565: 25 Cal. 278: 26 Cal. 869: 23 All. 159, 160: 22 Bom. 988, 995: 28 All. 98, 99*), and he is to hear the case sufficiently to enable him to make up his mind on the point (*Emperor* v. *Dost*, 28 All. 98, 99).

URGENT NUISANCE.—[*Secs. 144* and *107*]. A proceeding under sec. 107, and not one under sec. 144, is the proper one to adopt in the case of a dispute relating to rival *hats* (*Bidhu* v. *Ramesh*, 11 C. W. N. 223): *Satish* v. *Emp.*, Ibid 79 or to the right of erecting of *bunds* (*Gopal* v. *Krishna*, 11 C.W. N. civil). [*Secs. 144* and *145*] Wherein a proceeding under sec. 144 the Magistrate, holding the first party to be in possession, directed the opposite party not to interfere, but the District Magistrate, in revision under sec. 144 (4), found the other way: *held* that both orders were bad in law as proceedings should have been taken under sec. 145 and the question of possession decided in such a proceeding (*Parkar* v. *Ram*, 11 C. W. N. 271) [*Certain act*]. The question whether the words "a *certain* act" include a *series* of acts depends upon the consideration whether the series is definite or indefinite. Thus an order not to commit any act that may induce a breach of the peace and not to take forcible possession of a village was held indefinite (*Bibee Kulsum* v *Umatul*, 11 C. W. N. 121), so also an order forbidding certain persons from interfering in any way with the trade of a rival *hat* (*Satish* v. *Emperor*, 11 C. W. N. 79), or one forbidding the petitioner from going to a certain village or allowing any of his servants, relations or friends from going there (*Gholam* v. *Bhuban*, 2 C. W. N 422), or from collecting rents or attempting to do so or putting in hand any transaction as to certain standing trees (*16 Cal. 80*). An order to abstain from interference with a temple and its property was held to be one to abstain from a "certain act" (*3 Mad. 354: 18 Mad. 402: 24 Mad. 45, Ibid 262*). [*Propriety of order*]. The direction to remove an obstruction on a passage in an embankment and so cut the same is one that should not be passed under sec. 144, except to prevent an impending breach of the peace, but the parties should be directed to the Civil Court (*Gopal* v. *Krishna*, 11 C. W. N. civil). Where a breach of the peace was not imminent orders to remove a tree (*23 W. R. Cr. 34*) or weirs (*2 Shome 22*) or a bund (*9 Cal. 103*) across streams were set aside. [*Cancellation of order*]. A Magistrate cannot by successive orders extend the operation of an order under sec. 144 indirectly beyond two months. He may cancel a previous order and pass a fresh one, or pass successive orders for a period not exceeding two months in all (*Satish* v. *Emperor*, 11 C. W. N. 79). [*Interlocutory orders*] No interlocutory order can be passed during the existence of one under sec. 144 (*Ibid*). [*Order not expressly limited as to time*]. An order under sec. 144 is not bad because it is not *expressly limited* to two months. Unless there is something to show that it was intended to be in force for more than two months, it must be presumed that it was intended to remain in force for only such period. [*Ramnath* v. *Emperor*, 34 Cal. 897 (F. B.)] Irrevocable orders would under this ruling be bad, *e.g.*, to cut down trees (*5 B. L. R. 131*) to destroy the banks of a tank (*10 W. R. Cr. 36*) to divide crops (*32 Cal. 154*), to stop inoculation (*Weir 736*), but it has also been held that orders to remove a wall (*8 W. R. Cr. 37: 1 Agra H. C. R. 23*), or to cease building it (*12 W. R. Cr. 40*), are legal.

(*To be continued.*)

E. H. MONNIER.

CURRENT INDIAN CASES.

KRISHNAMA *v.* NARASINHA, I. L. R. 31 Mad. 114. *C. P. C., sec 568.*

A legitimate occasion for admission of additional evidence under sec. 568, C. P. C., is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence, and application is made to import it. That is the subject of the separate enactment in sec. 623.

CHIDAMBARAM *v.* THE TINNEVELLY SARANGAPANI SUGAR MILLS CO., LD., I. L. R. 31 Mad. 123. *Companies Act, sec. 149—Contract Act, sec. 221.*

Sec. 149 of the Indian Companies Act does not authorise the Court to deprive a secured creditor of possession of his security.

If a person is entitled to remain in possession by virtue of a lien under sec. 221 of the Indian Contract Act, the making of the winding up order would not affect his right to remain in possession and continue to make the necessary disbursements.

BUDRUDEEN *v.* ABDUL, I. L. R. 31 Mad. 125. *C. P. C., secs. 244, 278.*

Sec. 278, C. P. C., and not sec. 244, C. P. C., applies to a claim preferred by a judgment-debtor on the ground that he holds the property in trust for some third person.

SANKAPPA *v.* EMPEROR, I. L. R. 31 Mad. 127. *Confession—Evidence Act, secs. 27, 30.*

A confession by an accused can be taken into consideration against another accused when such confession leads to the immediate discovery of some relevant fact.

NARAYANA MUDALY *v.* EMPEROR, I. L. R. 31 Mad. 132. *Cr. P. C., secs. 257, 237.*

Sec. 537, Cr. P. C., does not cure an illegality when a Magistrate in refusing to issue process for the witnesses named by the accused does not base his refusal in regard to any particular witness, on any of the grounds which, under the provisions of sec. 257 of the Code, are sufficient to justify it.

LAKSHMINARASAPPA *v.* MEKALA VENKATAPPA, I. L. R. 31 Mad. 133.

"While it is quite clear to me that the High Court is entitled to deal with any case on facts, it has been held that only in cases of defective investigation, of failure to consider important evidence, of consideration of the evidence from a wrong point of view, of contravention of any provision of law, and of conviction upon facts which will not support the same, will the revisionary powers of this Court be exercised." (*Per* Sankaran Nair, J.)

Notes of Cases.

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD MACNAGHTEN.
LORD ATKINSON.
SIR HENRY DE VILLIERS.
SIR ARTHUR WILSON.

K. SINGAM AIYANGAR *v.* KUMUTHATHAMMAL and another.

Special leave, application for—Concurrent findings—Testamentary capacity—Onus.

This was an application for special leave to appeal from concurrent judgments of the High Court of Madras and of the District Judge. The litigation arose in consequence of a deed executed by a zemindar of Madras on the 26th February 1901. It provided, first of all, that he meant to make an adoption of the Respondent who was his sister's son. The deed further provided that in case the adoption was bad he devised and bequeathed his property, or nearly the whole of it, except a small provision mad for widows, to the adopted son. He died on the 23rd December 1901. There were two questions raised, *first*, as to whether the adoption of a sister's son was good or bad. The Courts in India held that it had been decided in a case in 9 Madras that an adoption of a sister's son amongst Brahmins in the Tanjore District was a good adoption by custom. And though this case did not come from Tanjore District, the Courts said they considered the matter concluded by the authority of 9 Madras, and refused to allow the Petitioner who was the next reversioner on the death of the widow to give any evidence of any sort.

The *second* contention was that if the document of the 26th of February 1901 would, in the event of the adoption failing, operate as a Will that this Will was invalid on the ground that the testator was practically *non compos mentis* in February 1901. The position of affairs in regard to the testator was this. In or about the year 1899 he had been ailing and had had various diseases from about the year 1894, that is five years prior to the execution of the Will. From the month of July, that is three months after the execution of the Will, there was conclusive testimony that up to the date of his death he was suffering from cerebral syphilis, and was absolutely incapable of understanding the nature of a common business transaction. In the year 1899 he had had a stroke of paralysis, and the medical evidence was to the effect that from that he had never had any recovery.

Mr. DeGruyther, K. C., after reciting the facts as above stated :—The view taken by the Courts in India was really this.. They said you charge that this man was, so far as his mental capacity was concerned, incapable of executing this document, and you say that it was induced by pressure brought to bear upon him by his sister's husband and the other members of the family ; I call upon you to prove this, and I hold that the evidence which you have produced is not sufficient to prove the charges which you have made. I submit, on the other hand, that if the adoption fails then the document is purely testamentary, and the burden of proof is on those who propound it.

SIR ARTHUR WILSON.—The burden of proof would be on those who propounded the Will so far as the capacity is concerned, but surely on the undue influence it would not be so?

Mr. DeGruyther.—No, not undue influence but on the question of capacity. We submit that although both Courts have considered these things at very great length the real error into which they have fallen is that of not placing the burden of proof properly.

SIR ARTHUR WILSON.—You never raised that or any other question of law before the Appeal Court. That is the ground on which they refused you leave. The only question argued before the High Court was a question of fact in which that Court agreed with the District Judge.

Mr. DeGruyther.—I concede that. The question was capacity or no capacity at the time, but in approaching the question whether the testator was of sufficient capacity or not I submit both Courts in India have thrown the burden of proof upon the present Petitioner instead of on the Respondent.

SIR ARTHUR WILSON.—Surely you should have raised that question before the Court of Appeal? I am assuming that it was not raised.

LORD ATKINSON.—Testamentary capacity is a question of fact.

Mr. DeGruyther.—I submit that both Courts in India have considered this evidence at great length, but they have not considered the evidence from what I call the true standpoint and they have disregarded the medical evidence which I submit in this case shews that from within three months of the execution of the document to the date of the man's death there is no doubt he was not possessed of sufficient mental capacity to have executed the document, and we proved that two years prior to this he not only had been in an unsatisfactory state of health but had had a stroke of paralysis. I must leave the matter in your Lordships' hands as to whether your Lordships consider that we have sufficiently raised the question of law, because the judgments of the two Courts in India are concurrent.

LORD MACNAGHTEN.—Their Lordships are unable

to advise His Majesty to give special leave in this case.

J. H. W. A. *Petition dismissed.*

PRIVY COUNCIL.

[APPEAL FROM BENGAL.]

LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
1908.
16, June.

HIRA LAL ROY CHOWDHURY
v.
HARENDRA NARAIN DAS.

Special leave to appeal—Question of law—Pleading—Amendment—Onus.

This was an application by the Defendant for leave to appeal. There were concurrent findings of the Court below in a suit brought upon a bond. The two questions were whether money had been received by the Defendant, the present applicant on the bond, and whether he executed the bond. Both Courts held that he did receive the money and did execute the bond. The Defendant desired to appeal on what was argued to be a substantial question of law.

Mr. Kenworthy Brown in support of the application—The only question of law which arises is this. The Plaintiff brought this suit as upon a promissory note. Issues were passed putting the burden upon the Defendant to show that there was no consideration. Subsequently, it came out that it was a bond. Issues were amended and a finding was recorded that the money was received. The Subordinate Judge came to that conclusion affirmatively, and that has been affirmed by the High Court. That is the only question which I can suggest as a question of law.

LORD ROBERTSON.—Their Lordships are unable to advise His Majesty that this petition should be granted.

J. H. W. A. *Petition dismissed.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ.. CRIMINAL REVISION No. 481 OF 1908. MOLAI MAHI AND ORS., Petitioners *v.* MAHAMAD ALI MAHI, Opposite Party. 11th June 1908.

Sentences, separate, under sec. 147 and sec. $\frac{324}{149}$—Which of the sentences is bad and should be set aside.

The Petitioners were placed on their trial before the Sub-divisional Magistrate of Habigunge for having committed rioting in the course of which several persons of the complainants' party received injuries. They were convicted under sec. 147, I. P. C., and sentenced to 4 months' rigorous imprisonment. They were also convicted of offence under sec. 324, I. P. C., read with sec. 149, I. P. C., and sentenced to rigorous imprisonment for six months, the two sentences were to run consecutively. On appeal to the Sessions Judge, he held that the two separate sentences were illegal. He set aside the sentence under sec. 147, I. P. C., and confirmed the sentence under sec. 324 read with sec. 149, I. P. C. The Petitioners obtained this rule to set aside the sentence and conviction.

Their Lordships observed :—

"In this case the four Petitioners mentioned in the rule were originally convicted of the offences under sec. 147, I. P. C., for which they received the sentence of four months' rigorous imprisonment, and under sec. 324 read with sec. 149 for which the punishment of six months' rigorous imprisonment was inflicted. On this coming before the Sessions Judge on appeal he held that the two sentences were illegal and he set aside the conviction under sec. 147, I. P. C. This leaves the conviction under sec. 324 read with sec. 149 unsustainable. The result is that we must set aside the conviction and sentence under sec. 324 read with sec. 149 and we restore the conviction under sec. 147, I. P. C., and order the sentence of rigorous imprisonment for four months."

Moulvi Syed Shamsul Huda and *Moulvi Nuruddin Ahmed* for the Petitioners.

No one for the Crown.

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 1480 OF 1906. PEARY MOHAN ROY, Appellant *v.* KHELARAM SARKAR AND ANOTHER, Respondents. 12th June 1908.

Mesne profits—Limitation Act (XV of 1877), Sch. II, Arts. 109, 120—"When the profits are received," meaning of.

The plaintiff was the owner of a *putni* mehal under the Maharaja of Burdwan. The mehal was sold under Reg. VIII of 1819 for arrears of rent for the year 1306 and was purchased by the first Defendant. The sale took place on the 18th May 1900. The Plaintiff instituted a suit for setting aside the *putni* sale and obtained a decree for possession on the 27th February 1901. He took possession on the 11th September 1901. The Defendants were in possession from 27th February to 11th September. The present suit for mesne profits for the period the Defendants were in possession was instituted on the 6th April 1904.

The question argued in the lower Courts and also in the High Court was whether the claim for mesne profits for the period before 3 years of the institution of the suit, that is, the period from 18th May 1900 to 5th April 1901 was barred by limitation.

The lower Courts held that Art. 120 of the second schedule of the Limitation Act applied to the case and not Art. 109 of the same schedule as contended for by the Defendants.

Held—The clause "when the profits are received" in Art. 109, Sch. II of the Limitation Act means "when the profits are actually received."

That as the Defendants wrongfully received profits which were actually receivable by Plaintiff but for the illegal *putni* sale the period of limitation was 3 years under Art. 109 and the limitation runs from the date when the profits were received.

Dhanput Singh v. *Saraswati Missrain* (I. L. R. 19 Cal. 267) explained.

Krishnanunda v. *Kunwar Pertab Narain Singh* (I. L. R. 10 Cal. 785) referred to.

Dr. Rash Behary Ghose and *Babu Hari Charan Sarkel* for the Appellant.

Babus Nilmadhub Bose, Surendra Nath Guha and *Atul Krishna Roy* for the Respondents.

A. T. M. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ APPEAL FROM ORIGINAL DECREE NO. 342 OF 1905 TARACHAND SAMANTA AND ORS., Appellants v. CHUNDRA SEKHAR BANERJEE AND ORS, Respondents. 25th June 1908.

Compromise by agent without principal's knowledge, when binding.

The Plaintiffs brought a suit to set aside a revenue sale. The first Court dismissed the suit; on appeal the High Court remanded the case for taking additional evidence. Some witnesses were examined in Court and commission was issued for examination of another witness. Two pleaders for the Plaintiffs who were authorized on their vakalatnama to effect compromise were present at the house of the witness as well as two agents of the Plaintiffs who were looking after the case on their behalf. There were two pleaders on behalf of the Defendants and all these persons put their heads together and effected a compromise of the case. The Commissioner then returned his writ; the pleaders for the Plaintiffs intimated to Court that they would not examine any further witnesses and the records of the case with the evidence already taken were ordered to be sent up to the High Court. The pleaders and agents of the Plaintiffs also filed the petition of compromise which was also sent up to the High Court for order. Some days after some of the Plaintiff put in a petition repudiating the compromise and said that it was effected without their knowledge or consent. The High Court again remanded the case for enquiry as to whether Plaintiffs had knowledge of the compromise. The lower Court found that Plaintiffs were not present and had no knowledge of the compromise when it was effected but their agents in consultation with their pleaders who were authorized to effect compromise did the whole thing and the compromise was lawful and not fraudulent. After the said findings were sent up the appeal was heard by the High Court. It was contended by the Appellants that the final order in the case was to have been passed by the High Court and before the final decree was passed by any Court it is open to any party to repudiate a compromise effected by his agent, I. L. R. 31 Cal. 357 at p. 361, secs 203, 204, 207, Contract Act. For the Respondent it was contended that the compromise was given effect to and that witnesses were given up on both sides after the compromise. In the absence of fraud the compromise was binding on the parties, the Full Bench case in I. L. R 24 Cal 908 was relied on.

Held—That the case in 31 Cal. 361 did not lay down any new rule contrary to the Full Bench in 24 Cal. 908. The party effecting a compromise through their agent are bound by its terms Decree should be passed in this Court in terms of the compromise and the case disposed of accordingly.

Babus Mohendra Nath Roy and *Hara Kumar Mitra* for the Appellants.

Babus Nalini Ranjan Chatterjee and *Kshetra Mohun Sen* for the Respondents.

A. T. M. *Compromise ordered to be entered and decree drawn accordingly.*

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No 1962 OF 1906 KRISHNA MOHAN PAL AND OTHERS, Plaintiffs, Appellants v. TAKANI PROSAD PAL AND OTHERS, Defendants, Respondents. 12th June 1908.

Adverse possession—Limited interest—Limitation.

The Plaintiffs prayed for khas possession by ejecting the Defendants who pleaded permanent right. They had pleaded such right before the year 1866 when the Deputy Collector decided the case against the Plaintiff. The lower Court held that the suit was barred by limitation.

Held—That the suit was barred by limitation.

Hari Charan Singh v. *Nilmoni*, I L. R 35 Cal. 470 and *Thakur Fateh Singji Dipsinji* v. *Bamanji Ardeshir Dalal*, I L. R. 27 Bom. 525, referred to.

Babus Joy Gopal Ghosha and *Surendra Nath Guha* for the Appellants.

Babu Harendra Narayan Mitter for the Respondents.

A. T. M. *Appeal dismissed.*

LIST OF INDIAN APPEALS

Before the Judicial Committee.

June and July 1908.

CAUSE.	Whence.	Record received.	Set down for hearing.	SUBJECT.		SOLICITORS.
Sankaralinga Nadan & ors. *v.* Raja Rajeswara Dorai *alias* Mutturamalinga Dorai and others ... (No. 19 of 1906)	Madras	27th Mar. 1906	11th Feb. 1908	Whether the Appellants and other members of the Shanar caste are entitled to enter a certain Hindu Temple at Kamudi.	A. R.	D. Grant. Chapman-Walker & Shephard.
Mahomed Ali Haidar Khan and another, heirs and legal representatives of Mahomed Ali Amjad Khan, deceased ... *v.* The Secretary of State for India in Council & ors. (No. 54 of 1906)	Bengal ...	13th Aug. 1906	2nd April 1908	Nature and extent of Appellants' rights over certain land; Regulation 3 of 1891; prescription.	A. R.	T. L. Wilson & Co. The Solicitor, India Office.
Kalka Parshad and others *v.* Mathura Parshad and others ... ... (No. 60 of 1907.)	Oudh	29th Aug. 1907	8th May 1908	Whether Appellants are the next heirs of one Gur Sahai and, as such, have established their title to the property in suit.	A. R.	Young, Jackson, Beard & King. T. L. Wilson & Co.
Atar Singh and others ... *v.* Thakar Singh ... (No. 38 of 1906.)	Punjab	7th June 1906	13th May 1908	Whether and to what extent a certain deed of sale is binding on Respondent.	A.	Watkins & Lempriere. *Ex parte.*
Sham Shivendar Sahi *alias* Lal Saheb ... *v.* Maharani Janaki Koer ... (No. 57 of 1907.)	Bengal	19th Aug. 1907	21st May 1908	Disputed title to a village; nature and extent of a gift thereof made by Repondent's late husband to Appellant's late wife.	A. R.	T. L. Wilson & Co. Sanderson, Adkin, Lee & Eddis.
Rama Kanta Das Mahapatra and others ... *v.* Chowdhuri Shamanand Das Paharaj Bidyadhar Bhuiyan Mahapatra ... (No. 1 of 1907.)	Bengal	5th Jan. 1907	25th May 1908	Whether the succession to the property in suit is governed by the family custom of primogeniture or by the ordinary Hindu law; limitation.	A. R.	Sanderson, Adkin, Lee & Eddis. T. L. Wilson & Co.
Pandit Gaya Parshad Tewari ... ... *v.* Sardar Bhagat Singh & anr. (No. 73 of 1907.)	Oudh	4th Nov. 1907	28th May 1908	Whether Respondents are liable to an action for malicious prosecution	A.	Sanderson, Adkin, Lee & Eddis. *Ex parte.*

FOR JUDGMENT.

CAUSE.	Whence.	Record received.	Set down for hearing.	SUBJECT.		SOLICITORS.
The Bank of Bombay and another ... ... *v.* Suleman Somji and others (No. 29 of 1907.)	Bombay ...	6th May 1907	24th Mar. 1908	Whether the claims of certain legatees under the will of one Somji Parpia have priority over a mortgage executed in favour of the Appellant Bank by the executors and residuary legatees.	A. R.	Cameron, Kemm & Co. Rawle, Johnstone & Co.
Ibrahim Esmael and ors. *v.* Abdool Carrim Peermamode and others ... (No. 39 of 1907.) Ibrahim Esmael and others *v.* Aboo Bakar Mamode Taher and others ... (No. 40 of 1907.)	Mauritius	28th May 1907	28th Mar. 1908	Whether two instruments providing for the management of the chief Mosque at Port Louis and for the administration of certain property held in connection therewith were rightly set aside; claim by the Mahomedan community of "Cutchee Maimans" to manage the Mosque.	A. R. A. R.	H. C. Barker & Son. Armitage & Chapple. H. C. Barker & Son. Armitage & Chapple.

GIRIDHARI MARWARI *v.* THE EMPEROR.

question of the genuineness of the bond has been tried by the Civil Court which has held it to be a forgery and that the case against the Petitioner cannot proceed without the sanction of the Civil Court, (2) that no notice was given before the further enquiry under sec. 437 was ordered. To this Mr. Sinha for the District Magistrate of Bhagalpur replies (1) that the decision of the Civil Court has altered the circumstances and that although the case against the Petitioner cannot proceed, as regards the main charge of forgery or abetment of forgery without the sanction of the Civil Court, the charges against him under sec. 423 of the Penal Code and sec. 82 of the Registration Act can be so proceeded with, (2) that the law does not require notice to be given before an order under sec. 437 can be made, (3) that in this case, it was not advisable to give a notice as the Magistrate had received information that the Petitioner was about to abscond.

But it would seem to us that (1) it is desirable if the case against the Petitioner is to proceed that it should not be proceeded with piecemeal and that therefore the sanction of the Civil Court should be obtained to his prosecution on the main charge before any further proceedings against him are taken, (2) though the law does not prescribe the giving of a notice before an order under sec. 437 can be made, the Full Bench decision of this Court in *Haridas Sanyal* v. *Saritulla* (1) recently followed in *Wahed Ali* v. *Emperor* (2), does require such a notice to be given, and any order under sec. 437 made without giving such a notice, must under the rulings of this Court be set aside. (3) The notice can be given, and an opportunity afforded to the Petitioner to show cause why the order for further enquiry should not be made, without impropriety after his arrest and after he is brought before the Court. We accordingly make the rule absolute and set aside the order of the Magistrate of Bhagalpur, dated the 22nd February last, complained of.

B. C. *Rule made absolute.*

(1) I. L. R. 15 Cal. 608 (1888).
(2) I. L. R. 32 Cal. 1090 (1905).

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN.
LORD JAMES OF HEREFORD.
LORD ATKINSON.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

1908.
2, June.

THE BANK OF BOMBAY, Appellant,
v.
SULEMAN SOMJI, Respondent.

Corporation—Bank of Bombay—Shareholders' register—Shareholder's right to inspect and take extracts—Special interest and definite object, necessary—Suit for declaration of right to inspect, in the nature of application for writ of mandamus *—Conditions on which relief can be given.*

A suit brought against the Bank of Bombay by a shareholder for a declaration that he is entitled to inspect the register of shareholders and to copy and take extracts from such register is, in its nature, though not in its form, somewhat of the character of an application for a writ of mandamus, *and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in such a suit.*

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

A writ of mandamus *will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other and that his claim has been refused.*

When, therefore, before the suit, the Plaintiff claimed an absolute right to inspect and take extracts from the Bank's register of shareholders—to which he was not entitled—and was refused, but in the suit claimed a more qualified or restricted right,

Held—*That the suit could not succeed.*

The right to inspect the documents of a corporation which at common law belongs to every member of such corporation is not an absolute right, but is confined to cases where the member of the corporation has in view some definite right or object of his own and to those documents which would tend to illustrate such right or object.

Where it appeared that the Plaintiff had no special interest in any of the matters he complained of or any interest other than or different from that of each member of the corporation and had no definite right or object of his own to aid or serve in asking for inspection of the register or right or object which the register would illustrate, but his object was to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs,

Held—*That no relief could be granted to the Plaintiff.*

REX *v.* MERCHANT TAYLORS CO. (3) *followed.*

(3) 2 B. and Ad. 116 (1831).

This was an appeal from an Appellate decree of the High Court of Judicature at Bombay, dated the 22nd January 1907, which reversed a decree made on the 6th August 1906, by Mr. Justice Scott, sitting on the Original Side of the said High Court.

The principal question involved in the present appeal was whether a shareholder in the Bank of Bombay is entitled to inspect the register of shareholders kept by the said Bank.

The litigation arose in the following manner. The Respondent held a share in the said Bank. He wished to inspect the register of shareholders, and, on the 1st June 1906, made a verbal request for inspection. This was refused. On the 4th June 1906, he wrote the Secretary of the Bank referring to the refusal, and asking to be furnished with "a list of shareholders and their addresses on payment for the same."

To this letter the Bank replied on the 7th June 1906, that there did not appear to be any provision in the Presidency Banks Act, as to the right of a shareholder or other person to claim such a list, but that to enable the Directors to decide definitely on the requisition the Respondent should state "for what purpose and under what authority" he required and claimed, to be furnished with the said list.

After further correspondence, the Respondent, on the 5th July 1906, wrote to the Bank as follows:—

"According to the advice that I have received I am entitled to the inspection as a matter of right. It is unfair to me to be asked to state why I require the inspection. There have been gross

THE BANK OF BOMBAY v. SULEMAN SOMJI.

irregularities in the management of the Bank, in the election of Directors, in the manner the Directors act and other matters, and you preclude me from communicating with the shareholders or taking concerted action by withholding the inspection.

"Please take notice that I have instructed Solicitors to prepare papers to file a suit, which will be done within three days from this date unless the inspection is given to me before then."

Inspection was not granted, and in consequence the Respondent, on the 11th July 1906, instituted the present suit in the High Court of Judicature at Bombay on the Original Side. The plaint alleged that the "Plaintiff having observed irregularities in the management of the said Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters relating to the said Bank, applied to the Secretary and Treasurer of the said Bank to allow him inspection of the register of the present shareholders so as to enable him to communicate with the other shareholders, and if possible obtain their assent to certain proposed resolutions for the better management of the affairs of the said Bank, and for the removal of some of the existing Directors, which he intended to bring before a general meeting of the shareholders." It asserted the refusal of the Bank to allow the said inspection, and prayed for a declaration of the Plaintiff's right at reasonable time to inspect and take extracts from the said register, for an order directing the Bank to allow the said inspection, and for an injunction restraining the said Bank from preventing the Plaintiff having reasonable access to the said register.

The Bank filed a written statement in defence. The nature of the pleas raised therein will appear from the issues fixed, of which the following are material:

1. Whether the Plaintiff had at the date of the filing of this suit any cause of action against the Defendant Bank?

2. Whether the Plaintiff required inspection for the protection of his own interests or for any other reasonable purpose?

The only witness examined was the Plaintiff, who tendered himself for cross-examination. On the 6th August 1906, Mr. Justice Scott delivered his judgment. He was of opinion that there was no right of inspection by Statute, and that by Common Law a right to inspect only existed where it was "necessary with reference to some specific dispute or question depending in which the parties applying were interested, and inspection would then only be granted to such extent as might be necessary for the particular occasion." He held that the Plaintiff had disclosed nothing sufficiently definite to entitle him to claim inspection, and came to the conclusion that the Plaintiff did not require inspection for the protection of any interest of his which was in jeopardy, or with reference to any particular dispute in which he was interested, but that he merely wished to cause annoyance to the Bank officials. In accordance with these findings a decree was made dismissing the suit with costs.

Against the said decree the Plaintiff filed an appeal on the Appellate Side of the said High Court, and, on the 22nd January 1907, the Court of Appeal

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

(Chandavarkar and Batty, JJ.) delivered judgment. The said Court held on a review of the authorities, *Grey* v. *Hopkins* (4), *Rex* v. *The Fraternity of Hostmen in Newcastle-on-Tyne* (5), *Rex* v. *Merchant Taylors Co.* (3), *Heslop* v. *The Bank of England* (6), *Burton and Saddlers' Co., In re* (7), *Mutter* v. *Eastern and Midlands Railway Co.* (8), that Mr. Justice Scott had taken too narrow a view of the Common Law right of a corporation to inspect books of the corporation, and that "a member of a corporation as such is entitled to the inspection of any of its documents, if he satisfies the Court that he is seeking inspection not from mere idle curiosity or for some speculative purpose, but that he had some reasonable and definite object in which he is interested, and for which the inspection is required, whether that definite object concerns or not any subject then actually in controversy or discussion." The said Court also found that the Plaintiff had disclosed a reasonable and proper object for which he desired inspection, that he was interested in the object, which itself was specific and definite, and that the object could not be attained without an inspection of the register of shareholders. It was pointed out that the claim was limited to the inspection of the said register alone; and that no suggestion had been made that an inspection of the said register would in any way harm or prejudice either the interests of the Bank or the interests of the shareholders. The said Court further held that the Plaintiff had sufficiently intimated to the officials of the said Bank the object of his inspection, and that the refusal of the said Bank to allow inspection was improper. In the result, a decree was made reversing the decree made by Mr. Justice Scott, and directing the said Bank to allow inspection as prayed. The following is an extract from the Appellate judgment:—"The object specified by him in his plaint is that 'having observed irregularities in the management of the said Bank, in the election of its Directors, in the advancing of large sums of money to its Directors and in other matters relating to the said Bank' he desired inspection of 'the register of the present shareholders so as to enable him to communicate with the other shareholders, and, if possible, obtain their assent to certain proposed resolutions for the better management of the affairs of the said Bank and for the removal of some of the existing Directors which he intended to bring before a general meeting of the shareholders.' It may be that if the Appellant had sought inspection of some other book or books or records of the Company with a view to find out whether there were irregularities in the management of the Bank, his object would have been of a purely speculative character, and he would have been out of Court upon the ground that he was seeking to fish out information without any definite and reasonable purpose. But substantially the object set forth in the plaint is that he desired to know who the shareholders are, for the purpose of communicating with them and obtaining,

(3) 2 B and Ad. 115 (1831).
(4) 7 Mod. 129 (1702).
(5) 2 Str Rep. 1223 (1791).
(6) 6 Simons Rep 192 (1833).
(7) 31 L. J. Q. B. 62 (1861).
(8) 38 Ch D. 92 (1888).

THE BANK OF BOMBAY v. SULEMAN SOMJI.

if possible, their assent to certain changes which he thinks ought to be introduced for the better management of the affairs of the Bank. That object is, so far as it goes, specific and definite. Though the Appellant does not belong to the class of shareholders entitled under the provisions of Act XI of 1876 to vote at any of the meetings of the proprietors and shareholders of the Bank, yet he has the right under the Act to attend and speak at those meetings. Under sec. 50 'any ten or more proprietors or shareholders holding stock or shares, or both, to the aggregate amount of fifty thousand rupees,' are entitled to 'convene a special meeting upon giving 15 days' previous notice of such meeting, and of the purpose for which the same is convened.' The Appellant can be one of such shareholders. If the Appellant thinks that a special meeting ought to be called for the purpose of passing some resolution which in his opinion would conduce to the better administration of the Bank, he cannot do it unless he knows who the proprietors or shareholders are, holding stock or shares or both, so as to communicate with them and take the steps required by the provisions of sec. 50. There is nothing vague or shadowy about the specific purpose which he has in view so far. It is immaterial for that purpose that he has no definite scheme as to what he considers to be 'the better management of the affairs of the Bank.' He may be able to devise a definite scheme after consultation with other shareholders. In the evidence he gave before Scott, J., he stated that his object was to get nine instead of only seven Directors elected, nine being the full number permitted by the Act. That is a legitimate object, as specific and definite as any object can be; he cannot attain it unless he is able to get the co-operation of other shareholders; and before he can secure their co-operation he must know who they are. And that he can know only by inspecting the register.

"It is but reasonable that a shareholder of such a concern should desire from time to time to consult other shareholders and discuss with them the affairs of the Bank for the purpose of taking concerted action where and when necessary, apart from any question of any irregularity existing in the management of the Bank. And for that purpose inspection of the register of shareholders is necessary to enable him to find out who the shareholders are whom it would be worth his while to consult and whose co-operation he should seek. Other books and records of the Bank may stand upon a different footing; where inspection of any of them is claimed other and stricter considerations might apply. But why should it be necessary for a shareholder to prove more than his desire to communicate with other shareholders in the event of necessity, where he asks to be allowed to inspect nothing else than the register containing their names, addresses, &c.? It is to his interest as it is to theirs that they should consult one another and keep themselves in touch with one another affecting the affairs of the Bank. The Bank cannot lose by such consultation or discussion or co-operation on the part of individual shareholders unless the inspection is sought for some fraudulent purpose or some purpose prejudicial to the Bank.

THE BANK OF BOMBAY v. SULEMAN SOMJI.

* * * * * *

"There was no doubt the suggestion made before Scott, J., that the Appellant's object was not honest but that he claimed inspection merely to cause annoyance to the Bank officials and particularly to Ahmedbhoy Habibbhoy, who is one of the Directors. And Scott, J, has held the suggestion proved by the cross-examination of the Appellant. But the evidence as to it is so meagre that I do not think it can be treated as more than a mere suggestion or suspicion. And even if it be that the Appellant has some indirect motive of the kind suggested, it cannot affect his legal right, if he makes out that right independently of the motive [*Pender* v. *Lushington* (9)] and, in my opinion, he has made out his right.

"The next question which has to be considered is whether the principle limiting the nature of the right claimed by the Appellant being as above stated, it was incumbent on him to state to the Bank authorities the specific purpose for which he claimed inspection before he could have a cause of action entitling him to sue on refusal by those authorities.

"The authorities cited at the Bar on this point are all on the question of the statutory right of inspection. I have not been able to discover any case where it was held that as regards the common law right of inspection claimed by a member of a Corporation, he must state to the Corporation his specific purpose or else he would not be entitled to sue the corporate body in case of refusal. But, I think, by analogy the rule as to the statutory right ought to apply to the Common-Law right as well. In *Queen* v. *The Directors of the London and St. Katherine Docks Co.* (10), the Statute gave in express terms the right of inspection but it did not provide that a party seeking inspection should 'state to the Company the purpose for which he required it.' But it was held that as the right was conferred by the Statute not for mere idle curiosity, he must state what his object was and what the scope of his demand was so that the Company might see that the demand was reasonable. So also in *Rex* v. *The Proprietors of the Wilts and Berks Canal Navigation* (1).

In the present case, by his letter of the 5th of July 1906 addressed to the Respondent Bank, the Appellant disclosed his purpose to be, that as there were several irregularities in the management of the Bank, in the election of the Directors, in the manner the Directors acted, and other matters, he desired to communicate with the shareholders and take concerted action. Whether he was right or not in complaining vaguely that there were irregularities, he stated his purpose to be that he wished to communicate with the shareholders and take concerted action, and he asked to be allowed inspection of their register. What was there unreasonable in that request? Why was he to point out what the irregularities were?

"He had stated in his demand his *immediate* purpose—his desire to communicate with other shareholders with reference to the affairs of the Bank, and that was sufficient under the circum-

(9) 6 Ch. D. 70 (1877).

(1) 3 A. and E. 477 (1835).

(10) 44 L. J. Q. B. 4 (1874).

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

stances so far as the book of which he claimed inspection was concerned.

"I think that there was here a sufficient statement to the Bank officials of the object or purpose for which inspection of the register of shareholders of the Bank was required by the Appellant and that there was an improper refusal on their part."

The decree directed that the Appellant as long as he was a shareholder of the said Bank was entitled at all reasonable times to inspect the register of shareholders of the Respondent Bank and to copy and take extracts from the said register; that the Respondent Bank should give such inspection and allow the Appellant as long as he was a shareholder of the said Bank to take copies of and extracts from the said register; and further, the Respondent Bank was restrained from preventing the Appellant as long as he was a shareholder of the said Bank from having access at all reasonable times to the said register of shareholders for the purpose of inspection and perusal, and from preventing the Appellant as long as he was a shareholder of the said bank from taking copies of and extracts from the said register, and it was further directed that the Respondent Bank should pay to the Appellant his costs of the suit and of the appeal.

Against the said decree of the Court of Appeal the Bank appealed to His Majesty in Council.

Mr. Levett, K. C., and *Mr. Frank Russell, K. C.*, for the Appellant.

Mr. DeGruyther, K. C., and *Mr. Kyffin* for the Respondent.

Mr. Levett, K. C.—Sec. 231 of the Indian Companies Act, 1866, expressly exempts Bank of Bombay from its operation. See also sec. 256, Indian Companies Act, 1882. Refers to the Plaintiff's letter, p. 3405 of Record. Plaintiff's object is to stop the following irregularities (*a*) Directors improperly elected, (*b*) conducting business irregularly; refers to *Rex* v. *Merchant Taylors Co.* (3), *Burton and Saddlers' Co., In re* (7).

Mr. DeGruyther, K. C., referred to secs. 28 and 31, Indian Companies Act, X of 1866; *Mutter* v. *Eastern and Midlands Railway Co.* (8). That Act was amdended by Act VI of 1882, see sec. 55. Act X of 1876, the Presidency Banks Act, reproduces Act VI of 1839. These Acts contain the charter of the Companies Secs. 11 and 13 of Act VI of 1839. Directors had no discretion to refuse; see *In re Steinway* (11), *State of Washington* v. *Pacific Brewing and Malting Co.* (12).

Mr. Levett, K. C., in reply.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ATKINSON.—This is an appeal from a decree, dated the 22nd January 1907, pronounced by the High Court of Judicature at Bombay (sitting in appeal from its Original Civil Jurisdiction), by which a decree, dated the 6th August 1906, of the High Court (sitting in its Ordinary Civil Jurisdiction) was reversed

(3) 2 B and Ad. 115 (1831).
(7) 31 L. J. Q. B. 62 (1861).
(8) 38 Ch. D. 92 (1888).
(11) Lawyers' Rep. Annotated Book, 45, pp. 461 to 475.
(12) Lawyers' Rep. Annotated Book, 47 at p. 208.

and set aside. By this latter decree the Respondent's action was dismissed with costs.

The Respondent is a holder of one share in the Appellant Company, the Bank of Bombay, one of the Banks incorporated in 1876 by the Indian Statute of that year entitled the Presidency Banks Act, 1876.

It was suggested that the Respondent purchased this share for the purpose of causing annoyance to the Bank owing to the fact that some other litigation to which he was a party had been instituted against the Bank and was still pending. There was no satisfactory evidence given to sustain this allegation.

From the correspondence which took place between the Respondent and the Bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the Respondent claimed a right to inspect the register of the shareholders of the Bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is that conferred on the shareholders of joint stock companies in this country by sec. 32 of the Companies Act, 1862, or in India by sec. 31 of the Indian Companies Act, 1866, and sec. 55 of the Indian Companies Act, 1882.

It must be taken that the Appellants refused to recognize this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of the 21st June 1906, which conveyed this refusal, they informed the Respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from the register contended for in argument on behalf of the Respondent was never asserted, nor any limited demand based upon it ever made or refused.

In the statement of claim the Respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the Bank, in the election of its board of directors, in the advancing of large sums of money to its directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the directors, which he intended to propose at the general meeting of the shareholders to take place on the 9th August 1906. But though this is the purpose for which, and the occasion on which, he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of Appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the Respondent, as long as he is a shareholder of the Bank, is entitled at all reasonable times to inspect the register of shareholders of the Bank, and to copy and take extracts from the said register, and it then proceeds to order that the Bank do give such

inspection, and do allow the Respondent, as long as he is a shareholder of the Bank, to take copies of and extracts from the register, and then restrains the Bank from preventing the Respondent, as long as he is a shareholder of the Bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the Respondent, as long as he is a shareholder of the Bank, from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the inteference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute right claimed by the Respondent in the correspondence above referred to could justify the decree appealed from in its present and unrestricted form. Now by sec. 231 of the above-mentioned Indian Act of 1866 and sec. 256 of the above-mentioned Act of 1882, the Appellant Bank is expressely exempted from the operation of each of those statutes.

There is no statute conferring on the members of this corporation a riht to inspect, copy, or take extracts from the register of its shareholders or any other document belonging to it. The only right the Respondent can have, therefore, against the Bank in reference to such matters, is that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities in which the nature, extent and measure of this right is explained and defined. [*Rex* v. *The Proprietors of the Wilts and Berks Canal Navigation* (1), *Reg.* v. *Lewisham Union* (2)]. The learned Judges in the Bombay Court of Appeal have referred to others. The result of the authorities is summed up in their Lordships' view correctly in "Taylor on Evidence," Vol. 2, para. 1495 (10th edition, 1906) in the words following:—

"On the application of a member the King's Bench Division will, in general, grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded: and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by the case of *Rex*

(1) 3 A. and E. 477 (1835).
(2) (1897) 1 Q. B. 498.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

v. *Merchant Taylors Co.* (3). In that case certain members of a corporation claimed the right to inspect all the documents belonging to that body on the grounds (1) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who managed the corporation's affairs; (2) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised; (3) that lavish expenditure had taken place (in some instances to the applicants' own knowledge) without the consent of the majority of the members of the corporation; (4) that a clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but that no accounts or information had been laid before the freemen or liverymen by which they could have ascertained the amount of the defalcations; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not.

Every member of the corporation in this case obviously had an interest in each of the matters mentioned, but none of the applicants had in any of them any special interest different from that of his fellow members, nor had they any definite purpose, or object, in obtaining the inspection asked for other than (in the words of Littledale, J.) to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of *mandamus* was accordingly refused in this case.

At the trial no witness other than the Respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the Bank had advanced 6 lacs of rupees to three persons whom he named; that at elections the directors transferred shares to nominees who voted for them (a practice not itself illegal); that there were now only seven directors, instead of the maximum nine; that he intended to bring in two respectable people, and that he had in the correspondence given his reasons for asking *inspection*. It is clear on this evidence that the Respondent had no special interest in any of the matters he complained of, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate, but that, on the contrary, his object was similar to that of the applicants in *Rex* v. *The Merchant Taylors Co.* (3), namely, to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Their Lordships think that, on this point the case is covered by the authority of *Rex* v. *The Merchant Taylors Co.* (3), that the Respondent is not in law entitled to the extended right to which the decree declares him to be entitled, that the limited and qualified right contended for at the trial was never put forward, or

(3) 2 B and Ad 115 (1831).

THE BANK OF BOMBAY *v.* SOLEMAN SOMJI.

insisted on, before action brought, or any claim based upon it, ever refused, and they are, therefore, of opinion that the decree appealed from is erroneous and should be reversed with costs, and the judgment and order of Mr. Justice Scott restored. They will humbly advise His Majesty accordingly. The Respondent must pay the costs of this appeal.

Solicitors: *Messrs. Cameron, Kemm & Co.* for the Appellant.

Solicitors: *Messrs. Payne & Lattey* for the Respondent.

J. H. W. A.

CIVIL APPELLATE JURISDICTION.

Nos 1832 AND 2127 TO 2130 OF 1906

AND

CIVIL RULES NOS. 403 TO 407 OF 1906.

MACLEAN, C. J.
DOSS, J.
1908.
29, April.

BHAGABATI BEWA and others, Defendants, Appellants,
v.
NANDA KUMAR CHUCKERBUTTY, Plaintiff, Respondent.

Bengal Tenancy Act (Act VIII of 1885), sec. 153, cl. (b)—Co-sharer landlord—Suit for share of rent without making other co-sharers parties—Appeal—Second appeal—Civil Procedure Code (Act XIV of 1882), sec. 622.

A suit by a co-sharer landlord for his share of the rent only without making the other co-sharers parties is a suit instituted by a landlord for the recovery of rent within the meaning of sec. 153, Bengal Tenancy Act.

Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was specially empowered under cl. (b) of sec. 153,

Held—*That no appeal lay to the Subordinate Judge and hence no second appeal from his decision reversing that of the Munsif.*

But the decision of the Subordinate Judge being without jurisdiction was set aside under sec. 622, Civil Procedure Code.

RAJA PROMODA NATH ROY *v.* RAJA RAMANI KANTA ROY (2) *applied.*

JOGENDRA *v.* PADAN (3) *not followed.*

These were appeals preferred on the 12th of November 1906, against the decrees of Babu Ram Charan Mullick, Officiating Subordinate Judge, 1st Court of Zillah Backergunge, dated the 12th of July 1906, reversing the decrees of Babu Sarat Chandra Sen, Munsif, 2nd Court at Perojpur, dated the 11th of December 1905.

Plaintiff is a co-sharer landlord who brought a suit against the tenant in each of the above cases for his share of the rent only, without making his co-sharers parties to the suit. He alleged in his plaint that he collected his share of the rent separately from the other co-sharers. The amount claimed in each case was less than Rs. 50.

The Munsif dismissed the suits on the ground that the relationship of landlord and tenant did not exist between the parties.

On appeal, the Subordinate Judge reversed the decision holding that the relationship was sufficiently established. A preliminary objection was raised before him that no appeal lay in these cases according to sec. 153, Bengal Tenancy Act, as the Munsif who tried the suit

(2) 12 C. W. N. 249 (1907).
(3) 8 C. W. N. 472 (1904).

BHAGABATI BEWA v. NANDA KUMAR CHUCKERBUTTY.

in the first instance was vested with final jurisdiction under cl. (*b*) of that section. The Subordinate Judge overruled this plea, holding on the strength of the case *Jogendra* v. *Paban* (3) that sec. 153 does not apply to a suit by a co-sharer landlord for his share of the rent.

The Defendants appealed to the High Court. They also preferred applications under sec. 622, C. P. C., in all the cases and obtained rules which were heard together with the second appeals.

Babu Gunada Charan Sen for the Appellants.—Sec. 153 applies to the case of a co-sharer landlord suing for his share of the rent only. *Jogendra* v. *Paban* (3) is against me, but the Full Bench case in *Narain* v. *Manofi* (4), which favours my contention, does not seem to have been considered in that case. Besides, the recent Privy Council case of *Raja Promoda Nath Roy* v. *Raja Ramani Kanta Roy* (2) sets the point at rest and virtually overrules *Jogendra* v. *Paban* (3). See Mitra, J.'s judgment in the same case, *Jogendra* v. *Paban* (5). See also *Jogendra Nath Roy* v. *Nogendra Narain Nandi* (6). The Full Bench case in *Bhabatarini Dasi* v. *Ekabbar Malita* (1) throws some light upon the point. The Full Bench decision in *Beni* v. *Joad* (7) relied upon in *Jogendra* v. *Paban* (3) is not in point.

Babu Baikuntha Nath Das (with him *Dr. Priya Nath Sen*) for the Respondent.—*Raja Promoda Nath Roy* v. *Raja Ramani Kanta Roy* (2) is distinguishable as that ruling is confined in its terms to a case where the suit is by one co-sharer for the entire rent and all the other co-sharers are parties. Otherwise the result of the Privy Council decision will be subversive of all previous rulings on the point. *Beni* v. *Joad* (7) applies and governs the present case. *Bhabatarini Dasi* v. *Ekabbar Malita* (1) has no application.

Babu Gunada Charan Sen in reply.—The Decision of the Privy Council is based on the argument that sec. 188 does not apply to the bringing of a suit for arrears of rent, for this is not an act which is required or authorised by the Act. Then 'landlord' in the first para. of sec. 153 does not exclude a co-sharer landlord and does not necessarily mean the entire body of landlords only.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—No. 1832. The only question on this appeal is whether the case falls within sec. 153 of the Bengal Tenancy Act, so as to preclude an appeal. The amount of rent sued for in the suit being admittedly under fifty rupees. The suit was one for recovery of rent by a co-sharer landlord and there are allegations in the plaint to the effect that there has been separate collection of the rent. Apparently the plaint does not go so far as to say that there was a separate agreement to that effect. If that had been so the case would have been gov-

(1) 5 C. L. J. 235 (1906).
(2) 12 C. W. N. 249 (1907).
(3) 8 C. W. N. 472 (1904).
(4) I. L. R. 17 Cal. 489 (1890).
(5) 7 C. W. N. 908 (1903)
(6) 11 C. W. N. 1026 (1907).
(7) I. L. R. 17 Cal. 390 (1890).

(1) 5 C. L. J. 235 (1906).
(2) 12 C. W. N. 249 (1907)
(7) I. L. R. 17 Cal. 390 (1890)

BHAGABATI BEWA *v.* NANDA KUMAR CHUCKERBUTTY.

erned by the Full Bench decision of this Court in the case of *Bhabatarini Dasi v. Ekabbar Malita* (1). The first Court dismissed the suit, then there was an appeal to the Subordinate Judge of Backergunge, who reversed that decision and gave a decree in the Plaintiff's favour. The Defendant has appealed and he contends that no appeal lay from the Munsif to the Subordinate Judge under sec. 153 of the Bengal Tenancy Act. We think that contention must prevail and without going through the authorities in which there is at any rate some conflict of judicial view we think the case is governed in principle by the recent decision of the Judicial Committee in the case of *Raja Pramoda Nath Roy* v. *Raja Ramani Kanta Roy* (2), where such a suit is treated as governed by the Bengal Tenancy Act. But if no appeal lies from the Munsif to the Subordinate Judge no appeal lies from the Subordinate Judge to this Court and therefore the appeal must fail and must be dismissed with costs. This judgment will govern the other appeals which are also dismissed with costs.

But concurrently with the appeals applications were made under sec. 622 of the Code of Civil Procedure, the Petitioner asking that the decree of the Subordinate Judge might be discharged on the ground that he had no jurisdiction to entertain the appeal and rules were granted. We think that these rules must be made absolute and that consequently the decree of the Subordinate Judge must be discharged. The Petitioners must have the costs of the rules. Hearing fee 1 gold mohur in each case.

DOSS, J.—I agree.

Appeals dismissed :

N. G. *Rules made absolute.*

(1) 5 C. L. J. 235 (1906).
(2) 12 C. W. N. 249 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 674 OF 1907.

RAMPINI, C. J. RYVES, J. 1908. Heard, 17, June. Judgment, 23, June.

POLIN CHANDRA MANDAL and anr., Plaintiffs, Appellants,
v.
BALAI MANDAL and others, Defendants, Respondents.

Hindu Law—Widow's estate—Alienation of portion of estate with consent of the reversioner—Validity.

The alienation by a Hindu widow of a portion of her husband's estate without legal necessity but with the consent of the then next reversioner is valid and binding on the actual reversioner upon the death of the widow.

MARUDAMUTHA *v.* SRINIVASA PILLAI (2) *dissented from.*

BEHARI LAL *v.* MADHO LAL (1), NABO KISHORE *v.* HARI NATH (4), HEM CHUNDER SANYAL *v.* SURNOMOYI DEBI (5), VINAYAK VITHAL *v.* GOVIND (6), BAJRANGI *v.* MANOKARNIKA (7), ANNADA KUMAR *v.* INDRA BHUSAN (8) *relied on.*

This was an appeal from a decision,

(1) I. L. R. 19 Cal. 236 (1892).
(2) I. L. R. 21 Mad. 128 (1898)
(4) I. L. R. 10 Cal. 1102 (1884)
(5) I. L. R. 22 Cal. 354 (1894).
(6) I. L. R. 25 Bom. 129 (1900).
(7) 12 C. W. N. 74 : s. c. 35 L. R. I. A. 1 (1907).
(8) 12 C. W. N. 49 (1907).

PULIN CHANDRA MANDAL *v.* BALAJI MANDAL.

dated the 8th January 1907, of C. E. Pittar, Esq., District Judge of Murshidabad, confirming on appeal a decision, dated the 3rd of July 1906, of Babu Birendra Kumar Dutt, Munsif of Kandi.

The Plaintiffs prayed for *khas* possession of the plaint lands on establishment of their title thereto as heirs of one Srinath Mondal to whom they originally belonged. The Plaintiffs were the sons of Srinath's deceased brother Lokenath and it was stated that on the death of Srinath his wife Modhu Mollani held the lands as his heiress, that on her death the Plaintiffs got possession of them as Srinath's heirs, but the Defendants dispossessed them therefrom in Asar 1312, on the allegation that they had purchased them from Madhu Mollani by a *kobala*, that the said *kobala* was invalid for want of consideration, that Madhu Mollani had no legal necessity for selling the properties and that as such also the *kobala* was invalid.

Defendants in contesting the suit urged that the *kobala* was a *bonâ fide* document executed for valid consideration, that Madhu Mollani's circumstances became very poor, owing to the debts incurred by her husband as well as for the bad state of the lands themselves which did not yield sufficient produce for her maintenance, that she sold the properties for legal necessity and that the transaction was valid in law.

The finding of the Munsif which was accepted by the District Judge was, that the immediate cause of the sale was the giving of dowery to the bride in connection with Madhu's daughter's son Nrittya's marriage. From the depositions of the witnesses on the Defendants' side it appeared that the consideration money of the *kobala* was not paid in cash but that Madhu Mollani, her daughter Mori and her daughter's son Nrittya sold the properties to Defendant No. 4 at the alleged value of Rs. 100, but really in consideration of the Defendant No. 4 giving up the amount which they would have to pay as dowery to Defendant No. 4's daughter when Nrittya married. On these facts the Munsif held that the *kobala* was executed for good consideration. Further, that the *kobala* was not executed only by Madhu Mollani but also by the two next reversionary heirs, Mori Mollani and Nrittya Gopal.

Before the District Judge it was contended on behalf of the Plaintiffs that though there was a very strong current of decisions of the Calcutta High Court to the effect that a grant by a Hindu widow with the sanction and concurrence of the next reversioner was valid, and created a title which could not be impeached, those decisions related only to cases in which the widow had relinquished her entire life estate, and had no application to a case like the present, in which a portion only of the estate had been alienated.

The District Judge, however, relying on *Behari Lal* v. *Madho Lal* (1), overruled this contention and held that the alienation was valid, although there was no legal necessity for the sale, the marriage of a daughter's son not constituting legal necessity. The Plaintiffs preferred this second appeal.

Babu Ram Chandra Majumdar for the Appellants.

Babu Ashutosh Mukerjee for the Respondents.

(1) I. L. R. 19 Cal. 236 (1892).

PULIN CHANDRA MANDAL *v.* BALAI MANDAL.

The JUDGMENT OF THE COURT was as follows:—

The question contested before us in this second appeal is whether the alienation by a Hindu widow of a portion of her husband's estate without legal necessity but with the consent of the next reversioner is valid or not, or whether an alienation by a Hindu widow in such circumstances is valid only if she alienates the whole of her husband's property. The Judge in the Court below has decided that a widow may alienate a portion of her husband's property if the next reversioner consents. The Appellants' pleader contends that this view is incorrect and that, unless the Hindu widow alienates the whole of her husband's property and so, as it were, surrenders the whole of her interest in the whole of her husband's property, the alienation is invalid. The learned pleader for the Appellants has cited the following cases in support of his view, *viz.*, *Behari Lal* v *Madho Lal* (1), *Marudamuthu* v. *Srinivasa Pillai* (2), *Radhashyam* v. *Joy Ram* (3). By the other side, the cases of *Nabo Kishore* v. *Hari Nath* (4), *Hem Chunder Sanyal* v. *Surnomoyi Debi* (5), *Vinayak Vithal* v. *Govind* (6) *Bajrangi* v. *Mano* (7) and *Annada Kumar* v. *Indra Bhusan* (8) have been relied on.

We are of opinion that the view of the learned District Judge is correct and that a Hindu widow may validly alienate a portion of her husband's property with the consent of the next reversioner. There would seem to be no reason why she should not do so, or why to make a valid alienation she must convey or surrender the whole of her husband's property. The only direct authority for such a view is to be found in the judgment of the Madras High Court in *Marudamuthu* v. *Srinivasa Pillai* (2), in which two former judgments of the Court to the contrary effect are overruled; but the decision in this case would seem to be based on a mistaken interpretation of the rule laid down by their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal* (1), *viz.*, that the surrender must be absolute and complete and that the whole estate should be withdrawn. This does not, we think, mean that the husband's whole property must be alienated. It only means that the whole estate of the widow in the husband's property must be withdrawn and that she cannot retain any interest in it. In the case of *Radhashyam* v. *Joy Ram* (3), some of the reversioners only consented to the alienation and, for this reason, it was held to be invalid as being an alienation of only a part of the Hindu widow's interest. The case reported in the foot-note at page 900 shows that this was the meaning of this judgment. The case of *Behari Lal* v. *Madho Lal* (1) has been considered by the District Judge in his judgment and, we think, must be interpreted in the way in which, while alluding to Mr. Justice Subramaniya Aiyer's judgment in *Maru-*

(1) I. L. R. 19 Cal. 236 (1892).
(2) I. L. R. 21 Mad. 128 (1898).
(3) I. L. R. 17 Cal. 896 (1890).
(4) I. L. R. 10 Cal. 1102 (1884).
(5) I. L. R. 22 Cal. 351 (1894).
(6) I. L. R. 25 Bom. 129 (1900).
(7) 12 C. W. N. 74 : s. c. I. L. R. 30 A. 1 (1907).
(8) 12 C. W. N. 49 (1907).

(1) I. L. R. 19 Cal. 236 (1892).
(2) I. L. R. 21 Mad. 128 (1898).
(3) I. L. R. 17 Cal. 896 (1890).

damutha v. *Srinivasa Pillai* (2), we have indicated it should, in our opinion, be construed.

On the other hand, the Full Bench decision in the case of *Nobo Kishore* v. *Hari Nath* (4), broadly lays down that:—"Under the Hindu law current in Bengal a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property." The Full Bench make no distinction between an alienation of the whole or of a part of the property. Then, in the case of *Hem Chunder* v. *Surnomoyi* (5), it has been expressly said:—"The widow may convey to the reversioner or to a third party with the consent of the next reversioner, the whole or any portion of the estate and the transferee will acquire an absolute interest." It is objected that this is an *obiter dictum*, but it is the view of a distinguished Hindu lawyer. The case of *Vinayak* v. *Govind* (6) is a direct authority for holding that a Hindu widow may validly alienate portions of her Husband's property with the consent of the next reversioners. The case of *Bajrangi* v. *Manokarnika* (7) is also an authority for this view. In this case portions of the husband's property were alienated on different occasions between 1872 and 1875. The subsequent consent of the reversioners, though given in 1877 and 1878, was held to validate the alienations. Again, in *Annada Kumar* v. *Indra Bhusan* (8), the alienation by a Hindu widow of the half share of her husband's property in favour of the then reversioner was held to be legal and valid.

The consensus of authority is accordingly in favour of the view taken by the learned District Judge.

We dismiss the appeal with costs.

Appeal dismissed.

(2) I. L. R. 21 Mad. 128 (1898).
(4) I. L. R. 10 Cal. 1102 (1884).
(5) I. L. R. 22 Cal. 354 (1894).
(6) I. L. R. 25 Bom. 129 (1900).
(7) 12 C. W. N. 74: s. c. L. R. 35 I. A. 1 (1907).
(8) 12 C. W. N. 49 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1839 OF 1907.

RAMPINI, J.
SHARFUDDIN, J.
1908.
18, May.

JAGANNATH MARWARI, Plaintiff, Appellant,
v.
ONDAL COAL CO., LD., and ors., Principal Defendants, Respondents.

Limitation Act (XV of 1877), Sch. II, Art. 47—Suit to recover property, the subject of order under sec. 145, Criminal Procedure Code (Act V of 1898)—Limitation—Starting point—Rule issued by High Court against Magistrate's order—"Final order."

For a suit to recover property in respect of which an order under sec. 145 of the Criminal Procedure Code has been made, the period of limitation runs from the date of the order of the Magistrate and not from the date on which a rule issued by the High Court under sec. 15 of the Charter Act against the Magistrate's order was finally disposed of.

This was an appeal preferred against the decision of W. N. Delevingue, Esq.,

JAGANNATH MARWARI v. ONDAL COAL CO., LD.

District Judge of Burdwan, dated the 1st of July 1907, affirming that of Babu Gopi Krishna Banerji, Subordinate Judge of Burdwan, dated the 26th of February 1906.

The appeal arose out of a suit for a declaration of title to and recovery of khas possession of an area of 1,102 bighas of land in Mouzah Sonepara. The facts of the case are that the possession of the lands in suit formed the subject-matter of a proceeding under sec. 145 of the Code of Criminal Procedure between the Plaintiff and his co sharers and others on the one hand and the principal Defendants, the Ondal Coal Company, Limited, on the other. Those proceedings were concluded on the 9th April 1902 and the Magistrate by his order of that date declared the Ondal Coal Company to be in possession of the lands in dispute including the minerals, etc., lying beneath the surface of the lands. It appears that a rule was obtained from the High Court against that order but was discharged on the 24th August 1902. The present suit was instituted on the 10th May 1905, that is, more than three years after the Magistrate's order but within three years of the order of the High Court. Both the lower Courts were of opinion that the suit was barred by limitation.

The Plaintiff preferred this second appeal.

Dr. Rash Behary Ghose and *Babu Surendra Nath Ghosal* for the Appellant.

Mr. Sinha and *Babu Digambur Chatterjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against a decision of the District Judge of Burdwan, dated the 1st July 1907.

The suit was brought for a declaration of title to and recovery of possession of 1,102 bighas of land in Mouzah Sonepara. This area of land was the subject of an order under sec. 145, Cr. P. C., which was passed on the 9th April 1902. The present suit was instituted on the 10th May 1905. Therefore the Courts below have held that it is barred by limitation. The Plaintiff contends that the order of the Distirct Judge is wrong inasmuch as the date of the final order in the case under Art. 47 of the Indian Limitation Act which is the article applicable to the case must be the final order of this Court in this case and not the final order of the Magistrate. It is pointed out to us that a rule was issued by this Court on the 4th June 1902 which was not disposed of until the 24th August 1902 and hence, it is said, that the suit is within time. We, however, cannot take this view of the matter and we think that the date in column 3 of Art. 47 of the Limitation Act must mean the date of the order of the Magistrate. Orders under sec. 145, Cr. P. C., are not subject to appeal review or revision. This is apparent from sub sec. 3 of sec. 435, Cr. P. C. No doubt a rule was issued by this Court in connection with this order. But that was issued under sec. 15 of the Charter Act and it could never had been contemplated by the Legislature when they drew up the provision of Art. 47 of the Indian Limitation Act that rules issued under our powers of "superintendence under the Charter Act" and disposed of by us should come within the meaning of the words "final order" in the case.

JAGANNATH MARWARI *v.* ONDAL COAL CO., LD.

Then another contention has been raised that the order of the Magistrate was only with regard to mineral rights and therefore the order of the Magistrate under sec. 145, Cr. P. C, is without jurisdiction. We do not think that this is the case. The order of the Magistrate was passed with regard to 1,203 bighas of land and the minerals subsisting underneath. The latter are tangible immoveable property.

The last ground of appeal is that the Plaintiff has now got a fresh lease of the land and so he is not bound by the order passed under sec. 145, Cr. P. C. We think, however, that it is clear that this is not so. At all events, the Defendants have got a good title to the lands by the order under sec. 145, Cr. P. C. Their possession and their rights cannot be disturbed except by a Civil Court decree. The Plaintiff was a party to the case under sec. 145, Cr. P. C., and the suit is clearly barred under the provisions of Art. 47 of the Limitation Act. We therefore dismiss the appeal with separate cost to each of the two sets of Respondents.

N. G. *Appeal dismissed.*

[CIVIL REVISIONAL JURISDICTION.]

CIV. RULE NO. 1719 OF 1908.

RAMPINI, C. J.
RYVES, J.
1908.
12, June.

CHANDI CHARAN DEY, Petitioner,

Legal Practitioners Act (XVIII of 1879), secs. 3, 36—District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause.

Before proceeding to declare a person to be a tout, the District Magistrate should himself make an enquiry as to the person's antecedents and give him an opportunity to show cause.

Where a Sub-divisional Officer called on a person to show cause why he should not be declared a tout and he showed cause and the Sub-divisional Officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate, and the latter after perusing them passed order declaring the person to be a tout, the order was set aside.

IN THE MATTER OF MADHU PERSHAD (1) *followed.*

This was a Rule granted on the 18th of May 1908, against an order of Mr. A. G. Laine, Additional District Magistrate of Dacca, dated the 28th of April 1908, declaring the Petitioner a tout and directing his exclusion from the precincts of all Courts in the district.

The fact of the case are as follows :—

On the 7th March 1908 the Sub-divisional Officer of Naraingunj, V. Dawson, Esq., issued a notice upon the Petitioner to show cause on the 9th March 1908 why a report should not be made to the Collector of the district for declaring him to be a tout and excluding him from the precincts of the Court of the Sub-divisional Officer under sec. 36 of the Legal Practitioners Act. On the 9th March, he showed cause before the Sub-divisional Officer denying that he was a tout and stating that he was a talukdar and service-holder by profession and had been serving as officer and *am-mokhtar* of several zemindars and talukdars. In support of the latter allegation the Petitioner produced several documents of which the

(1) 6 C. W. N. 289 (1901).

CHANDI CHARAN DEY.

Sub-divisional Officer kept a list directing the Petitioner to produce them before the District Magistrate to whom he would be reported. The Sub-divisional Officer after examining witnesses on both sides submitted a report recommending that the Petitioner be declared a tout. The Additional District Magistrate of Dacca before whom the report came up for consideration did not call on the Petitioner to show cause against the inclusion of his name in the list of touts but on a perusal of the evidence as recorded came to the conclusion that the Petitioner "had been satisfactorily proved to be a tout within the meaning of sec. 3 of the Legal Practitioners Act. Referring to the proceeding before the Sub-divisional Officer he observed that the Petitioner had an opportunity of showing cause and had indeed showed cause but had utterly failed to rebut the evidence recorded against him. Against this order Petitioner moved the High Court and obtained this rule *inter alia* on the ground, *firstly*, that the Additional District Magistrate had no power under the Legal Practitioners Act to entertain the proceeding, and, *secondly*, that he had not allowed the Petitioner an opportunity to show cause against his inclusion in the list of touts.

Babu Sarat Chandra Basak for the Petitioner submitted that the "Additional District Magistrate" was not authorised to take proceedings under sec. 36 of the Legal Practitioners Act. An Additional District Magistrate cannot exercise such powers as the District Magistrate has outside the Criminal Procedure Code. See sec. 8, Criminal Procedure Code. As regards the second point, relies on two unreported decisions of this Court, *In the matter of Prasanna Kumar Das* (2), *In the matter of Atul Chunder Chow-*

---

(2) CIVIL APPELLATE JURISDICTION.

CIVIL RULES NOS. 566, 582 AND 583 OF 1897.

MACLEAN, C. J. BANERJEE, J. 1897. 31, May. — In the matter of PRASANNA KUMAR DAS, Petitioner.

Legal Practitioners' Act (XVIII of 1879), sec. 36—Tout, declaring a person to be—District Judge to take evidence himself—Power to direct Munsif to take it—Opportunity to show cause—Procedure when Munsif suspects a person to be a tout.

Sec. 36 of the Legal Practitioners' Act is of a final nature and its provisions must be strictly and precisely complied with.

It is only the Judges and other officers specially mentioned in sec. 36 of the Legal Practitioners' Act who can frame and publish a list of touts and they can only frame and publish such a list when it has been proved to their satisfaction by evidence taken and heard by themselves that the person whom they propose to include in the list habitually acts as a tout.

A District Judge has no power to delegate to the Munsif the special statutory powers conferred upon him by that section.

When a Munsif has reason to suspect that any person is acting as a tout he should inform the District Judge of his suspicions giving him the names of witnesses and leaving it to him to take and hear evidence.

Babu Chunder Kant Ghose in Rule No. 566.
Babu Chunder Kant Sen in Rules Nos. 582 and 583.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This is a rule calling upon the District Judge of Backergunge to show cause why the Petitioner's name should not be struck out of a certain list of touts prepared in alleged pursuance of the provisions of sec. 36 of the Legal Practitioners' Act as amended by Act XI

CHANDI CHARAN DEY.

dhury (3) and on *In the matter of Madhu Pershad* (1).

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why the order of the Additional District Magistrate of Dacca, dated the 28th April 1908, complained of in the petition should not be set aside or such other order should not be passed in the matter as to this Court may seem fit.

The order complained of is one declaring the Petitioner to be a tout and forbidding him loitering about the precincts of the Courts of the District of Dacca. The rule is supported on various grounds but it is sufficient for us to make the

(1) 6 C. W. N. 289 (1901).

(3) Civil Rule No. 782 of 1905 (unreported).

---

of 1896, and for consequential relief. The applicant, whose name has been included in the list, hereafter referred to, as a tout, objects that the list in question has been irregularly and illegally framed and published, and that the procedure in relation to the framing and publishing of that list was irregular and contrary to law.

I think that the objection must prevail. Under sec. 36 of Act XI of 1896, it is only the Judges and other officers especially mentioned in the section, who can frame and publish the list referred to in that section, and, they can only frame and publish such a list when it has been proved, to their satisfaction, by evidence, that the person whom they propose to include in the list, habitually acts as a tout The section is of a penal nature, and in my opinion, its provisions must be strictly and precisely complied with.

What happened in the case is this. The Munsif at the instance of the District Judge, appears to have held a preliminary enquiry—apparently an enquiry at which the Petitioner was present or of which he had notice. The Munsif took evidence and having taken that evidence he arrived at the conclusion that the Petitioner was a tout within the meaning of the Act, and included his name in a list and sent up that list, being a list of such persons as he considered to be touts, to the District Judge. The District Judge, apparently without giving the Petitioner any opportunity of showing cause against the inclusion of his name in the list, as is provided for by sub-sec. 2 of sec. 36 and without taking or hearing any evidence, merely adopted or approved the list as framed by the Munsif. The District Judge himself therefore held no enquiry, took no evidence, and made no list. The Munsif took and heard the evidence and prepared the list. But, in my opinion the District Judge has no power to delegate to the Munsif the special statutory powers conferred upon him, by sec. 36, nor has the Munsif any authority to act under that section. The only persons who, as I read the Act, are authorized to make the list are the persons specially named in the section, and they are the persons who are to take and hear the evidence, and having taken and heard the evidence to decide whether a particular person is to be included in any particular list as a tout.

I can readily conceive why the legislature deemed it advisable that these powers, penal in their consequences if put in force, should only be entrusted to and exercised by judicial and other officers of high position. Further, in my opinion, no name ought to be included in the list, unless and until the person, whose name is proposed to be so included has had an opportunity of showing cause against such inclusion. I think the procedure to be adopted under this section of the Act has been misconceived in the present case, and upon the short grounds I have indicated I am of opinion that the list has been improperly framed and published, and that the Petitioner is right in the objection he has urged before us.

I may perhaps add for the assistance of those in the Mofussil who have to deal with this subject that, whilst the Munsif cannot exercise the powers given by sec. 36 of the Act, if he have good reason to suppose that any person is acting as a tout within the meaning of the

HANDI CHARAN DEY.

rule absolute on the ground that the Additional District Magistrate in declaring the Petitioner to be a tout did not make any enquiry himself as to the Petitioner's antecedents and did not give him any opportunity to show cause. He should have proceeded in the manner laid down in *In the matter of Madhu Pershad* (1).

(1) 6 C. W. N. 289 (1901).

Act, he would, in my opinion, be justified in informing the District Judge of his suspicions, giving the latter the names of the witnesses who could testify to the fact, and leaving it to the District Judge to take and hear the evidence. But the person accused must have the opportunity of defending himself before the list is framed or published. I entertained but little doubt that the powers conferred by the section of the Act I have referred to are useful and salutary, but it is most important that they should only be exercised strictly in accordance with the provisions of the section. Upon the merits of the case, as we decide this case solely upon the view that the provisions of the Act have not been complied with, we express no opinion, but having regard to the views expressed both by the District Judge and the Munsif, we think that the matter ought to be further prosecuted in accordance, however, with the opinion expressed in this judgment as to the proper method of procedure. The rule must therefore be made absolute without costs.

I understand that our decision also governs Rules Nos. 582 and 583 and these rules, therefore, will also be made absolute without costs.

BANERJEE, J.—I am of the same opinion. I think the proceedings in this case have been held not in strict conformity with the provisions of sec. 36 of the Legal Practitioners' Act. That section requires that before any list of touts is published, it should be proved to the satisfaction of the authorities expressly named in the section by evidence of general repute or otherwise, that the persons included in the list habitually act as touts. This means, that the authorities named in the section should not merely read the evidence taken by a subordinate authority, but should take the evidence themselves, so that they may be in a position to weigh it properly. The section does not authorise any of the authorities therein named to act upon evidence taken otherwise than by themselves. That being so, and it being clear in this case that the evidence against the Petitioner was taken not by the District Judge but by the Munsif, the requirements of sec. 36 have not been complied with.

On this ground we make the rule absolute and set aside the order of the Additional District Magistrate.

N. G. *Rule made absolute.*

CRIMINAL REVISIONAL JURISDICTION.

RULE NO. 165 OF 1908.

GEIDT, J.
WOODROFFE, J.
1908.
Heard,
7, April.
Judgment,
10, April.

MOHENDRA NATH MISSER, Petitioner,
v.
THE EMPEROR, Opposite Party.

Perjury—Indian Penal Code (Act XLV of 1860), sec. 193—False statement made in a deposition which was not read over to the witness in presence of the accused or his pleader—Criminal Procedure Code (Act V of 1898)—Sec. 360, noncompliance with, effect of—Indian Evidence Act (I of 1872), secs. 91 and 80—Proof of statement.

A witness cannot be convicted under sec. 193, I. P. C., for having made false statements in his deposition before a Criminal Court when the deposition was not read over to him in the presence of the accused or his pleader in accordance with the provisions of sec. 360, Cr. P. C.

KAMATCHINATHAN *v.* EMPEROR (1) *followed.*

(1) I. L. R. 28 Mad. 308 (1904).

MOHENDRA NATH MISSER *v.* THE EMPEROR.

Where the deposition of a witness in a criminal trial is not read over to him in the presence of the accused or his pleader in accordance with the provisions of sec. 360, Cr. P. C., it is not admissible in evidence and no other evidence is admissible in proof of the statements made therein.

This was a rule granted on the 10th of February 1908, against an order of Babu N. C. Kar, Dy. Magistrate of Bankura, dated the 21st of January 1908, convicting the Petitioner under sec. 193, I. P. C., and sentencing him to undergo three months' rigorous imprisonment for each of the two offences—which order was, on appeal, affirmed by Mr. J. Cornes, Sessions Judge of Baukura, on the 1st of February 1908.

The facts material to the report as they appear in the judgment of the Magistrate are as follows:—

The accused in this case was prosecuted under sec. 193, I. P. C., for making false statements on oath while under examination before the Sessions Judge on the 2nd of August 1907 as a witness in the case of *Emperor* v. *Hrishikesh Mondal*. He made three different statements and the present prosecution was with respect to all of them.

Accused said he did not remember what statements he made at the Sessions Court but alleged that whatever he said was true.

The statements were these (1) "He, (Hrishikesh) also gave me 2 *purwanas* connected with the money sent. I wrote the *kaifiat* on the *purwana*." (2) "I did take the two *purwanas* at the same time" and (3) "I handed over both the money and the *purwanas* to Ramkumar."

Re (1), the Magistrate thought the evidence was meagre. He said "It shows that the accused while making over the money covered by the two *purwanas*, did not make over the *purwanas* themselves but only the money, and they being returned by the peon Hrishikesh himself subsequently. This being the evidence it does not follow that Hrishikesh never gave *purwanas* to the accused. It may be that he gave him *purwanas* at his residence to write out the *kaifiat* and then took them back sending only the money to the Nazir through him. As the statement admits of an explanation like this, I do not think he can, in the face of the evidence, be held guilty of perjury."

Re (2 & 3), the Magistrate held the evidence to be clear that these were false. To prove this, he said, there was the evidence of the Nazir, Ramkumar, who deposed that the accused made over to him only the money and not the *purwanas*. In this statement he was supported by the entries in Reg. 43 which was kept by him. There were columns in the register for dates of actual returns of processes and these were found blank with respect to the processes. Further the entry in red ink in the remarks column showed that the processes were received back on 16th May whereas the money in question was brought by the accused on 6th May. As regards this note of return of the processes, it was contended on behalf of the accused that it was the result of an after-thought and made on a subsequent date, as the note did not appear in the copy of the register filed by the witness before the committing Magistrate. The witness explained that as he filed copy, and the note being no

MOHENDRA NATH MISSER *v.* THE EMPEROR.

part of the register, but only a manuscript note not by himself but by the Nazir, he did not think "it should go to the copy" and hence omitted it. The Magistrate thought the explanation was a reasonable one and accepted it and observed "thus both this note as well as the non-entry of the actual date of return at the prescribed column are sufficient corroborations of the statement that the processes were not received back from the accused on 6th May when money was returned by him and they go to prove beyond doubt that the statements are false and as the accused made them with that knowledge since he was aware that he made over only the money he is guilty of wilfully giving false evidence."

An objection was taken that the statements were not read over to the accused either in presence of the Judge or the pleader as they were read over in another chamber and it was argued by the pleader that the accused could not be convicted on statements which were not taken down in accordance with sec. 360, Cr. P. C., and in support of this, he relied on the case of *Kamatchinathan* v. *Emperor* (1). The Magistrate thought this was an irregularity but it was not such as to render the proceeding invalid under sec. 530, Cr. P. C.

Babus Tara Prosonno Chatterjee and *Jotindra Nath Ghose* for the Petitioner.

No one for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

The Petitioner has been convicted of having given false evidence in a criminal

(1) I. L. R. 28 Mad. 308 (1904).

trial. The false statements alleged to have been made by him were proved by putting in the deposition recorded by the Sessions Judge. That deposition is, under sec. 91 of the Evidence Act, the only evidence admissible in proof of those statements; and under sec. 80 of the same Act, it is admissible only if it was taken in accordance with law.

Now, in the present case, it is admitted that the deposition was not taken in accordance with law as it was not taken in accordance with the provisions of sec. 360, Cr. P. C., in that it was not read over to the witness in the presence of the accused or his pleader. It follows, therefore, that the deposition is not admissible in evidence and there has been no legal proof that the Petitioner made the false statements which he is charged with having made.

The same view was taken by the Madras High Court in *Kamatchinathan* v. *Emperor* (1). Following that decision, we must hold that the conviction of the Petitioner in this case is illegal.

We accordingly make the rule absolute, set aside the conviction and sentence and direct that the Petitioner be discharged.

B. C. *Rule made absolute.*

(1) I. L. R. 28 Mad. 308 (1904).

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 137 OF 1908.

RAMPINI, J.
SHARFUDDIN, J.
1908.
7th, May.

SAJJAD AHMED CHAUDHURY, 1st Party, Petitioner,
v.
PARBATICHARAN ROY and ors, 2nd Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), sec. 145—Irregularity amounting to want of jurisdiction—Interference by the High Court.

A Magistrate drew up a proceeding under sec. 145, Cr. P. C., but he did not serve any notice upon the first party in accordance with sub sec. (3) of sec. 145, Cr. P. C., nor did he fix a notice on some conspicuous place at or near the subject of dispute, nor receive a written statement from either party before he passed his final order under sec. 145. There was no appearance on behalf of the first party and no opportunity was given to cite witnesses or to put in any documentary evidence. But on examining one witness on behalf of the second party the Magistrate held that there was a likelihood of a breach of the peace and declared the second party to be in possession,

Held—*That the proceedings of the Magistrate were very irregular and must have prejudiced the first party. That the irregularities were so great as to amount to a want of jurisdiction and to justify the interference of the High Court to set aside the proceedings.*

This was a rule granted on the 30th of January 1908, against an order of M. Aminul Islam, Sub-divisional Magistrate of Jongipur, dated the 19th of December 1907, declaring the second party to remain in possession of the disputed land until evicted therefrom in due course of law.

The facts of the case will appear from the judgment.

Babu Dasarathi Sanyal for the Petitioner.

Mr. P. L. Roy and *Babu Anilendra Nath Roy Chaudhury* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why the order complained of should not be set aside.

The order complained of is one under sec. 145, Cr. P. C., directing that the second party shall remain in possession of the disputed land until evicted therefrom in due course of law. It appears that there was a dispute with regard to two plots of land extending over an area of 1,200 bighas. The police thought that a breach of the peace was likely to occur in connection with these lands, and as far as we can see, it seems to us that the proceedings of the Magistrate were very irregular. In the first place he did not, after drawing up the proceeding under sec. 145, issue notices to the parties. He apparently called the parties before him and he says that on the 15th December last Johad Ahmed Chowdhury, brother of Sajjad Ahmed Chowdhury, the first party, and Ganga Charan Saha, agent of Parbati Charan Roy, met him with a view to settle the dispute amicably, but no agreement could be arrived at and so at the request of Johad Ahmed a proceeding under sec. 145, Cr. P. C., was drawn up and the 19th December was fixed in the presence of both the two persons, Johad Ahmed

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JULY 20, 1908. [No. 36

Contents.

NOTES

We would draw attention to a question raised in our correspondence column. Recently the Government of Bengal has appointed a whole time District and Sessions Judge at Khulna. Before that the District and Sessions Judge of Jessore was also the District and Sessions Judge of Khulna. During this time by a notification of the Calcutta High Court the Subordinate Judge of Khulna was empowered under sec. 21 of the Civil Courts Act (XII of 1887) to take all appeals from the orders and decrees of Munsifs in the Khulna District. The question therefore is whether the appointment of a District and Sessions Judge for Khulna has had the effect of withdrawing the appellate jurisdiction of the Subordinate Judge. From a reading of sec. 21 of the Civil Courts Acts we are of opinion that the specific jurisdiction conferred by the notification of the High Court cannot be withdrawn except by an express notification. We are not sure that the newly appointed District and Sessions Judge will not have a concurrent appellate jurisdiction. But, anyhow, if it is intended that the District Judge of Khulna would alone exercise such jurisdiction, we think the jurisdiction of the Subordinate Judge should be expressly withdrawn.

The case of *Mahadeo Prasad v. Bindeshri Prasad*, reported at p. 137 of the current Allahabad Series of the Indian Law Reports, deserves more than a passing notice. In this case one Bindeshri Prasad, the managing member of a joint Hindu Mitakshara family, applied to the District Judge under sec. 10 of the Guardians and Wards Act to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukdeo Prasad and Mahadeo Prasad, grandfather and father of Kedar Nath's wife. The District Judge with the consent of the parties referred the matter to the arbitration of a gentleman of high social position who by his award recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the District Judge appointed Bindeshri Prasad to be the guardian. Mahadeo Prasad appealed to the High Court against the order on the ground *inter alia* that the District Judge had no power to refer the matter to arbitration and accept the award. A Divisional Bench of the Allahabad High Court (Aikman and Karamat Hussain, JJ.) held that the appointment of the guardian was illegal.

Under the Guardians and Wards Act there is no provision for referring the question as to who is the proper person to be appointed a guardian to arbitration. Under sec. 17 (*i*) of the Act the Court in appointing a guardian "shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor." Now the question is whether the Court can, with the consent of rival applicants for guardianship, ask any person to report as to which of the rival applicants is a fit and proper person to be the guardian. If after making enquiries he reports in favour of one of them and the propriety of the report is not questioned by the other party and the judge is satisfied that the person recommended is a fit and proper person to be the guardian of the minor, will not the Judge be justified in accepting the report and appointing the person recommended by the report?

Exception may, no doubt, be taken to the report. But supposing that no exception is taken to the report, could not the District Court act upon the report and make the appointment accordingly? Under sec. 46 (*i*) of the Guardians and Wards Act the District Court has the power to call upon the Collector or any Subordinate Court for a report on any matter arising in any proceeding under the Act and treat the report as evidence. If the District Court can treat the report of the Collector or the Subordinate Court as evidence, there is no reason why the District Court should not treat the

report of a person in whom both the Court and the rival parties have confidence as evidence, specially when nothing is urged against the report by the one or other of the parties. From the report of the case under review it appears that the District Judge made the appointment in accordance with the award or report of the arbitrator. If he did so without judicially determining whether the person recommended by the arbitrator was a fit and proper person, the order could not be supported. The District Court has no authority to delegate its judicial functions to any person. If the District Judge had treated the report as evidence and made his order relying thereon, hardly, any, exception could be taken to his order. But he could not treat the report as an award of an arbitrator. The question as to who should be a fit and proper guardian of a minor is one pre-eminently for the Court to decide and cannot be referred to a third person.

CRIMINAL CASES OF 1907.

(*Continued from* p. *cxci*.)

LAND DISPUTES.—[*Secs. 145 & 147*]. The question whether a dispute relating to trees comes within sec. 145 or sec. 147 arose in *Surjakanta* v. *Jagadindra*, 11 C. W. N. 198, 201. The answer in all such cases is easy. If each party claims *exclusive possession* of the tree *as the result of possession* of the land on which it is growing, the case is under sec. 145, as the dispute then really concerns land; but if *possession* of the land *is admitted* to be with one party and the dispute is as to *usufructuary enjoyment* of the tree only the case is within sec. 147. So if the dispute as to a *julkur* or ferry arises out of a claim by each party to *possession of* the water by title thereto sec. 145 applies, whereas if the dispute is only as to the *right* to fish or ferry the *possessory title* to the water being *admitted*, sec. 147 applies. [*Dispute as to immoveables*]. An order as to *harvested* crops [*Amrit* v. *Lakhpati*, 11 C. W. N. ccxxxix: *see* also *30 Cal. 110, 111 : 9 C. W. N. cclxv : 28 All. 266, 267*] or as to moveables in a house, *Radha* v. *Nazima* (11 C. W. N. cclxii) or as to pilgrims fees (*3 C. L. J. 137*) is *ultra vires*, but not one relating to *standing* crops (*15 All. 394*, following *14 All. 30* and *11 Mad. 193*). [*Likelihood of breach—Police-report*]. The High Court may interfere when a police-report states in the vaguest terms that each party claims a right and that, as both were men of substance there might be a breach of the peace, *Surjakanta* v. *Jagadindra*, 11 C. W. N. 198. *See* also *Bahadur* v. *Ranjit*, 11 C. W. N. 835. These two cases have weakened the authority of *Kuloda* v. *Danesh*, 33 Cal. 33, in the argument of which all the cases on the point will be found. [*Imperfect initial order*]. The omission to state in the initiatory order the ground for believing the likelihood of a breach of the peace is an irregularity, which in the absence of prejudice does not vitiate the order (*Re Chinnapuddayan*, 30 Mad. 548). The report does not show the nature of the omission but if it contained a reference to some other document as its basis, the case would fall within the Full Bench ruling in *Khosh* v. *Nazir*, 33 Cal 352; but if there was no reference to any such document the Madras case would be in conflict with *32 Cal. 771* and *27 Cal. 981*. [*Ascertainment of subject of dispute*]. Before a proceeding is drawn under sec. 145 the Magistrate must clearly ascertain the subject of dispute (*Surjakanta* v. *Jagadindra*, 11 C W. N. 198. *See* also *7 C. W. N. 558 : 27 All. 296 : 6 W. R. Cr. 61, 62 : 3 Cal. 320, 322 : 5 R. C.* and *C. R.* (*per Jackson, J.*), but if there was no question as to the identity of land in dispute during the hearing, the proceedings are not bad (*5 C. W. N 563* : see *24 Cal. 55, 62* and *11 Cal. 762, 765, 766*. [*Notice*]. Want of notice to one party cannot be set up by another party who had notice and appeared (*Re Chinnapuddayan*, 30 Mad. 548) [*Evidence*]. Failure to record any evidence affects the Magistrate's jurisdiction (see cases *infra*). An order only upon the written statements without evidence is *ultra vires* (*Kolha* v. *Muneswar*, 34 Cal. 840: See *30 Cal. 508*). A Magistrate can proceed *ex parte* on the failure of a party to attend (*6 C. W. N. 925 : 10 C. W. N. cii*), or to file a written statement (*5 C. W. N. 71 : 8 C. W. N. 642 : 30 Cal. 918 : 6 C. L. R. 193 : See 8 C. W. N. 76*), but he has no jurisdiction to pass an order without any evidence taken (*Ibid*). [*Subject of dispute*]. A trial order extending to land which was not covered by the initiatory order is bad (*Chaman* v. *Cook*, 11 C. W. N. xliii. *See* also *7 C. W. N. 558 : 29 Mad. 561 : 5 C. W. N. 105* and *12 Cal. 539, 542*). Where each party is in possession of a definite and separable portion of the disputed land, an order made as to each portion (*Kangali* v. *Mati*, 11 C. W. N. 743. *See* also *5 C. W. N. 710* and *24 W. R. Cr. 73*). If the enjoyment of one portion in possession of one party is not independent of the enjoyment of the other portion in possession of the opposite party no order can be made as to the several parts, but the whole must be attached (*22 Cal. 297*). [*Joint possession*]. The section does not apply to a dispute between parties having joint rights in the disputed land, each claiming exclusive possession (*Makhan* v. *Barada*, 11 C. W. N. 572). There are a large number of decisions which have established that the section does not apply to a case of joint possession, but only where the opposite parties each claim exclusive possession of the subject of dispute (see *W. R. 1864, pp. 28, 29 : 18 W. R. Cr. 36 : 17 W. R. Cr. 9 : 25 W. R. Cr. 2, 16, 24 : 1 R. J.* and *P. J. 235 : 24 W. R. Cr. 73 : 2 C. L. R. 62 : 33 Cal. 80 : 5 All. 607 : 4 C. W. N. 426 : 7 C. W. N. 462 : 27 Cal. 892, 898 : 8 C. W. N. 485 : 10 C. W. N. 1088 : 32 Cal. 249*. The case *contra* in *27 Cal. 259* and *27 Cal. 261n.* are wrongly decided : Cf. *10 C. W. N. 1088*). [*Decree*]. A decree four years old was held not to be

recent enough to fall within the rulings that the Magistrate should follow the decree of a Civil Court determining the rights of the parties. (*Matangi* v. *Lal Khan*, 11 C. W. N. ccx). [*Attachment*]. A settlement with third parties of the disputed land pending an *interim* attachment ceases with the removal of the attachment (*Maigh* v. *Ambica*, 5 C. L. J. 448, 450). [*Costs*]. A suit to enforce an order of the Magistrate as to costs will not lie (*Forbes* v. *Hayes*, 11 C. W. N. cclxii, distinguishing *8 C. W. N. 178*).

(*To be continued.*)

E. H. MONNIER.

Correspondence.

[TO THE EDITOR "CALCUTTA WEEKLY NOTES."

SIR,—I shall be much obliged if you or any of your readers will please enlighten me on the following matter :—

Khulna was formerly a Sub-Division within Jessore District. In April 1882 Khulna was created a District but there was no separate District and Sessions Judge for Khulna, the Judge of Jessore having jurisdiction over the District. In November 1882 a Sub-Judge was located at Khulna. Appeals from the decrees and orders of Munsifs within Khulna District used to be preferred and filed before the District Judge at Jessore. By a notification of the Honourable High Court under sec. 21 of Act VI of 1871 it was ordered that "from 1st April 1883 appeals from the decrees and orders of the Munsifs of Khulna, Bagerhat and Satkhira shall be preferred before the Sub-Judge of Khulna." By a Government order under sec 14 of Act XII of 1887 the District Judge of Jessore-Khulna was empowered to try and dispose of civil cases arising within the Khulna District at Khulna also. But notwithstanding this order civil appeals used to be filed before the Sub-Judge even while the District Judge happened to be present at Khulna. By a recent Government notification Khulna has been created a separate district and from 1st July 1908 last a District Judge has been located here Now the question is, whether the appointment of a separate District and Sessions Judge for Khulna has had the effect by its own force of withdrawing the jurisdiction of the Sub-Judge to receive and entertain appeals which was vested in him by the notification mentioned above. I am inclined to think that when the Honourable High Court has not as yet withdrawn the said powers the local Sub-Judge still retains the jurisdiction vested in him and that such jurisdiction is exclusive and until the said powers are taken away the District Judge is incompetent to receive and entertain appeals against the decrees and orders of Munsifs in this district.

Yours truly,
NAGENDRA NATH SEN,
Pleader.

KHULNA,
15th July 1908.

Review.

THE LAWS OF ENGLAND. Being a complete statement of the whole law of England. *By the Right Honourable the Earl of Halsbury, Lord High Chancellor of Great Britain, 1885 86, 1886-92 and 1895-1905 and other lawyers. Vol. II. London. Butterworth & Co., 11 and 12, Bell Yard, Temple Bar. Law Publishers. 1908.*

The scope and object of this great work were reviewed at length in our notice of the first volume at p. xlvii. It is, as has been stated, "neither an encyclopædia, a digest of cases, nor a dictionary. It rather takes the form of a series of treatises on every branch of the law, by experts in each particular branch." The titles dealt with in the present volume are :—Bankruptcy and Insolvency, Barristers, Bastardy, Bills of Exchange, Promissory Notes and Negotiable Instruments. The article on Barristers will be found of special interest. Most of the statements contained in it are, it is noted, statements of matters of etiquette only and not rules of law or binding as such. This article gives a more complete and reliable account of the law and rules of practice and etiquette concerning this important branch of the legal profession than is to be found in any other work. It also gives in outlines an account of the Inns of Court and the rules relating to the admission of students and their call to the Bar. The treatment of the subject of "Bankruptcy and Insolvency" is very full, covering over 350 pages. The same remark applies to the article on Bills of Exchange, Promissory Notes, and Negotiable Instruments. The law of Bastardy as detailed in this volume is peculiar to England and is on the whole inapplicable here. But cases are conceivable in which reference to the principles of law adopted by the English Courts will be found necessary and useful. As we noticed in our review of the first volume, the foot-notes in which the reasons and illustrations and references to cases are given nearly equal in bulk the "statement of law" proper in the body of the work and furnish the materials for use in the practice of law. The case law and other references in this volume are brought up to the 1st of April 1908. This volume, like its predecessor, thus fully works out the idea of the editors, so far as the subjects already dealt with are concerned, *viz*, of furnishing complete treatises on each branch of the law available alike to the theoretical jurist and to the practitioner in the law Courts In this respect the contents go beyond what is implied in the bare title of the work.

It only remains to note that the work is progressing with commendable speed, the present volume appearing within six months of its predecessor.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CRIMINAL REVISION No. 82 OF 1908. KAMINI MOHUN MAZUMDAR, 1st Party, Petitioner *v.* HARIPADA GHOSE, 2nd Party, Opposite Party. 17th June 1908

Power of Criminal Court to interfere with joint family property by a proceeding under sec. 145, Criminal Procedure Code.

In this case the dispute between the parties, all members of a joint family, related to the possession of a hut standing on a plot of joint land within the precincts of the joint family *bari*. It appears that there were 5 co-sharers, four of whom had by mutual arrangement got a separate Baitakkhana for the use of each. The fifth claimed a hut which was being used as the family house of worship for his separate use as a Baitakkhana. The other members did not agree and hence the dispute which led to a proceeding under sec. 145, Cr. P. C.

Their Lordships observed :—

"There is nothing to show any partition and the property must all be considered joint with permissive separate use where such use is admitted. Under these circumstances the Criminal Court has no jurisdiction to interfere with the joint premises and decide who is in permissive separate possession of any particular hut.

"There is a strong body of authority both under the Code of 1882 and the present Code that sec. 145 proceedings do not apply to disputes between co sharers except in some exceptional cases such as the collection of rents from outlying tenants, where the dispute goes outside the mere possession of joint property and may give rise to breaches of the peace affecting other people."

Mr P. M. Guha for the Petitioner.

Babu Harendra Narain Mitra for the Opposite Party.

B. C.

CIVIL APPELLATE JURISDICTION. Before CASPERSZ and SHARFUDDIN, JJ. APPEAL FROM ORIGINAL DECREE No 185 OF 1906. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BAIJ NATH GOENKA AND OTHERS. Heard, 7th and 8th July 1908. Judgment, 8th July 1908.

Land Acquisition Act, sec. 52—Power of Judge to delegate function to Commissioner—Compensation for future loss of rent

A building with land situate within Monghyr Fort known as Dumdama Koti was acquired by Government for the residence of the Collector. The claimants not accepting the Collector's award the case was referred to Civil Court. The Subordinate Judge appointed a pleader as commissioner to take evidence as to valuation and to report; on receipt of the report the Sub-Judge heard the parties accepted the report and decided the case. The Secretary of States appealed to High Court.

Held—Under sec. 5 of Land Acquisition Act the proceeding must be held in open Court. The Sub-Judge was not right in delegating his judicial functions to the Commissioner. The claimant must be treated as Plaintiff and the Government as Defendant, the burden of proof being on the Plaintiff. Compensation was allowed on Municipal assessment deducting therefrom (1) one-sixth share for repairs and other costs, (2) the taxes and the ground rent, (3) contingent loss for future increase of rent and taking twenty years' purchase on that amount.

Babu Ramcharan Mitra for the Appellant.

Babus Digambur Chatterjee and *Kshetra Mohun Sen* for the Respondent.

A. T. M. *Decree modified.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. APPEAL FROM APPELLATE DECREE No. 535 OF 1907. GANGADAS SIL, Plaintiff, Appellant *v.* MR. CAPTAIN A. PEPERNO AND OTHERS, Defendants, Respondents. 9th July 1908.

Notice, sufficiency of—Monthly tenancy—To pay either increased rent or quit at the end of the month.

By a letter, dated 30th December 1902, Defendant No. 1 hired from the Plaintiff a house at a monthly rental of Rs. 23 per mensem. On the 11th April 1905, Plaintiff served on Defendant No. 1 a notice in the form of a letter in which he explained that he saw fit to increase the rent of the holding from Rs. 23 to Rs. 30. He asked the tenant to come to an agreement with him to pay the increased rent. Then he concluded by saying, "otherwise I shall take steps to eject you at the expiration of this month and hence you consider this as 15 days' notice expiring with the end of this month."

Defendant No. 1 did not pay the enhanced rate and on 27th May 1905 the present suit was lodged. Defendant No. 1 pleaded that Defendants Nos 2 and 4 were his partners and thereupon those two Defendants were added. On a plea raised by Defendant No. 2, Defendant No. 3, the receiver, was also brought on the record.

Defendants Nos. 1, 2 and 4 contested the suit *inter alia* on the ground of insufficiency of notice.

The Court of first instance decreed the suit; but the lower Appellate Court held that the notice served was not sufficiently definite and that it did not comply with the provisions of sec. 106 of the Transfer of Property Act, as the notice merely threatened to evict if the rent was not raised and was not in any sense an intimation to quit at the end of April, and therefore dismissed the suit.

The Plaintiff appealed to High Court.

Held—That as the landlord in order to make himself safe intended to terminate and did terminate the existing tenancy at the end of the month, the notice was sufficiently definite.

Babu Brojo Lal Chuckerbutty for the Appellant.

Babu Ram Chunder Mozumdar for the Respondents.

A. T. M. *Appeal allowed.*

Chowdhury and Ganga Charan Saha, for enquiry in the case. As far as we can see, no notices, as required by sec. 145, Cr. P. C., were served on either of the parties. We see it is recorded in the order-sheet that notice was taken to the Am-mukhtear of the 1st party, Babu Paresh Nath Das, on the 19th December, but he refused to receive it. Then two mukhtears, Babu Kalikanta Sircar and Lal Mahamed Haji, appeared in Court on behalf of the first party on that date. They did not file any *mukhtearnama* so they were not listened to. The Magistrate then proceeded to take the evidence of one witness of the name of Ganga Charan Guha on behalf of the second party and decided that there was a likelihood of a breach of the peace and that the second party was in possession of the disputed land. When he passed his order neither party had filed written statements. A written statement on behalf of the second party was filed after the *ex parte* order under sec. 145, Cr. P. C., had been passed. It appears to us that the Magistrate's proceedings in this case are very irregular and they must have prejudiced the first party. This irregularity was so great as to amount to a want of jurisdiction and to justify our interference. No notice was ever served on the 1st party in accordance with the provisions of sub-sec. 3 of sec. 145, Cr. P. C. No notice was fixed on a conspicuous place in the locality though that may not be essential to the legality of the proceedings. No written statement was received from either party at the time when the order was passed and there had been no appearance on behalf of the first party and no opportunity given to cite witnesses or to put in any documentary evidence. In these circumstances we do not think that the Magistrate was justified in passing the order which he did. We accordingly set it aside as it was passed without jurisdiction, and make the rule absolute.

B. C. *Rule made absolute.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 264 OF 1906.

MITRA, J.
CASPERSZ, J.
1908.
Heard, 23 and 24, January
Judgment, 10, February.

GOBINDA CHANDRA PAUL and ors.,
v.
DWARKA NATH PAUL, and others.

Consent-decree—Matters outside the scope of suit, if may be embodied—Civil Procedure Code (Act XIV of 1882), sec. 375—Terms introduced as consideration for relief given—Registration—Registration Act (III of 1877), sec. 17 (1)—Hypothecation clause in consent decree—Whether mortgage or charge—Transfer of Property Act (IV of 1882), secs. 58, 100.

In a suit for recovery of money due on bahi-khata *accounts a decree was made upon a petition of compromise for the payment by the Defendants of a certain sum by instalments. The decree further declared that certain immoveable properties specified in the petition of compromise "shall be hypothecated for the realisation of the money and that the Defendants shall not be able to create any incumbrance on the same,"*

Held—*That having regard to cl.* (1) *of sec. 17 of the Registration Act the latter clause, even if it amounted to a mortgage, would not require registration.*

GOBINDA CHANDRA PAUL *v.* DWARKA NATH PAUL.

BINDESRI NAIK *v.* GANGA SARAN SAHU (1), PRANAL ANNEE *v.* LAKSHMI ANNEE (2) *followed.*

RAGHUBANS MANI SINGH *v.* MAHABIR SINGH (3), PATHA MUTHAMMAL *v.* ESUP ROWTHER (4), GUPTA NARAIN DAS *v.* BIJOYA SUNDARI DEBYA (5) *referred to.*

That the hypothecation of immoveable property was the consideration for the time allowed for payment of the sum decreed by instalments, and thus formed an integral and necessary part of the adjustment of the claim in the suit; and the Court did not act contrary to the provisions of sec. 375, Civil Procedure Code, in inserting this clause in the consent decree.

BIRBHADRA RATH *v.* KALPATARU PANDA (6), GURDEO SINGH *v.* CHANDRIKAH SINGH (7) *distinguished.*

RAGHUBANS MANI SINGH *v.* MAHABIR SINGH (3), GUPTA NARAIN DAS *v.* BEJOYA SUNDARI DEBYA (5), PURNA CHANDRA SARKAR *v.* NILMADHUB NANDI (9) *relied on.*

Held further, *on the construction of the hypothecation clause, that it merely created a charge within the meaning of sec 100 of the Transfer of Property Act and not a mortgage within sec. 58.*

TANCRED *v.* DELAGOA BAY AND EAST AFRICA RAILWAY CO. (11), BURLINSAN *v.* HALL (12) *relied on.*

(1) 2 C. W. N. 129: s. c. L. R. 25 I. A. 9; I. L. R. 20 All. 171 (1897).
(2) 3 C. W. N. 485: s. c. L. R. 26 I. A. 101; I. L. R. 22 Mad. 508 (1899).
(3) I. L. R. 28 All. 78 (1905).
(4) I. L. R. 29 Mad. 365 (1906).
(5) 2 C. W. N. 663 (1897).
(6) 1 C. L. J. 388 (1905).
(7) 5 C. L. J 611 (1907).
(9) 5 C. W. N. 485 (1901).
(11) 23 Q. B D. 239 (1889).
(12) 12 Q. B. D. 347 (1884)

Distinction between a mortgage and a charge discussed.

The question whether any particular term of a petition of compromise incorporated in a compromise decree relates to the suit or is covered by its subject-matter must be decided from the frame of the suit, the relief claimed and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down and each case must be governed by its own facts.

This was an appeal preferred against a decree of Babu Pramatha Nath Chatterjee, Subordinate Judge of Chittagong, dated the 17th of April 1906.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Akshay Kumar Banerjee* for the Appellants.

Babus Basanta Kumar Bose, Pravas Chandra Mitter and *Kshetra Mohun Sen* for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

MITRA, J.—The facts are not disputed. In 1898 the Plaintiffs instituted a suit against the Defendants Nos. 1 to 4 for recovery of Rs. 36,882-2 5 due on *bahikhata* accounts. The Defendants pleaded non-liability. The parties, however, ultimately came to terms and the terms of the compromise were stated in a petition to the Court; one of the Defendants was a minor and the Court was necessarily asked to give permission to the

GOBINDA CHANDRA PAUL v. DWARKA NATH PAUL.

compromise. On the 28th July 1898, the Court gave the permission sought for and a decree was made to the following effect, namely: "The Defendants do pay to the Plaintiffs the sum of Rs. 31,257-0 3 pies together with interest at 6 per cent. per annum in instalments of Rs. 500 per mensem but on default of payment of two instalments, the whole amount with interest at the aforesaid rate will be realisable at once." According to the agreement of the parties as contained in the said petition of compromise, the decree further declared that "the immoveable properties specified therein shall be hypothecated for the realisation of the said money and that the Defendants shall not be able to create any encumbrance on the same."

A part of the debt covered by the decree was realised by execution. For the recovery of the balance, *i.e.*, Rs. 29,591 2 9 the Plaintiffs instituted the present suit under the provisions of the Transfer of Property Act and asked for sale of the properties specified in the schedule to the decree (made on the 28th July 1898) as hypothecated properties. They impleaded Defendant No. 5 in the suit by reason of his having taken possession of some of the hypothecated properties after their decree, and Defendants Nos. 6 to 11 as subsequent attaching creditors.

The present suit was contested by Defendants Nos. 1, 5, 6, 7, 8, 9, 10 and 11 on various pleas which were all overruled by the lower Court, and on the 17th April 1906, a decree was passed in favour of the Plaintiffs in accordance with their principal prayer in the plaint, under the provisions of the Transfer of Property Act, for sale of the hypothecated properties. The Defendants Nos. 1, 5, 6, 7, 8, 9, 10 and 11 have appealed from this decree.

The only contention raised before us is that the decree of the 28th July 1898 was void and of no effect in so far as it purported to create a lien on immoveable property. The following, in substance, are the arguments addressed to us by the learned vakil for the Appellants: (1) that no mortgage or hypothecation of immoveable property such as is alleged in this case could be effected without a duly registered instrument or contrary to the provisions of sec. 17 of the Indian Registration Act and sec. 59 of the Transfer of Property Act, (2) that the decree of the 28th July 1898 was made in a suit for recovery of a simple money debt and the hypothecation of immoveable property for recovery of such debt was beyond the scope of that suit, and that the said decree, so far as it provided for hypothecation, cannot be regarded as properly a part of it, and (3) that the distinction made in this case by the lower Court between a mortgage and a charge is without a difference.

The first argument overlooks the exception in cl. (*i*), sec. 17 of the Indian Registration Act which excepts decrees and orders of Courts and awards from the rule as to the compulsory registration of documents. In *Bindesri Naik* v. *Ganga Saran Sahu* (1), the Judicial Committee of the Privy Council declared that the provisions of sec. 17 of the Registration Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders

(1) 2 C. W. N. 129 : s. c. L. R. 25 I. A. 9 ; I. L. R. 20 All. 171 (1897).

made by Court when registration would be otherwise necessary. The same view was expressed by their Lordships in *Pranal Annee* v. *Lakshmi Annee* (2). The High Courts at Allahabad and Madras, respectively, followed this view in *Raghubans Mani Singh* v. *Mahabir Singh* (3) and in *Patha Muthammal* v. *Esup Rowther* (4) This Court took the same view in *Gupta Narain Das* v. *Bejoya Sundari Debya* (5).

Sec. 59 of the Transfer of Property Act lays down a rule for the registration of mortgages as defined in sec. 58 of the Act, and if, as we shall presently show, a charge as contemplated in sec. 100 of the Act is distinguishable from a mortgage, the absence of the formalities required by sec. 59 would not bar the relief which may be obtained under sec. 100. In this view of the decree so far as it related to hypothecation of immoveable property it could not be regarded as a mortgage, it might, under certain circumstances, be dealt with as an instrument creating a charge.

The learned vakil for the Appellants, however, laid great stress on the second head of his contention. He relied, mainly, on certain observations contained in the decisions of this Court in the cases of *Birbhadra Rath* v. *Kalpataru Panda* (6) and *Gurdeo Singh* v. *Chandrikah Singh* (7). The question whether any particular term of a petition of compromise incorporated in a decree made under the power given by sec. 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts. The cases cited before us, *Birbhadra Rath* v. *Kalpataru Panda* (6) and *Gurdeo Singh* v. *Chandrikah Singh* (7), turn on their own facts, and those facts are clearly distinguishable from the facts of the present case. We have carefully examined the judgments in the cases relied on and are unable to apply them to the facts with which we are now dealing. On the other hand, in *Pranal Annee* v. *Lakshmi Anee* (2) already cited, Lord Watson, in delivering the judgment of the Privy Council, said, with reference to property not covered by the decree but which was the subject of an agreement which led to a decree by consent of parties.—"If the parties after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit and also a half share of the lands now in dispute had informed the learned Judge that these were the terms of the compromise and

(2) 3 C. W. N. 485 : s. c. L. R. 26 I. A. 101 ; I. L. R. 22 Mad. 508 (1899)

(3) I. L. R. 28 All. 78 (1905).

(4) I. L. R. 29 Mad. 365 (1906)

(5) 2 C. W. N. 663 (1897).

(6) 1 C. L. J. 383 (1905).

(7) 5 C. L. J. 611 (1907).

(2) 3 C. W. N. 485 : s. c L. R. 26 I. A. 101 ; I. L. R. 22 Mad. 508 (1899).

(6) 1 C. L. J. 383 (1905).

(7) 5 C. L. J. 611 (1907).

GOBINDA CHANDRA PAUL v. DWARKA NATH PAUL.

had invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence available to the Appellant that the Respondents had agreed to transfer to her the moiety of land now in dispute :" [See in this connection, also *Raghubans Mani Singh* v. *Mahabir Singh* (3)].

In *Jasimuddin Biswas* v. *Bhuban Jelini* (8), Brett and Sharfuddin, JJ., recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Das* v. *Bejoya Sundari Debya* (5), *Purna Chandra Sarkar* v. *Nilmadhub Nandi* (9). In the latter case, Ghose and Pratt, JJ., held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject-matter of the suit and contains other conditions and that if those other conditions are the considerations for the compromise of the subject-matter of the suit, they must be incorporated in the decree.

In the present case the hypothecation of immoveable property in the consent decree was the consideration for the time allowed for payment of the sum decreed by instalments, and which covered a period of over five years. It was an integral and necessary part of the adjustment of the claim in the suit, for without it there would have been no compromise. In our opinion, such a hypothecation was properly inserted in the consent decree, and we cannot hold that the Court acted against the provisions of sec. 375 of the Code in allowing its insertion.

Muthayya v. *Venkata Rutnam* (10), cited before us by the learned vakil for the Appellants, does not militate against the view we take. In that case no decree was drawn up, the suit having been withdrawn and so the question now argued before us did not arise.

Thirdly, as regards the distinction between a mortgage and a charge, we observe that the Transfer of Property Act refers to mortgages which are defined in sec. 58 and to charges which are defined in sec. 100. The Act obviously contemplates a difference between mortgages and charges though no doubt the mode of granting relief and the nature of the relief that may be granted are similar because a decree for sale is the only relief that may be granted for the enforcement of a charge. A mortgage is a transfer of an interest in specific immoveable property, a charge only secures payment of money out of that property. Either may be created by act of parties but when "the transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immoveable property. A document which only gives a right to payment out of a particular property without transferring it has been held to create a charge ; *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (11), *Burlinson* v. *Hall* (12).

(3) I. L. R. 28 All. 78 (1905).
(5) 2 C. W. N. 663 (1897).
(8) I. L. R. 34 Cal. 456 (1907).
(9) 5 C. W. N. 485 (1901).

(10) I. L. R. 25 Mad. 553 (1901).
(11) 23 Q. B. D. 239 (1889).
(12) 12 Q. B. D. 347 (1884)

GOBINDA CHANDRA PAUL *v.* DWARKA NATH PAUL.

The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definitions given in sec. 58 of the Transfer of Property Act has somewhat obliterated the distinction in India. The result has been a divergence of opinion between the High Courts; *Khemji Bhagvandas Gujar* v. *Rama* (13), *Motiram* v. *Vitai* (14), *Rangasami* v. *Muttukumarappa* (15), *Nabin Chand Naskar* v. *Raj Coomar Sarkar* (16) and *Pran Nath Sarkar* v. *Jadu Nath Shaha* (17) and *Kishan Lal* v. *Ganga Ram* (18). A charge which owes its existence to the operation of law may be easily discovered, such as a rent charge. A charge created for payment of a legacy or annuity or maintenance money by a Will or trust-deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of lien created by other acts of parties especially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates a charge; *Tancred* v. *Delagoa Bay* (11).

(13) I. L. R. 10 Bom. 519 (1886).
(14) I. L. R. 13 Bom. 90 at p. 97 (1888).
(15) I. L. R. 10 Mad. 509 (1887).
(16) 9 C. W. N. 1001 (1905).
(17) 9 C. W. N. 897 : S. C. I. L. R. 32 Cal. 729 (1905).
(18) I. L. R. 13 All. 28 (1890).

The decree under construction in the present case has little resemblance in form to a simple mortgage, the hypothecation clause creates a lien and prohibits further encumbrances. The parties only intended that the immoveable properties mentioned in the schedule to the decree should be reserved in fact as security for payment of the money directed to be paid under the decree.

We are, therefore, of opinion that the decree made by the lower Court is correct, and we accordingly dismiss this appeal with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 518 OF 1907.

MACLEAN, C. J.
DOSS, J.
1908.
15, May.

BIRAJ MOHINI DASSI, Plaintiff, Appellant,
v.
KEDAR NATH KARMOKAR, Defendant, Respondent.

Compromise petition, constituting a lease and filed in a criminal proceeding—Registration if necessary.

Plaintiff sued a tenant for increased rent on the basis of a petition of compromise filed in a criminal proceeding which resulted in the withdrawal of the proceeding, though no order was passed incorporating the terms of the petition,

(11) 23 Q. B. D. 239 (1889).

BIRAJ MOHINI DASSI *v.* KEDAR NATH KARMOKAR.

Held—*That the petition was not admissible in evidence without registration.*

If the petition had been filed in a civil proceeding and had been followed by an order or decree which embodied directly or indirectly its terms, then it would not have been necessary to have had it registered.

PRANAL ANNEE *v.* LAKSHMI ANNEE (1), KALI CHARAN *v.* RAM CHANDRA (2), BIRBHADRA *v.* KALPATARU (3) *referred to.*

This was an appeal preferred on the 20th of March 1907, against a decree of Babu Jogendra Nath Mukerjee, Subordinate Judge of Zillah 24-Pergunnahs, dated the 30th of November 1906, reversing that of Babu Behari Lal Chatterjee, Munsif at Sealdah, dated the 7th of April 1906.

The facts as they appear from the judgments of the lower Courts are as follows:—

The Plaintiff, Biraj Mohini Dasi, executed a registered deed of *mourasi mokhrari* lease of the property to which the land in suit appertained in favour of her brother Kedar Nath Ghose, who afterwards executed a deed of release in Plaintiff's favour. Kedar Nath used to collect rent so long as he did not execute the deed of release. He brought a suit for recovery of arrears of rent due for 1307, 1308, and the first two quarters of 1309 in suit No. 434 of 1903 against the Defendant claiming as rent 4½ *aris* of paddy per annum, as claimed by the Plaintiff in this suit, but obtained a decree at the rate admitted by Defendant, *viz*, 1¾ *katas* per annum In the meantime the Defendant prosecuted the Plaintiff and two others under sec. 426, I. P. C., for causing damage to the paddy raised by him on the land. This case was compromised and a *solenamah* was filed. The *solenamah* recited that the Defendant would hold the land for 9 years more from 1310 to 1318 and pay rent to the Plaintiff at 4½ *aris* of paddy. It was contended on behalf of the Defendant that the *solenamah* was not admissible in evidence as it was not registered as it should have been, being to all intents and purposes a lease. It had a clause in it to the effect that "the *rajinamah* would be treated as *pottah* and *kabuliyat*." The Munsif held that this *rajinamah* was merely an admission on the part of the Defendant before the Criminal Court but not an agreement between the parties and did not require registration. Accordingly he decreed the suit at the rate claimed by the Plaintiff.

On appeal the Subordinate Judge held that the *soleh* petition was a lease as held in *Syed Sufdar Reza* v. *Amzad Ali* (4) and so inadmissible in evidence and there being no other evidence in the record he held that the Plaintiff was entitled to have rents at 1¾ *aris* only per year. He modified the decree accordingly.

The Plaintiff preferred this second appeal.

Babu Gunoda Charan Sen for the Appellant.—The petition compounding the case under sec. 345, Cr. P. C., formed part of the pleadings in the case and was therefore exempted from Registration according to *Bindesri Naik* v. *Ganga Saran Sahu* (5). The Full Bench case in *Syed Sufdar Reza* v. *Amzad Ali* (4)

(1) 8 C. W. N. 485; s. c. L. R. 26 I. A 101; I. L. R. 22 Mad. 508 (1899).
(2) I. L. R. 30 Cal. 783 (1903).
(3) 1 C. L. J. 388 (1905).
(4) I. L. R. 7 Cal. 703 (1881).
(5) 2 C. W. N. 129; s. c. L. R. 25 I. A. 9; I. L. R. 20 All. 171 (1897)

BIRAJ MOHINI DASSI *v.* KEDAR NATH KARMOKAR.

cited by the Court below rather supports my contention as here also the terms must have been orally agreed upon first and then set down in the petition. See also *Maharaja Luchmissur* v. *Mussamat Dakho* (6). The petition is not a lease though the parties chose to call it so. It only gave an extension of term in consideration of an increased rent. See *Satyesh Chunder* v. *Dhunpal Singh* (7) and *Obai Goundan* v. *Ramalinga* (8). The Privy Council case of *Pranal Annee* v. *Lakshmi Annee* (1) does not touch the present case.

Babu Monmatha Nath Mukherji for the Respondent.—The Privy Council case in *Parnal Annee* v. *Lakshmi Annee* (1) supports me. *Kali Charan* v. *Ram Chandra* (2) is also in my favour. The petition was a lease to all intents and purposes, and it cannot be exempted from registration as the terms dealt with in it cannot be said to be within the scope of the criminal case. See *Gurdeo Singh* v. *Chandrikah Singh* (9).

Babu Gunada Charan Sen in reply.—The petition was filed in a judicial proceeding and is as such exempted according to the rule laid down in the Privy Council case in *Bindesri Naik* v. *Ganga Saran Sahu* (5). It is not outside the scope of the case as it deals with land which formed the subject-matter of the dispute which gave rise to the case. If the argument of the other side is to prevail all criminal cases will be taken out of the salutary rule laid down by the Privy Council. *Gobinda Chandra Paul* v. *Dwarka Nath Paul* (10).

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—The only question on this appeal is whether a petition which was filed in certain criminal proceedings between the present Plaintiff and Defendant is admissible in evidence, when it has not been registered. There was some dispute between the parties, which resulted in criminal proceedings and the petition in question was presented in those proceedings, and in consequence they were withdrawn, but no order was passed incorporating the terms of the petition. The question in the present suit is, as to the amount of rent payable by the Defendant to the Plaintiff. It is a rent suit. As to the rent payable before the date of the petition there is no question, and a decree has been passed in the Plaintiff's favour in respect of that rent. But the Plaintiff says that, having regard to the terms of the *solenamah* as contained in the petition, he is entitled to more, to which the Defendant replies that the Plaintiff cannot rely upon the petition because it has not been registered, and not having been registered is not admissible in evidence. The petition so far as is material runs thus :— "The disputed 1 bigha 15 cottahs land which has been in my possession from before will continue in my possession for 9 years more, *i.e.*, from 1310 B. S. to 1318, B. S. After that the landlord will be able to make settlement of the land

(1) 3 C. W. N. 485 : s. c. L. R. 26 I. A. 101 ; I. L. R. 22 Mad. 508 (1899).
(2) I. L. R. 30 Cal. 783 (1903).
(5) 2 C. W. N. 129 : s. c. L. R. 25 I. A. 9 ; I. L. R. 20 All. 171 (1897).
(6) I. L. R. 7 Cal. 708 F. B. (1881).
(7) I. L. R. 24 Cal. 20 at p. 24 (1896).
(8) I. L. R. 22 Mad. 217 (1898).
(9) 5 C. L. J. 611 (1907).
(10) 12 C. W. N. 849 : s. c. 7 C. L. J. 492 (1908).

as he likes. For the said land I will give to Biraj Mohini Dassi 4½ aris of gola paddy annually, and this *rajinamah* will be considered as *pottah kabuliyat*. I will not therefore prosecute this case any further." The document defines the area of land, the rent to be paid the duration in point of time, of the tenancy, and the parties treated it as a *pottah kabuliyat*. This document is the foundation of the Plaintiff's title to the increased rent, and as the Plaintiff must fall back upon the petition itself, that cannot, unless it is registered, affect the immoveable property comprised therein, exceeding 100 rupees in value, or be receivable in evidence of the transaction affecting that property. If this petition had been filed in a civil proceeding, and the petition had been followed by an order or decree which embodied, directly or indirectly, its terms, then it would not have been necessary to have had it registered. But this has not occurred in the present case; and as this document is the root of the Plaintiff's claim to the increased rent, it ought to have been registered: and in the absence of registration it is not admissible in evidence. This view seems to be consistent with the Privy Council decision in *Pranal Annee* v. *Lakshmi Annee* (1), with the decision of this Court in *Kali Charan* v. *Ram Chandra* (2), and with the principle involved in a more recent decision of this Court in *Birbhadra* v. *Kalpataru* (3).

The appeal therefore fails and must be dismissed with costs.

DOSS, J.—I agree.

N. G. *Appeal dismissed.*

(1) 3 C. W. N. 485: s. c. L. R. 26 I. A. 101; I. L. R. 22 Mad. 508 (1899).
(2) I. L. R. 30 Cal. 783 (1903).
(3) 1 C. L. J. 388 (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2503 OF 1905.

GEIDT, J.
CHITTY, J.
1908.
Heard, 14, February.
Judgment, 19, February.

MUSSTT. MESRAW, Defendant, Appellant, v. GIRJANUNDAN TEWARI, Plaintiff, Respondent.

Hindu Law—Alienation by a Hindu widow—Suit by reversioner—Limitation Act (XV of 1877), Sch. II, Art. 125.

A suit by a reversioner during the lifetime of the widow to have an alienation by her declared void except for her life is governed by Art. 125 of Sch. II of the Limitation Act.

Semble—*A new cause of action does not arise when owing to the death of the next reversioner, a remoter reversioner becomes entitled to sue.*

A reversioner whose suit under Art. 125 has been barred may still sue for possession if he survives the widow.

This was an appeal preferred on the 20th of December 1905, against the decree of T. W. Richardson, Esq., District Judge of Zillah Patna, dated the 15th of September 1905, affirming the decree of Babu Rajeswar Prasad, Officiating Munsif of Bihar, dated the 25th of April 1905.

The facts of the case appear from the judgment.

Mr. Sinha and *Moulvi Mahomed Mustafa Khan* for the Appellant in Nos. 2503 and 2504 of 1905.

Babus Umakali Mukerjee and *Chandra Sekhar Prosad Singh* for the Appellant in Nos. 99 and 116 of 1906.

MUSSTT. MESRAW *v.* GIRJANUNDAN TEWARI.

Mr. Garth and *Babus Harendra Narain Mitter* (*for Babu Mahendra Nath Roy*) and *Jnanendra Nath Bose* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The Plaintiff, Girija Nandan Tewari, sued to have it declared that his maternal grandmother, Musst. Ganga Bai, was not competent to alienate property left by her husband without legal necessity and that a sale deed by her, dated 5th May 1872, had been executed without any legal necessity and was void and invalid so far as the Plaintiff was concerned. The Plaintiff further claimed to be entitled to immediate possession under a deed of surrender in his fovour by Ganga Bai, dated 2nd June 1903 Failing that he prayed for a declaration that he would be entitled to possession on Ganga Bai's death. The Defendants represent the purchasers from Ganga Bai. Ganga Bai was the wife of one Sripat Tewari and they had an only daughter Haro Koer, who was married to Nowrangee Tewari and had one son, the Plaintiff. Sripat Tewari died before 1872. The alienation by his widow on 5th May 1872 appears to have been made with the assistance of her son-in-law Nowrangee Tewari. The Plaintiff was born in 1881 and attained his majority in April 1899. His mother Haro Koer died in 1893. Ganga Bai is still alive.

This suit was filed on 2nd July 1904.

Both Courts have found against the deed of surrender of 2nd June 1903. On this finding of fact the suit for recovery of possession fails. The only point which we need consider is whether the suit is barred by limitation, the suit being regarded as one for a declaration that the alienation made by Ganga Bai was void except for her life. The learned Munsif discussed this question at great length, and came to the conclusion that Art. 125 of Sch. II of the Limitation Act 1877 could not apply and that the Plaintiff's suit was not barred. The learned District Judge was of opinion that whether Art. 125 or Art. 120 was applicable, the Plaintiff having sued within six years from the date of his attaining majority was within time. The learned District Judge appears to have overlooked the provision of the last para. of sec. 7 which lays down that in the case of a person under disability, the period within which the suit must be instituted cannot be extended for more than 3 years from the cessation of such disability.

We are clearly of opinion that the suit is barred. We think that Art. 125 applies. The suit was one during the life of Ganga Bai, a Hindu female, by the Plaintiff, a Hindu, who if Ganga Bai died at the date of instituting the suit, would be entitled to the possession of the land and it was instituted to have the alienation by her of such land declared void except for her life. It, therefore, corresponds exactly to the suit described by the article. The article prescribes 12 years from the date of alienation and even if any allowance could be made on account of Plaintiff's minority, he was long out of time. It was argued that it was a hard case, because Plaintiff did not become the next reversioner until the death of his mother Haro Koer in 1893 and that the suit was then already barred. This may be

MUSSTT. MESRAW v. GIRJANUNDAN TEWARI.

so, but it cannot be an excuse for not reading the article as it stands. It was long ago held by this Court that in such a case the cause of action was not revived in favour of Plaintiff, who had since been born and had now arrived at majority. See *Pershad Singh v. Chedee Lall* (1). This was followed by the Bombay High Court in *Chhaganram Astikram v. Bai Motigavri* (2). It is true that the Allahabad High Court has expressed a different view. [See *Bhagwanta v. Sukhi* (3)], but it is unnecessary to discuss the question for even if (as the Allahabad Full Bench thought) Art. 120 applied the Plaintiff would still be out of time. Some attempt was made to contend that his right to sue for a declaration accrued from day to day and so the question of limitation did not arise. His Counsel cited the case of *Chukkun Lal Roy v. Lalit Mohon Ray* (4) and in paticular some remarks of Ghose, J., at page 925. But that was a suit for the construction of a Will and a declaration of Plaintiff's rights under it, a very different case from the one before us. Indeed Ghose, J., excepts from his remarks suits like the present which are especially provided for in the Limitation Act. Supposing Plaintiff's right to sue accrued at his birth, his suit having been instituted more than 3 years after he attained his majority would be out of time. It would be a strange anomaly if a declaratory suit by the next reversioners were barred by statute after a fixed period, while more remote reversioners were altogether exempt from limitation. The Plaintiff is, however, not really prejudiced. His right to declaratory relief may have been lost. He may even owing to his position in his family and the date of his birth never have possessed it. He can still sue for possession if he survives his grandmother.

(1) 15 W. R. 1 (1871).
(2) I. L. R. 14 Bom. 512 (1890).
(3) I. L. R. 22 All. 33 (1899).
(4) I. L. R. 20 Cal. 906 (1893).

The appeal must be allowed and the Plaintiff's suit dismissed, with cost throughout.

Judgment in each of appeals Nos. 2504 of 1905, 99 of 1906 and 116 of 1906.

These appeals are analogous to appeal No. 2503 of 1905. The question is the same. The Plaintiff's suit is barred by limitation. These appeals are therefore allowed and the suit is dismissed with costs throughout.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM ORDERS.

NOS. 446, 494 AND 495 OF 1907.

MITRA, J.
BELL, J.
1908.
Heard,
16, June.
Judgment,
17, June.

UDIT NARAIN CHOWDHURY, Decree-holder, Appellant,
v.
MATHURA PERSHAD MAHATA, Judgment-debtor, Respondent.

Civil Procedure Code (Act XIV of 1882), secs. 232, 649—Execution, application for, where to be made—Transfer of jurisdiction—"Court which passed the decree."

The expression "the Court which passed the decree" in sec. 232, C. P. C., includes the Court which by reason of a transfer of jurisdiction has jurisdiction in respect of the subject-matter of the suit.

Sec. 649, C. P. C., should, if possible, be so construed as to make it conve-

UDIT NARAIN CHOWDHURY *v.* MATHURA PERSHAD MAHATA.

nient to parties to execute their decrees, the decree-holders as well as the judgment-debtors.

These were appeals preferred on the 18th of November 1907, against orders of H. E Ransom, Esq , District Judge of Zillah Durbhanga, dated the 14th of June 1907, reversing those of Babu Nalini Nath Mitter, Subordinate Judge of that district, dated the 8th of March 1897.

The facts of the case appear from the judgment.

Babu Shoroshi Charan Mitra for the Appellant.

Babu Dwarka Nath Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

These three appeals have arisen out of three proceedings in execution of orders made in the same suit. The suit was instituted in the Court of the Second Subordinate Judge of Mozufferpur at a time when Durbhanga was not made into a separate district for civil purposes. After the disposal of the suit in March 1896, notifications were issued by the local Government that certain parts of the original Zillah Tirhut should be taken off the jurisdiction of the District Judge of Mozufferpur and formed into a separate district. A District Judge was appointed to take charge of the new district as well as a Subordinate Judge to try civil cases arising in it. The suit which gave rise to the orders under these appeals related to property which was exclusively within the present district of Durbhanga.

Applications were made to the Subordinate Judge of Durbhanga for orders for execution and for substitution of the present Appellant as decree-holder in place of the original decree-holders. Orders were made by the Subordinate Judge but, on appeal, the District Judge of Durbhanga held that the Subordinate Judge of Durbhanga had no jurisdiction to make any order for substitution under sec. 232 of the Code. In his opinion, the words "the Court which passed the decree" in sec. 232 applied exclusively to the Court of the Second Subordinate Judge of Mozufferpur which had entertained and passed the decree in the original suit. He accordingly disallowed the application for substitution and hence these appeals.

It has been contended before us that sec. 649, C. P. C, enlarged the definition of the words "the Court which passed the decree" and, according to it, the Court of the Subordinate Judge of Durbhanga had jurisdiction to deal with the applications for substitution. On the other hand, it has been contended that the Court of the Subordinate Judge of Durbhanga would not, under the circumstances of the case, come within the words "the Court which passed the decree" as defined in sec. 649, C. P. C.

The question is not *res integra*, so far as this Court is concerned. In *Lutchman* v. *Madan Mohun* (1), Sir Richard Garth, the then Chief Justice, and Mr. Justice Field held, in a case much similar to the present one, that the words "the Court which passed the decree" did not exclude the Court which originally passed the decree but merely included another Court, namely, the Court which had jurisdiction to execute the decree on the

(1) I. L. R. 6 Cal. 513 (1880).

UDIT NARAIN CHOWDHURY *v.* MATHURA PERSHAD MAHATA.

transfer of jurisdiction. The learned Judges put a wide and convenient construction on the following words in sec. 649, namely, "the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it."

The same view was taken in another case in this Court, *Jahar* v. *Kamini Debi* (2). Prinsep and Hill, JJ., were of opinion that *Lutchman* v. *Madan Mohun* (1) was correctly decided and that the applications for execution could be entertained either by the Court which passed the decree or the Court which at the time of the application had local jurisdiction with respect to the subject-matter of the suit.

A contrary view appears at first sight to have been taken in the case of *Kalipodo* v. *Dinonath* (3). It was held in that case that, where the District Judge, in the exercise of the powers conferred on him by sec. 13 of the Bengal, N.-W. P. and Assam Civil Courts Act, had so assigned the jurisdiction of a Munsif, that the result was that the Munsif who had not originally decided the case had jurisdiction with respect to the original subject matter, the Court which passed the decree had exclusive jurisdiction to entertain an application for execution. There were some observations in the judgments of the learned Judges which might favour the contention of the Respondent in the present case. But the judgments passed in the above case were discussed in the later case of *Jahar* v. *Kamini Debi* (2) and it was distinguished from the case of a change of jurisdiction by a notification of the Government of Bengal.

We are also of opinion that the case of *Kalipodo* v. *Dinonath* (3) was decided on facts which are quite different from the facts of the present cases. We are not bound by the *obiter* observations of the learned Judges in that case. We prefer to follow the decisions in *Lutchman* v. *Madan Mohun* (1) and *Jahar* v. *Kamini Debi* (2) and no good reasons have been shown to us to come to a different conclusion from that arrived at by the learned Judges in those cases.

Our attention has been drawn to recent decision of the High Court at Madras in *Panduranga Mudaliar* v. *Vythilinga Reddi* (4). The learned Judges in that case were not inclined to follow the decisions in *Lutchman* v. *Madan Mohun* (1) and *Jahar* v. *Kamini Debi* (2) already referred to and they relied on *Kalipodo* v. *Dinonath* (3). But with all respects to the learned Judges of the Madras High Court, we are of opinion that sec. 649, C. P. C., should, if possible, be so construed as to make it convenient to parties to execute their decrees, the decree-holders as well as the judgment-debtors. The result of taking a different view would be that an application for execution might be entertained by the Subordinate Judge's Court at Mozufferpur; but as soon as the application was made, it would have to be transferred to the Court of the Subordinate Judge at Durbhanga, as no execution could be

(1) I. L. R. 6 Cal. 513 (1880).
(2) I. L. R. 28 Cal. 238 (1900).
(3) I. L. R. 25 Cal. 315 (1897).

(1) I. L. R. 6 Cal. 513 (1880).
(2) I. L. R. 28 Cal. 238 (1900).
(3) I. L. R. 25 Cal. 315 (1897).
(4) I. L. R. 30 Mad. 537 (1907).

enforced within the jurisdiction of the Subordinate Judge's Court at Mozufferpur. It seems to us that the object of sec. 649 is to avoid the cumbrous procedure which would result if the Court which passed the decree be held to be the only Court which could execute it.

We, therefore, set aside the orders of the lower Appellate Court, and restore the orders of the Subordinate Judge of Durbhanga. The appeals are accordingly decreed with costs. We assess the hearing fee at one gold mohur in each case.

S. C. S. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1030 OF 1906.

RAMPINI, C. J.
RYVES, J.
1908.
17, June.

JAMADAR SINGH, Defendant, Appellant,
v.
SERAZUDDIN AHAMAD CHOWDHURY and others, Plaintiffs, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 13, Expl. II—Res judicata—*Matter which should have been made a ground of defence in previous suit—Subject-matter, if must be identical—Rent suit—*Ex parte *decree—Plea of payment not raised—Claim of set off in subsequent rent suit.*

In a suit for rent, the Defendant claimed a set off for a certain sum which he said he had paid on account of previous arrears of rent but for which no credit had been given by the Plaintiffs in a suit for the rent of that period. That suit had been heard ex parte *and decreed in the Plaintiffs' favour,*

Held—*That the plea of payment now raised should have been made a ground of defence in the previous suit and the Defendant was precluded from claiming a set off in regard to it by Expl. II of sec. 13 of the Civil Procedure Code.*

KAILASH MONDUL v. BARODA SUNDARI DASYA (2), RAJENDRA NATH GHOSE v. TARANGINI DASI (4) *considered.*

SRIGOPAL v. PIRTHI SINGH (6) *followed.*

Semble, per RYVES, J.—*The Privy Council in* SRIGOPAL v. PIRTHI SINGH (8) *has by implication overruled the decision in* KAILASH MONDUL v. BARODA SUNDARI DASYA (2).

This was an appeal preferred on the 20th of June 1906, against the decree of H. Walmsley, Esq., Officiating District Judge of Zillah Dacca, dated the 31st of March 1906, reversing that of Babu Khettra Nath Dutt, Subordinate Judge of that district, dated the 31st of August 1905.

The suit out of which this appeal arose was based on an *ijara kabuliyat* stipulating for payment of Rs. 200 quarterly. The *ijara* took effect from the beginning of 1306 and the present suit was for the rent of five quarters, *viz*, the last quarter of 1308 and the four quarters of 1309. The Defendant pleaded that he had made payments in previous years which had not been credited. It appears that in a previous suit the Plaintiff had on the 12th June 1902 obtained an *ex parte* decree for rent due from Pous 1306 to Pous 1308 and executed it without objection in

(2) 1 C. W. N. 565: s. c. I. L. R. 24 Cal. 711 (1897).
(4) 1 C. L. J. 248 (1904).
(6) I. L. R. 20 All. 110 (1897).
(8) 6 C. W. N. 889: s. c. I. L. R. 24 All. 249 (1902)

JAMADAR SINGH *v.* SERAZUDDIN AHAMAD CHOWDHURY.

The Defendant's case in the present suit was that he had made payments to the Plaintiff, amounting to Rs. 1,400-8 as. prior to the institution of the previous suit but the Plaintiff in that suit gave him credit for Rs. 842 only, and in the present suit the Defendant asked to have the difference of Rs. 548-8 as. treated as a set off to Plaintiffs' claim. The Plaintiffs on the other hand sought to prove that this sum of Rs. 548, was applied to the discharge of a debt found upon adjustment of accounts to be due from the Defendant to the Plaintiffs on account of their half share of the fees realised by the Defendant from the tenants for mutation of names, under a stipulation in the *kabuligat*. The Subordinate Judge held that there was no reliable evidence to show that any adjustment was made in the presence of the Defendant or that the Defendant realised any fees from the tenants before the institution of that suit. He held, however, that the question of the payment of the amount, Rs. 548-8, was never raised or decided in the previous suit and therefore the Defendant was not precluded from claiming a set off in the suit for that amount.

On appeal by the Plaintiffs, the District Judge held "that the Defendant might and ought to have made a ground of defence in that suit, his present assertion that he had paid not Rs. 842 but Rs. 1,400-8 as." He observed that "an *ex parte* rent decree may not be final on certain questions between landlord and tenant, such for instance as the rate of rent, the area of the tenancy, but in a rent suit the one simple and substantial question is—whether the rent has or has not been paid. There was no other question between these parties, and if the decree was not final on that one point, decrees must become of little value." "After the rent suit for the period ending Pous 1308, the parties started as it were with a clean slate, all payments before that point were over and done with and a new account was opened with no entry either on the debit or the credit side." In this view he reversed the decision of the Subordinate Judge and decreed the appeal with costs.

The Defendant preferred this second appeal.

Dr. Priya Nath Sen for the Appellant.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

RAMPINI, C. J.—The Defendant is the Appellant before us. The facts of the case are fully set forth in the judgment of the District Judge.

The only question we have to decide is whether the District Judge is right in holding that the *ex parte* decree for rent due from Pous 1306 to Pous 1308 had the effect of *res judicata* and of deciding that all accounts between the parties up to Pous 1308 were finally settled. There is no question as to the payments made during the period for which rent was sued in the previous suit. The Defendant paid Rs. 1,400-8 and the Plaintiff, in the previous suit, credited him with Rs. 842 only, deducting Rs. 548-8 on account, it is said, of half mutation fees alleged by him to have been realized by the Defendant the

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY.

raiyats. It is to be noted that the decree in the previous suit was duly executed. The first Court finds that the Plaintiff has not satisfactorily established that the Defendant realized these fees and the District Judge has not displaced this finding. If the *ex parte* decree has not the effect, as the Judge holds it has, of settling 'all accounts between the parties and starting them with a clean slate from the last quarter of 1308, then the question of set off claimed by the Defendant in this suit should have been enquired into.

Now, the decree was no doubt an *ex parte* one and decided no other question than that the Defendant owed the Plaintiff the sum of Rs. 842 for rent after deducting Rs. 548-8, credited to another account. But this latter sum is the very sum which the Defendant claims to set off in this suit. It was held in the previous suit to be due from the Defendant because the Plaintiff had deducted that amount from the payments proved on account of other debts due from the Defendant. If the Defendant did not agree to that deduction, he should have raised in the previous suit the defence he raises in the present one, and, as he did not do so, under Expl. II to sec. 13, C. P. C., I consider that he cannot raise it now.

The learned pleader for the Appellant, however, contends that this is not so, for two reasons (1) that the question at issue in the previous suit was different from that at issue in the present suit, and (2) that Expl. II to sec. 13 cannot be relied on, as the subject-matters of the two suits are not the same.

I am, however, of opinion that the question which the Defendant raises in this suit is the very question which was at issue in the previous suit, *viz.*, what was the amount of rent due from the Defendant for the period Pous 1306 to Pous 1308. The Plaintiff in that suit alleged that it was Rs. 842. The Defendant did not traverse his allegation, which he should have done, if he contended that he had paid more than Rs. 842. The defence which the Defendant raises in this suit is the very same as what he should have raised in the previous suit, *viz*, that he did not owe so much as Rs. 842 for that period and that the Plaintiff had improperly failed to credit him with the sum of Rs. 548-8. In support of his second plea, the learned pleader for the Appellant has cited the following cases, *viz*, *Sarkum Abu* v. *Rahaman Buksh* (1), *Kailash Mondul* v. *Baroda Sundari Dasya* (2), *Woomesh Chundra Maitra* v. *Sarada Das Maitra* (3), *Rajendra Nath Ghose* v. *Tarangini Dasi* (4) and *Surjiram Marwari* v. *Berham Deo Pershad* (5). I do not think it necessary to discuss all these cases at length. It is sufficient to say that, although in some of these cases there are expressions which support the plea of the learned pleader for Appellant, I think all that is meant is that, as held by Banerjee, J., in *Rajendra Nath Ghose* v. *Tarangini Dasi* (4), "the explanation would have meaning and effect where the subject-matter is the same in the two suits, or where the subject-matter of the second suit

(1) I. L. R. 24 Cal. 83 (1896).
(2) 1 C. W. N. 565: s. c. I. L. R. 24 Cal. 711 (1897).
(3) I. L. R. 28 Cal. 17 (1900).
(4) 1 C. L. J. 248 (1904).
(5) 1 C. L. J. 337 (1905).

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY.

is the same as that of the issue tried in the first suit, notwithstanding that any ground of attack or defence was not expressly raised." The limitation that for Expl. II of sec. 13 to have any application the subject-matters of the two suits must be the same, is not to be found in sec. 13 itself. If this view were strictly applied, then, in suits for arrears of rent there could be no *res judicata* at all, for the subject-matters of successive suits for arrears of rent are necessarily different. But what the rulings cited by the learned pleader for the Appellant must mean is, as laid down by sec. 13, that the matter directly and substantially at issue must have been directly and substantially at issue in the previous suit. They cannot and do not, in my opinion, lay down that both the issues and the subject-matters of the two suits must be the same, before Expl. II can be applied. Now, I have already pointed out that the question as to the amount of rent due by the Defendant from 1306 to 1308 was the question at issue in the previous rent suit against the Defendant and is at issue in the present one. It is, therefore, in my opinion, not necessary that the subject-matters of the two suits should be the same.

Another point as to the application of Expl. II to sec. 13 on which there is some conflict is as to whether the matter which might and ought to have been raised in the former suit, but was not so raised, must have been heard and finally decided in the previous suit. As pointed out in the Full Bench case of *Srigopal* v. *Pirthi Singh* (6), this would not seem to be required. Seeing that the decree in the previous rent suit against the Defendant has been duly executed, it is clear that the matter of the set off the Defendant now claims has been at least finally decided in the previous suit.

I would, therefore, dismiss this appeal with costs.

RYVES, J.—The facts of this case are as follows:—The Plaintiffs (Respondents) the zemindars leased an *ijara* mehal to Defendant (Appellant) by a registered lease on 19th Bhadra 1306, (*i.e.*, 4th September 1899) for a period of seven years at an annual rental of Rs. 800 payable by quarterly instalments of Rs. 200 with a stipulation that any sum not paid on due date should carry interest at 2 per cent. per mensem. In 1902 the Plaintiffs brought a suit in the Court of the Subordinate Judge of Dacca against the Defendant to recover arrears of rent and interest due under the lease up to the instalment of Pous in the year 1308 (January 1902).

In the plaint of that suit the Plaintiffs stated, that, out of the whole amount of rent which had become due, they had received from the Defendant sums aggregating Rs. 852 towards the rent; and, giving him credit for that amount, prayed to recover the balance. Notice of the suit was served on the Defendant, who is a resident of the District of Mozufferpur. He, however, did not appear: and the suit was decreed *ex parte*. The Defendant made no attempts to challenge that decree and allowed execution to be taken out against him for the full amount decreed.

On the 1st April 1903, the Plaintiffs

(6) I. L. R. 20 All. 110 (1897).

brought the present suit, out of which this appeal arises, in the same Court against the Defendant, for arrears of rent due under the same lease, for five instalments from Cheyt 1308. The Defendant contested the suit, and the main defence was that for the period covered by the previous suit, he had in fact paid sums amounting to Rs. 1,400-8 as. as rent, whereas the Plaintiffs had given him credit for Rs. 852 only. In the written statement it is stated, "In the said suit (*i.e.*, the previous suit) the Plaintiffs did not give credit for the total amount of Rs. 548 8 paid by the Defendant on different dates on account of the rent of the mehal under claim. The Defendant is entitled to get credit for the said amount and a set off against the present claim; and the Defendant accordingly prays for the same. As the Plaintiffs have brought the present suit by artfully omitting to credit the said amount, they cannot get any relief. All the documents that are with the Defendant showing that the aforesaid amount has been paid, are filed herewith."

In the first Court, it was contended on behalf of the Plaintiffs that this plea of "set off" was barred by the rule of *res judicata*.

This plea was overruled by the Court of first instance, which held that Rs. 548 8 had in fact been paid by the Defendant towards the rent for the period covered by the former suit and had wrongly been credited by Plaintiffs to another account, and deducting this amount, gave Plaintiffs a decree for the balance claimed. This decree was reversed on appeal by the District Judge.

The Defendant has appealed to this Court. The only ground pressed in appeal is that the rule of *res judicata* does not apply.

It was argued that that rule does not apply, *firstly*, because the subject-matter of the two suits was not identical, being sums of money due as rent for different years, and, *secondly*, that the issue in this case, whether Rs. 548-8 had been paid by Defendant to Plaintiff as rent in the years covered by the former suit, had not been "heard and finally decided" in that suit and that consequently that decision did not bar the hearing of the issue in this suit.

A number of authorities were relied on in support of these arguments and I will refer to them later.

The fundamental principles on which the rule of *res judicata* is based are well-known and are common to all modern jurisprudence.

It has been said, "Justice requires that every cause should be once fairly tried and public tranquillity demands that, having been tried once, all litigation about that cause should be concluded for ever between those parties."

Reading sec. 13 of the Code of Civil Procedure together with Expl. II, the meaning of the rule, it seems to me, would run—"No Court shall try any suit or issue in which the matter directly and substantially in issue, has been directly and substantially in issue, or which might and ought to have been directly and substantially in issue, in a former suit between the same parties, etc"

If this reading is coreect, then it seems to be clear that the fact whether this sum of Rs. 548-8, now claimed, had

JAMADAR SINGH v. SERAZUDDIN AHAMAD CHOWDHURY.

had not been paid by the Defendant might and ought to have been made an issue in the former suit and cannot be re-opened. In effect the decision of the first Court is equivalent to a denial by the Court that this sum had been paid and not credited as now alleged by the Defendant because it found that the amount due for rent for the period of the suit was as stated by the Plaintiff. From this finding it follows that the Court held on the materials before it that the statement of the Plaintiffs that Rs. 852 only had been paid by the Defendant was correct. Two decisions of the Privy Council seem to me conclusive in this view. They are *Kameswar Pershad* v. *Raj Kumari Ruttan* (7) and *Srigopal* v. *Firthi Singh* (8). I need not refer to other authorities.

The rulings relied on by the learned pleader for the Appellants are the following, *Sarkum Abu Tarab Abdul Wahed* v. *Rahaman Buksh* (1). According to the head note to that case, it was there decided "the relief claimed in the second suit was not *res judicata*, the subject-matters of the two suits being distinct."

In the body of the judgment, however it appears that the Court held the second suit was quite different from the first. Thus at p. 90 the judgment runs "In the suit of 1881 the question of the title of the Plaintiffs as *khadims* was not raised either directly or indirectly. They sued them as strangers to the office and failed in their suit in consequence of having put their claim exclusively upon that footing." That being so it was held that the second suit, based on a totally different title, was not barred.

It is significant, too, that after examining a number of authorities quoted in support of the opposite view, their Lordships held, immediately before the sentence above quoted, "these cases go to show that when a question has necessarily been decided in effect though not in express terms between the parties to a suit, it cannot be raised again although in a different form between the same parties in another suit."

Now, as I have said above, the decision of the first Court in effect was that Rs. 852 only had been paid by the Defendant as rent for the years covered by that suit. This case, therefore, on examination, does not seem to help the Appellant. The next case was *Kailash Mondul* v. *Baroda Sundari Dasya* (2). At first sight that case and certain observations of Banerjee, J., in particular, do appear to support his argument. The learned Chief Justice said "all that the Court previously decided was that a particular amount of rent he claimed was due from the Defendant to the Plaintiff. Can it be said to follow that the rent now claimed is of necessity, by reason of that decision, equally due from the Defendant or that the Defendant is to be debarred from setting up any defences he may have to the present action?"

He goes on to say with reference to Expl. II "We have no materials before us to enable us to say that the matter

(1) I. L. R. 24 Cal. 83 (1896).
(7) I. L. R. 20 Cal. 79 (1892).
(8) 6 C. W. N. 889 : s. c. I. L. R. 24 All 249 (1902).
(2) 1 C. W. N. 565 : s. c. I. L. R. 24 Cal. 711 (1897).

which the Defendant now desires to set up might or ought to have been made ground of defence in the particular action in respect of that particular rent."

This is enough to distinguish this case. It it true that in that case Banerjee, J., observed at p. 714, and his observations have been embodied in the head-note, "granting that the matter now in issue might and ought to have been made ground of defence in the former suit, the question still remains whether it has been heard and finally decided by the Court within the meaning of sec. 13." It is very difficult to see how a matter which *ex hypothesi* was not before the former Court could possibly have been heard and finally decided by it, and it seems to me that if this were necessary, the whole of Expl. II would be rendered meaningless In *Woomesh Chandra Maitra* v. *Barada Das Maitra* (3), Ameer Ali and Brett, JJ., quoted with approval the *dictum* of Banerjee, J., in the last-mentioned case, but as they add "We do not know what the nature of the former suit was, as the pleadings are not before us" it may be that, on the materials available in the present litigation, they would have arrived at a different conclusion. In *Rajendra Nath Ghose* v. *Tarangini Dasi* (4), Banerjee, J, followed his *dictum* in *Kailash Mondul* v. *Baroda Sundari Dasya* (2), and went further holding apparently that Expl II to sec. 13 applies not only when the matter which ought to have been made a defence in the former suit has been finally determined in the former suit, but also only when the subject-matter of the two suits is identical, If this is so, the rule can never apply to rent suits or to suits in which claims are made on a periodically recurring liability. This would very materially restrict the usefulness and policy of the rule, although there is no apparent reason—but rather the contrary—why it should not apply in all its fulness to litigation naturally constantly recurring and arising out of one and the same transaction.

The only other case referred to us in this connection was *Surjiram Marwari* v. *Barham Deo Pershad* (5) in which Mookerjee, J., adopted the *dicta* of Banerjee, J., in the last-mentioned case. In discussing the Privy Council decision of *Srigopal* v. *Pirthi Singh* (8), however, that learned Judge says in p. 253: "The true test is, as, Sir Ford North puts it in *Srigopal* v. *Pirthi Singh*" (6), could the first mortgagee, if he had set up his earlier security, obtain in the previous suit what he asks now and thus avoid the necessity for the subsequent suit?" Applying this test to the present suit I certainly think the rule of *res judicata* operates as a bar to raising the issue of set off.

With reference to all these latter cases it is open to consideration how far they are affected by the decision of the Privy Council in *Srigopal* v. *Pirthi Singh* (8). In that case when before the Full Bench of the Allahabad High Court, *Srigopal* v. *Pirthi Singh* (6), the case of *Kailash*

(2) 1 C. W. N. 565: s. c. I. L. R. 24 Cal. 711 (1897).
(3) I. L. R. 28 Cal. 17 (1900).
(4) 1 C. L. J. 248 (1904).
(5) 1 C. L. J. 337 (1905).
(6) I. L. R. 20 All. 110 (1897).
(8) 6 C. W. N. 859: I. L. R. 24 All. 249 (1902)

Mondal v. *Baroda Sundari* (2), on which these latter decisions are largely based, was discussed, the Full Bench held in the clearest terms, contrary to that decision, "It is quite certain that in order to make sec. 13 of the Code of Civil Procedure applicable it is not necessary that the matter of the subsequent suit should have been heard, or have been finally decided by a competent Court in the former suit, when the case is one to which Expl. II applies."

The Privy Council in upholding the decision of the Full Bench would seem at least inferentially to have agreed in the reasons for that decision. If so, the authority of these later decisions, so far as they are inconsistent with *Srigopal* v. *Pirthi Singh* (6), would seem to have been shaken.

For the above reasons I would dismiss the appeal with costs.

N. G. *Appeal dismissed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 75 OF 1908.

STEPHEN, J.
HOLMWOOD, J.
1908.
Heard,
16, June.
Judgment,
22, June.

NARSING PROSAD SINGH and ors., Petitioners,
v.
THE KING EMPEROR Opposite Party.

Artificers Act (XIII of 1859), secs. 2 and 5—Extension of the Act under sec. 5—Effect—Money advanced, whether recoverable when contract expired.

When Act XIII of 1859 is extended to a certain place under the provisions of sec. 5 of the Act a master or employer residing or carrying on business in the place has the same rights as are conferred by the Act on masters or employers resident or carrying on business in any Presidency town.

Per STEPHEN, J.—*Under sec. 2 of Act XIII of 1859, a master or employer can enforce the repayment of the money advanced by a proceeding under the Act even after the term of the contract has expired.*

QUEEN EMPRESS *v.* KONDA (4) *followed.*

KHODA BUKSH *v.* MOTI LAL JOHORI (3) *dissented from.*

Per HOLMWOOD, J. (contra)—*When the term of the contract has expired, a master or employer cannot enforce the repayment of the money advanced by a proceeding under Act XIII of 1859.*

KHODA BUKSH *v.* MOTI LAL JOHORI (3) *affirmed.*

This was a rule granted on the 18th of May 1908, against the proceedings taken against the Petitioners pending before the Court of Babu Nanda Lal Bagchi, Deputy Magistrate, Alipur.

The facts material to the report appear from the judgment.

Moulvi Mahamudul Huq and *Babu Atulya Charan Bose* for the Petitioners.

Mr. A. Chaudhuri and *Babu Tarak Chandra Chakravarty* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

STEPHEN, J.—The Petitioners are alleged to have entered into a contract at or near Patna with one Narangi Persad

(2) 1 C. W. N. 565 : s. c. I. L. R. 24 Cal. 711 (1897).
(6) I. L. R. 20 All. 110 (1897).
(3) 11 C. W. N. 247 (1906).
(4) I. L. R. 16 Mad. 347 (1893).

to work for him at certain brick fields in the neighbourhood of Calcutta, for a period ending on the 31st of May now passed. It is said they received an advance of money on account of the work that they contracted to perform, and subsequently wilfully and without lawful or reasonable excuse refused to perform it. A complaint was accordingly made against them by Narangi Persad under sec. 1 of Act XIII of 1859 on the 5th of March 1908 and the case was transferred to a Deputy Magistrate who made an order against one of the persons charged, with which we are not at present concerned. A rule has now been granted calling on the District Magistrate of the 24-Pergunnahs to show cause why the proceedings against the other persons who contracted to serve Narangi Persad should not be quashed as being without jurisdiction. The Magistrate considers that there is no objection to the jurisdiction of the trying Court, but also offers no objection to the proceeding being quashed as he considers it probable that the case has been falsely instituted at the instance of the Petitioners' zemindar. We have, however, heard Counsel on behalf of the complainant, which I consider was correct procedure as the present proceedings are in fact undertaken to enforce his civil right.

The argument in favour of the rule, to show that the Magistrate has no jurisdiction is twofold. That which goes the more to the root of the matter is that as the complainant does not reside or carry on business in a Presidency town he cannot claim any remedy under the Act. An argument of more restricted scope is that as the term of the contract has now expired the complainant's remedy is gone.

The first argument may be stated thus. The Act confers on certain persons, namely masters and employers residing or carrying on business in any Presidency town, the privilege of enforcing their civil rights by a penal remedy enforceable by Criminal Procedure. The workman or the place where he contracts to do his work may be anywhere but the remedy is to be sought from a Magistrate of Police, which means a Presidency Magistrate. When the Act is extended by sec. 5 the only effect of the extension is to enable officers specially appointed to exercise the functions of a Magistrate of Police, and the privilege of persons residing or carrying on business in Presidency towns is not extended to any one else. I cannot agree with this argument. The curious effect attributed, and as it seems to me rightly attributed to the Act, in enabling a Presidency Magistrate to enforce a contract made and to be performed anywhere in British India, no doubt lends some colour to the suggestion that the extension of the Act has no effect except to provide for its enforcement at or near the place where it was made, or is to be performed. But had this been the intention of the Legislature I do not think they would have mentioned the extension of the Act. Also I consider that the language of sec. 5 shows that the extension of the Act means the extension of the whole Act, that such extension is something more than merely conferring certain powers on the officers mentioned, and that giving them those powers is merely ancillary to something else. If this is so

NARSING PROSAD SINGH *v.* THE KING-EMPEROR.

the only other effect that the extension can produce is to confer on persons residing and carrying on business in the area to which the Act is extended the privilege conferred by the Act on persons similarly situated in regard to the Presidency towns.

That a practice has been followed for nearly fifty years is no proof that it is legal. But when we find that the Act has been extended to all the collectorates in the Bombay Presidency, to all the Districts of Madras, to the town and Cantonment of Rangoon, and to the tea Districts of Assam and Darjeeling, it is impossible to suppose that the privileges it confers were not intended to be exercised, and were not in fact exercised, by persons who resided or carried on business in those places and did not do so in a Presidency town. And I cannot find in the numerous reports of cases that have arisen under this Act that the exercise of such a privilege has ever been challenged. Consequently I am of opinion that a master or employer residing or carrying on business in a place to which the Act is extended has the same rights as are conferred by the Act on masters or employers resident or carrying on business in any Presidency town: and that the first ground I have mentioned on which we are asked to make this rule absolute fails.

As to the second argument in support of the rule, apart from authority I cannot regard it as sound. It was long ago decided in this Court that the Magistrate cannot order the workman to perform his work after the term of the contract has expired, *In re Chikka Putta* (1) and *In re Matha Goundan* (2), and the same view was recently taken by this Court in *Khoda Buksh* v. *Moti Lal Johori* (3). The reason for this I suppose to be that after the term of the contract is expired the workman cannot perform his contract "according to the terms of his contract." But I cannot see why the expiration of the term of the contract should deprive the complainant of his right to exercise his option of asking for the recovery of the money he advanced The option between the two remedies is that of the complainant and not of the person complained against, and the fact that one remedy would be infructuous does not seem to me to deprive him of the other. I consider that the complainant's right to recover the money he has advanced continues till it is repaid to him, subject to the effect of the Limitation Act of which there is no question here. This seems to me to be so particularly when, as is the case here, the complainant instituted proceedings at a time when both remedies were open to him, and it is only this rule that has prevented him from exercising his option. This view is in agreement with that of the Madras High Court in *Queen-Empress* v. *Konda* (4); but the decision in *Khoda Buksh* v. *Moti Lal* (3) seems to me to be a direct authority the other way. It is there laid down that where the term of the contract has expired "the contract cannot be specifically enforced" or "the money recovered." I must respectfully dissent from this view, but I do not consider the decision as

(1) Weir's Rep. 470 (1884).

(2) Weir's Rep. 471 (1884).

(3) 11 C. W. N. 247 (1906).

(4) I. L. R. 16 Mad. 347 (1893).

NARSING PROSAD SINGH *v.* THE KING EMPEROR.

obiter. Owing to the view taken by my learned brother the case cannot be referred to a Full Bench, and I have therefore no choice but to follow this decision. I therefore agree that the rule must be made absolute.

HOLMWOOD, J.—I think this rule should be made absolute. It is unnecessary to recapitulate the facts which are sufficiently set out in the judgment of my learned brother.

In my opinion the remedies under sec. 2, Act XIX of 1859 are interlocked and interdependent and if one has lapsed the other has lapsed also

This is the view that was taken by this Court (Mitra, J. and myself) in the case of *Khoda Buksh* v. *Moti Lal Johori* (3), to which I was a party. The law has, it is true, been much more stringently interpreted in Madras, Bombay and Allahabad but I prefer to follow the spirit of the rulings of this Court.

The offence created by the Act is not the neglect or refusal of the workman to perform his contract, but the failure on his part to comply with an order made by the Magistrate, directing the workman to repay the money advanced or perform the contract. *King-Emperor* v. *Takasi Nukiyya* (5). The complainant has the option of repudiating the contract and getting the money back or of keeping to the contract and getting the work done. Imprisonment is imposed as the punishment for refusing either of these remedies, but no fine or imprisonment is provided as a punishment after the contract has been broken and expired. The option being the return of money advanced or the performance of the contract while it is still running, it seems to me that the Magistrate's jurisdiction is gone if the option has become impossible The complainant must exercise that option within the time the contract is running. He cannot come after the contract has expired and say: "Now I have no option but I want my money back." The very fact that he has no option throws him on his ordinary civil remedy.

As regards the enforcing of the remedy if it has been duly sought within the time before the contract has expired I do not think any hard and fast rule can be laid down, but as to the exercise of the option I am clear and the circumstances of this case fully bear me out.

In the case that has been tried out and which forms the subject of another rule* the option chosen by the complainant was that the work should be completed but now that the time has expired in the other cases, the complainant merely wants his money back or rather wants to punish the accused with imprisonment, for failing to return the money. The Magistrate of the District in showing cause for the Crown considers that the case is a more than doubtful one and recommends the quashing of the proceedings. We heard the learned Counsel for the complainant very fully and the impression left on my mind was that these cases are now being pursued to secure the punishment of the accused and not to secure the legal remedies under the Act.

(3) 11 C. W. N. 217 (1906).
(5) I. L. R. 24 Mad. 660 (1901).

* Not reported. There was a conviction in that case. But it was quashed by their Lordships —REP.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, JULY 27, 1908. [No. 37

Contents.

NOTES.

The following constitution of Benches and distribution of business amongst them will take effect from 28th July :—

PRESIDENCY AND PATNA GROUPS AND PRIVY COUNCIL DEPARTMENT.—Mr. Justice Coxe and Mr. Justice Bell.

RAJSHAHYE AND BURDWAN GROUPS.—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

BELOW Rs. 1,000 CASES.—Mr. Justice Doss.

CRIMINAL BUSINESS—Mr. Justice Brett and Mr. Justice Ryves.

ORIGINAL SIDE.—Mr. Justice Stephen, Mr. Justice Fletcher and Mr. Justice Chitty will sit singly.

THE APPELLATE JURISDICTION BILL WHICH WAS READ in the House of Lords for the second time on the 30th of June last will effect a change in the constitution of the Judicial Committee of the Privy Council for the hearing of Colonial and Indian appeals. The Lord Chancellor in moving the second reading of the Bill said it was a small departmental measure to enable colonial judges who might be available to be asked to act as assessors to the Judicial Committee of the Privy Council on the hearing of appeals from the colonies with which they were associated; to enable any person who was or had been Chief Justice or Judge of any High Court in British India and was a member of the Privy Council to be a member of the Judicial Committee of that Council; and to facilitate the Court of Appeal in England receiving the assistance of any Judge of the High Court.

WE ARE GLAD THAT THE RESOLUTION OF THE SYNDICATE as accepted by the Senate removes the misapprehension regarding monopoly that the scheme of the proposed University Law College had given rise in public mind. The resolution runs as follows :—

> That with a view to avoid misconception, it be recorded that in establishing a University Law College the University does not wish to deviate from the principal enunciated in the resolution of the Government of India, dated the 24th October, 1902; the college is to be established for the promotion of legal education of students for Degrees in Law, and to serve as a Model College, and not with a view to create a monopoly, either general or local.

THAT THERE WERE JUST GROUNDS FOR APPREHENSION and controversy is also confirmed by what His Honour the Rector said. His Honour explained in the following terms how the original scheme had come to be modified :—

> Certainly as the proposal was made at first there was a good deal of ground for controversy, but now when it is distinctly laid down that the Syndicate's recommendation, which I understand was arrived at after a meeting of the Faculty of Law last Tuesday, provides on the one hand, that a University Law College be established and that, on the other hand, this college will not be established for the purpose of creating a monopoly but as a model college, and that any college which carries out the requirements of the University will be allowed to do its work, then I think the matter becomes one of very much less controversy than before.

WE RECENTLY NOTICED AN ENGLISH CASE WHERE A solicitor was suspended for taking fees for two counsel from client and not paying them over. This decision will, no doubt, have the indirect effect in enforcing solicitors' obligation to counsel. There has been since then another decision (*Sadd* v. *Griffin*) the effect of which will be similar. The question arose during the taxation of a solicitor and client bill of costs as to whether counsel's fees which had not been paid up to the time of the delivery of the bill could be considered as "disbursement." It was contended on behalf of the solicitor that even when such fees had not been actually paid the practice was to regard it as "disbursement" because a solicitor was under 'honourable obligation' to pay and the payment might be enforced by moral pressure though not by actual recourse to law. The Court, however, held that sums claimed as disbursement must be actually paid before delivery of the bill and that the items not so paid must be disallowed during taxation. It is believed that the result of this decision will be that solicitors will now pay counsel's fees before

getting their bills taxed. Enforcement of such stringent rules here will cause considerable embarrassment to solicitors. The introduction of such rules may not be desirable at once but still the profession here should keep pace with progress and endeavour to shape their practice so that they might not find themselves in an embarrassing position should our Courts here choose to follow the English practice.

IT IS NOT UNCOMMON TO FIND LAY PEOPLE ABUSING lawyers for advocating bad causes. Such unthinking and unreasonable people do not even hesitate to pass a slur on the profession because lawyers regard their duty before a Court of Justice to be to place before it the best case on behalf of their client and that quite regardless of what their own private opinion or personal conviction may be with regard to the case entrusted to them. It may seem strange to such people that lawyers on the contrary regard it a professional impropriety on the part of any advocate to place before the jury or the judge his private convictions or personal opinion regarding the guilt or innocence of any person.

THE ENGLISH *Law Journal* HAS IN A RECENT issue cited some very forcible judicial opinion in this connection. Lord Bramwell said "a man's rights are to be determined by a Court, not by his advocate or counsel. It is for want of remembering this that some foolish people object to lawyers that they would advocate a case against their own opinions. A client is entitled to say to his counsel 'I want your advocacy not your judgment; I prefer that of the Court.'" Lord Halsbury, the late Lord Chancellor, also said regarding the contention that "an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him as ridiculous, impossible of performance and calculated to lead to great injustice." As regards the impropriety of any expression of personal opinion by counsel in any criminal case, our contemporary cites the instance of Serjeant Shee's expression of belief in the innocence of Palmer which drew a strong protest from Sir Alexander Cockburn, who remarked that the counsel for the defence "had better have abstained from making any observations which involved the assurance of his own conviction." If it were made into a rule that a lawyer could only take up such cases as he believed were just or reasonable, they would frequently indulge in expressions of such personal opinion and cases would often be decided by Magistrates and Judges upon the comparative weight of the advocate's opinion than upon the merits of the cases.

WE HAVE, ON THE AUTHORITY OF THE LATE LORD Chief Justice of England, the late Lord Chancellor and the Home Secretary of England, maintained in these columns that the object of bail is to ensure attendance of an accused person and not at all to punish him before trial. The same view has also generally prevailed in our Courts till lately. The present Lord Chief Justice of England sitting in the new Court of Criminal Appeal repeated again what has been said so often by eminent English Judges that every accused person must be presumed to be innocent till he is proved to be guilty. Any departure from this attitude will surely lower public confidence in our judicial tribunals in India. Our superior Courts ought also to impress the Courts subordinate to them that they ought not to refuse bail simply because the offence alleged is non-bailable. Every Magistrate ought to see whether there is sufficient evidence to raise a presumption of guilt. The question whether the accused is likely to abscond is also a very important element in the grant of bail.

THE GROSS INJUSTICE AND HARDSHIP THAT MAY be caused by the Magistrates refusing bail on the bare statement of the Police that there is evidence is illustrated by the recent case of *Pandit Panchanan Tarkaratna and others*. The Magistrate of Sealdah remanded the accused to *hajut* without calling upon the Police to produce evidence of their alleged complicity in the Kankinara bomb outrage. It is to be regretted also that three days after when application for bail was made before the District Judge of Alipur he refused bail saying that when the accused would be brought up before the Magistrate on the following week, if bail was still refused, he would call for the papers. After bail had thus been refused by the District Judge, curiously enough, the Police on the very same day themselves appeared before the Magistrate and applied for enlarging the accused on a small bail. The Magistrate complied at once. The procedure followed in this case has created an impression in the public mind that bail is granted or refused by Magistrates according to the suggestion of the Police. Such impression is likely to work mischief in various ways. We venture to suggest therefore that both the Government and the superior Courts should impress on the Magistrates their duty in respect of the grant of bail as has been done by the Home Secretary in England.

WE ARE GLAD TO NOTICE THAT MR. KEAYS, THE second Presidency Magistrate, has intimated it to the Police in a recent case that he would not convict even old offenders for bad livelihood under sec. 109 (*b*) of the Criminal Procedure Code unless it is proved that they have been living on the proceeds of crime or circumstances are proved that leave little doubt in the mind of the Magistrate that they

are so doing. It is said to be the practice amongst a certain class of Police officers when they are unable to detect a crime to produce some old offenders and if sufficient evidence is not forthcoming to connect them with the crime, to run them in under the bad livelihood section. Mr. Keays must therefore be congratulated for discouraging such abuses of the legal procedure.

AN IMPORTANT QUESTION AROSE FOR DECISION IN THE case of *Kup Chand* v. *Seth Kastur Chand*, a report of which appears at page 303 of the June number of the current *Punjab Record* (Vol. XLIII). A certain immoveable property was purchased by C at an auction sale in execution of a money decree obtained by C against A the owner of the property. It appears that this property was subject to a mortgage in favour of B. But in the sale proclamation no mention was made of this incumbrance upon the property which was sold by the Court and purchased by C in the belief that it was free from encumbrances. After the execution sale, the mortgagee came forward and wanted to sell this property in satisfaction of his mortgage and to have the previous execution sale cancelled. The question was whether the mortgagee was entitled to do so. The learned Judge on the authority of the cases in 12 Moore I. A. 366, I. L. R. 6 Bom. 193 and 490, I. L. R. 22 Bom. 624 and I. L. R. 29 Bom. 234 held that the mortgagee had no cause of action to set aside the execution sale, as by it his interest as a mortgagee was not affected in the least and he was entitled to follow the property into the hands of the auction purchaser. This view was based on the principle that the auction purchaser purchased only that which the judgment debtor could honestly dispose of, and as at the time of the auction sale the right, title and interest of the judgment debtor consisted only of his equity of redemption and nothing more the purchaser could not get more than the equity of redemption by his purchase.

NO DOUBT FROM THE MORTGAGEE'S STANDPOINT THIS was the proper view of the matter. But what is the position of the auction purchaser when the Court purported to sell him the whole property free from any incumbrance. He paid for the whole estate and probably would not have purchased it if he had known that the property was subject to a mortgage. In the case of *Abdul Aziz Khan* v. *Appayasami Naikor*, 8 C. W. N. 186, their Lordships of the Privy Council observe at p. 190. "In all cases, at least the recent cases, the inquiry has been what the parties contracted about if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance, but only a sale in execution of a money decree." Again: "In the case of a sale in execution of a money decree the questions are, what did the Court intend to sell, and what did the purchaser understand that he bought."

THE ABOVE OBSERVATIONS, HOWEVER, OCCUR IN A case in which there was no mortgage lien attaching to the property. A Court cannot ordinarily sell more than what the judgment-debtor has the right to sell by private conveyance. It has been held that a Court can empower a receiver to transfer property free from previous mortgage liens with a view to preserve the property. See *Girdhari Lal Roy* v. *Dhirendra Krista Mookherjee*, 11 C. W. N. 1. But such a power the Court exercises in very exceptional circumstances, and there were no such circumstances in the present case. The Court purported to sell the whole estate in ignorance of the mortgage. Had it known of the mortgage it would have sold only the right, title and interest of the judgment-debtor, *i.e.*, the equity of redemption. All things considered the decision of the Punjab Chief Court seems to be sound.

CRIMINAL CASES OF 1907.

(Continued from p. cxcviii.)

FIRST INFORMATION.—The recording of an information four days after another information had been lodged at the thana but not recorded, and when the enquiry was proceeding is contrary to sec. 154, and the later statement is not the *First* Information, and has little value, as it can be made to fit in with the case as then developed (*Emperor* v. *Kampu*, 11 C. W. N 534). The information earliest in point of time and on which an investigation has commenced is the first information (*King-Emperor* v. *Bhut*, 7 C. W. N. 345 : *King-Emperor* v. *Daulat*, 6 C. W. N. 921, 922 : *Emperor* v. *Dina*, 8 C. W. N. 218, 220). A statement recorded, after information received at the thana, at the deponent's house, or at the hospital is not the first information (*22 Cal. 50, 72 : 6 C. W. N. 921*).

RIGHT OF COPY OF STATEMENTS UNDER SECS. 162, 164.—[*Right of copy*]. An accused is not, *before the commencement of the enquiry*, entitled to copies of statements recorded under secs. 162 and 164. No such right is conferred by the Code; and the question whether any person has a right to inspect a public documents not provided for in the Evidence Act (*Emperor* v. *Muthia*, 30 Mad. 466). Sec. 162 applies to statements taken under sec. 161, but not to those recorded under sec. 164, and does not give a right of *copy* (*Queen-Empress* v. *Mannu*, 19 All. 390, 406, 412, 416 : *Queen-Empress* v. *Nasiruddin*, 16 All. 207). Sec. 257 only entitles the accused to call for documents *after the charge*, but does not refer to *copies*. [*Right of inspection*]. There is a distinction between a right of *copy* and a right of *inspection* (*Queen-Empress* v. *Arumugam*, 20 Mad. 189, 191, 192, 194,

200, 201 (F. B.): *Queen-Empress* v. *Mannu*, supra, pp. 406, 412: and *see* 76 of the Evidence Act). An accused may, so far as the law of Evidence permits, make use of as evidence any document which is then in Court (*Bikas* v. *Queen-Empress*, 16 Cal. 610, 618). Every one has a right to inspect public documents provided he is individually interested in them. (See *20 Mad. 189, 191* per Davies, J., referring to Taylor on Evidence, 2nd Vol., 9th Ed., § 1492, and to *Mutter* v. *E. & M. Ry. Co.*, L. R. 38 Ch. D. 92, 106. Neither in the Procedure Code nor in the Evidence Act is there any provision declaring or limiting the right of inspection of documents in the hands of third persons. A right to inspect public documents is assumed in sec. 76 of the Evidence Act. The law recognizes the right generally for all who show an interest for the protection of which liberty of inspection is necessary (*Queen-Empress* v. *Arumugam*, supra, p. 196, followed in *31 Cal. 284*. [*Proper mode of use of statements under sec. 161*]. After a prosecution witness has been examined-in-chief, the accused must apply to the Magistrate for the production in Court of the statements, and must question the witness, if he made such a statement, in order to contradict his evidence given in Court. If he admits it, the accused need not go further: if he denies it the accused or the Court must call the recording officer who, after refreshing his memory from the record of the statement if necessary, will prove the statement (see *Dadan* v. *Emperor*, 33 Cal. 1023, and the rulings in *11 Bom. 657: 15 All. 25: 17 All. 57: 19 All. 390: 27 All. 469*). Unless the witness has been first cross-examined on the point the statement cannot be used to contradict him (see Evidence Act, sec. 145, and *33 Cal. 1023, 1029: 15 All. 25: 17 All. 57: 14 All. 212, 220: 16 Cal. 612n, 618n*). A difficulty arises if the police officer who has recorded the statement says he does not remember, and declines to refresh his memory. It has been held that a witness cannot be compelled by a private person to refresh his memory (*8 Cal. 154, 156, 157: Ibid 739, 745: 33 Cal. 1023, 1028*). In such a case the Court ought to compel the witness to do so. Another question arises whether the document *itself* may, after being used to contradict a witness, be put on the record, having regard to the words of sec. 162 "*nor shall such writing be used as evidence.*" The rulings are not clear nor satisfactory: See *17 All. 57, 60* and *Emperor* v. *Narayan*, 32 Bom. 111 (*per* majority), in favour of a negative answer, but *contra*, see *Emperor* v. *Muthia*, 30 Mad. 466, 468, and *32 Bom. 111, 142* per Beaman, J. The proviso to sec. 162 does not allow the *prosecution* to impeach the credit of the defence witnesses (*32 Bom. 111, 143*), though this was allowed under the previous law (*15 All. 25, 26: 15 W. R. Cr. 23*). *A fortiori* it does not allow the prosecution to impeach the credit of its own witnesses (*32 Bom. 111, 143* per Beaman, J.: contra *32 Bom. 111, 129* per Batty, J.: *Emperor* v. *Jagardeo*, 27 All. 469: *Emperor* v. *Cherath*, 26 Mad. 191). The view of Beaman, J., is unquestionably sound, notwithstanding the Allahabad and Madras rulings which really proceed on the law as it existed before the Code of 1898.

VOLUNTARY CONFESSION.—[*Section 163*]. A tender of pardon by the Local Government, though of doubtful validity, is not an illegal inducement or threat within sec. 163. (*D. L. R.* v. *Banu*, 5 C. L. J. 224). This case decided a number of points, but seems generally questionable. [*Section 164*]. A confession not made when the accused was first placed before the Magistrate, but after five days' illegal detention, and recorded by a Subordinate Magistrate, is open to suspicion, notwithstanding the attachment of the proper certificate under sec. 164 (*Emperor* v. *Kampu*, 554, 558). *See* on the subject the Author's *Law of Confession*, pp. 23 28.

SEARCH AND DETENTION.—[*Search*]. A constable making a search without written authority does not lawfully exercise the power of a public servant (*Idu* v. *Emperor*, 6 C. L. J. 753). [*Detention by police*]. Sec. 167 authorizes detention in police custody, beyond 24 hours, only in special cases and for special reasons, and not as a matter of course whenever asked for (*Emperor* v. *Kampu*, 11 C. W. N. 554: *see* also *7 C. W. N 457* and *21 Cal. 642, 654, 661*). Special circumstances may exist justifying the order, *e.g.*, that the accused is desirous of pointing out property, and could not do so within the 24 hours and without further detention (*Queen* v. *Rughonath*, 3 N. W. P. 275: *Emperor* v. *Kampu*, supra: see *Queen-Empress* v. *Narayan*, 25 Bom. 543, 548). But it is an abuse of the section to allow detention to *force* the accused to give a clue of stolen property (*3 N. W. P. 275*), or to point out places through which they passed on the way to commit an offence (*7 C. W. N. 457*: see *7 C. W. N. 220, 223, 224*), or in order to obtain their identity (*Ibid*), or to complete the enquiry (*7 C. W. N. 457, 459: 21 Cal. 642, 654*: see *25 Bom. 543, 548*), or to verify a confession (*7 C. W N. 220, 223, 224*: *see* the unreported case, *Cr. App. No. 554 of 1902*), or, until the local bazar is held (*11 C. W. N. 554, 557*).

TAKING COGNIZANCE OF OFFENCES.—[*Institution of proceedings*]. Where the police have reported that the charge of non cognizable offences against the accused was false, and the Magistrate has accepted the report, he cannot call for a charge sheet in respect of such offences, unless he has before him other materials to substantiate the charge (*Mokamiji* v. *Emperor*, 11 C. W. N. 832). An Appellate Court reversing the conviction and trying the case itself takes cognizance under sec. 190 (*b*), and not cl. (*c*) (*Emperor* v. *Manikka*, 30 Mad. 228). [*Revival of Prosecution*]. The cases under this head fall into four groups

(i). Revival of a *case dismissed by the same mofussil* Magistrate.

A mofussil Magistrate who has dismissed a complaint by the mother of a girl, within certain sections

of the Penal Code, under sec. 203, Cr. P. C., may entertain a second complaint by the husband of the girl under different sections, but based on the same facts (*Emperor* v. *Meherban*, 29 All. 7, following *All. W. N. (1895), p. 86, 28 Cal. 652* and *29 Cal. 726*, and distinguishing *22 All. 106*). He may revive a complaint dismissed by himself at the instance of the same complainant (*Queen-Empress* v. *Umedan*, All. W. N. (1895), p. 86). *See also 9 All. 85 : 21 All. 216 : 28 Cal. 102 : 29 Cal. 726 : 8 C. W. N. 456, 458* : contra *23 Cal. 983 : 24 Cal. 286 : 3 C. W. N. 760* (which are overruled by the Full Bench ruling in *29 Cal. 726*). The Calcutta Full Bench case was dissented from in *28 Mad. 255*, which in turn was dissented from by the Madras Full Bench decision in *29 Mad. 126*. In this case Benson, J, distinguished *28 Mad. 255, 23 Cal. 983* and *22 All. 106* as being cases of revival by another Magistrate, Moore, J., limited his decision to cases of dismissal of complaint *under sec. 203*, and held that orders under secs. 253, 259 could not be revived. A complaint may be revived after dismissal for want of sanction (*24 Mad. 337*), or absence of complainant under sec. 259 (*28 Mad. 310*). The net result of the cases is that a complaint dismissed under sec. 203 may be revived, but it is not so clear whether orders of discharges under sec. 253 or sec. 259 can be similarly revived, but the better opinion is that they can.

(ii). Revival of *complaint dismissed by another mofussil* Magistrate. The Bombay rulings hold that a second Magistrate can revive such a complaint (*10 Bom. 131 : 16 Bom. 414* per Telang, J.). The Madras ruling in *10 Mad. 232* is against a revival in such cases, but it has been practically overruled by the majority of the Full Bench in *29 Mad. 126*. In Allahabad the case in *22 All. 106* is opposed to the power of revival, but see *9 All. 52*. The Calcutta cases in *23 Cal. 983 : 2 C. W. N. 290* (see also *1 C. W. N. 49, 51*) holding that no revival can take place are opposed to the principle of *29 Cal. 726*.

(iii). A *Presidency Magistrate* can revive a complaint dismissed by himself for want of sanction (*22 Bom. 711*) or on the merits (*28 Cal. 211 : Ibid 652 : 7 C. W. N. 527 : 1 C. W. N. 49*), and the cases in *4 C. W. N. 26* and *Ibid 46* to the contrary are practically overruled.

(iv). Revival by *another Presidency Magistrate*. The case in *28 Cal. 211* dissenting from *24 Cal. 528* is in favour of the power of the second Magistrate to revive the case on the same facts.

The differences between the views in the conflicting cases above noted are (*a*) that on the one hand it is argued that provision having been made in secs. 436, 437 for revivals and commitments, the Legislature intended that this procedure alone should be followed; when on the other that these two sections are enabling sections, and do not affect the Magistrate's powers of revival. (*b*) There is a difference between dismissals of complaint under sec. 203, and discharges under sec. 253 where evidence has been recorded and a *quasi*-judgment passed.

(*To be continued.*)

E. H. MONNIER.

CURRENT INDIAN CASES.

MEGHBAI *v.* POONGABAI, I. L. R. 32 Bom. 163.
High Court rules—Prothonotary's decision not final.

"On the authorities however and under Rule No. 80 (*a* 1) it seems to be the right of a party dissatisfied with the Prothonotary's decision to apply to the Judge to have the matter adjourned to him and I take it that the Judge in chambers is bound to take up the matter and decide the matter for himself" (*Per* DAVAR, J.).

RANCHOD *v.* MANMOHAN DAS, I. L. R. 32 Bom. 165.
Contract Act, sec. 73.

"As sec. 73 imposes no exception on the ordinary law as to damages whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of immoveable property through inability on the vendor's part to make a good title, the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. Each case should be dealt with on its own merits" (*Per* MACLEOD, J.).

BANAO BEGAM *v.* MIR ABED ALI, I. L. R. 33 Bom. 172 *Mahomedan Law—Life interest.*

The creation of a life interest is allowed amongst the Shias.

A definite interest like what is called in English Law a vested remainder may be created by a Mahomedan and such an interest can be attached and sold.

JAMSETJI *v.* HARI DAYAL, I. L. R. 32 Bom. 181.
Injunction.

Case where it was held that an injunction did not run with the land.

LAKSHMI DAS LALJI, *In re*, I. L. R. 32 Bom. 184.
Criminal Procedure Code, secs. 195, 476—Sanction.

The case of *Begu Sing* v. *Emperor*, I. L. R. 34 Cal. 551, has been dissented from and it has been held that the word "Court" in sec. 476, Criminal Procedure Code, includes within its scope the other Courts to which such Court is subordinate, referred to in sec. 195.

ANANT VINAYAK *v.* NAGAPPA, I. R. R. 32 Bom. 195. *Civil Procedure Code, sec. 232.*

Sec. 232, cl. (*b*) of the Civil Procedure Code is not applicable to an application by the transferee of a decree where in the decree there were directions for payment of separate sums of money against separate persons.

In re GOPAL, I. L. R. 32 Bom. 208. *Sanction for prosecution—sec. 195, Cr. P. C.*

Where an application for sanction was dismissed for default the District Judge has no jurisdiction to give sanction but an application should be made to the Sub-Judge for revision.

NATHABHAI *v.* BAI UGAIN, I. L. R. 32 Bom. 207. *Transfer of Property Act, sec. 99.*

When any application is made for bringing the property to sale, that is the time to consider whether or not sec. 99 has any application.

Reviews.

THE INDIAN TRUSTS ACT with a Commentary. *By Eyre B. Powell, M. A., L. L. B., Bar-at-law and Government Pleader, Madras High Court. Second Edition. Published by Srinivasa Varadachari & Co., Madras. 1908.*

This is a very handy and convenient edition of the Indian Trusts Act. The provisions of the Amending Act (III of 1908) have been embodied in the text. The Indian Trusts Act is after all the English Law of Trusts codified to suit the requirements of India. The Mahomedan Law of Trust (*Wakf*) and Hindu law relating to private, religious or family trusts have been left out of its scope. The Act is also limited in its operation as it is not applicable to Bengal. It is in force, however, in Assam which is within the jurisdiction of the Calcutta High Court. The author gives in the preface a short history of the law of trusts. In annotating the sections, the author not only notices all the important Indian decisions which have a bearing thereon but also explains the general principles by reference to the leading English decisions and text books on the subject. The author shows a thorough grasp of the subject. His annotations are both well digested and methodical and should prove very useful both to the practising and the conveyancing lawyer.

DISEASES OF WORKMEN. *By T. Luson, M. D., and R. Hyde, M. R. C. S., with an introduction by His Honour Judge Ruegg, K. C. Butterworth & Co, Law Publishers, London. 1908.*

In an industrial country like England, a work of this kind is bound to prove useful both to the Bar and the Bench. Although workmen's compensation cases are almost unknown in India, yet there are many interesting chapters in this work which both lawyers and laymen in India will find it useful to read. Cases of poisoning by nickel carbonyl or carbon-bisulphide may be unknown in India but instances of poisoning of workmen through lead, arsenic, phosphorus, mercury or nitrous fumes, though not common, yet may not be altogether unknown. Should any workman get disabled by working with such substances he can claim compensation from his employers if they neglect the ordinary precautions. The work is written in such a manner that even laymen can comprehend how such cases of poisoning may arise. This work may also help them to avoid risks incidental to such industries.

PROBATE AND ADMINISTRATION ACT. *By Alex. Kinney (Thacker, Spink & Co. Price Rs. 3 8).*

We welcome a cheap and neat case-noted edition of the above Act by Mr. Kinney, the Deputy Administrator General of Bengal. The author in his official capacity has become thoroughly familiar with Administration Practice in India and this volume comes as a companion to "Administration Practice in India" by the same author. In the introduction there is a useful summary of the previous legislation and the various regulations on the subject. The Indian cases referred to are thoroughly up-to-date. We can recommend the book to all practitioners as a safe and reliable book of reference on the Probate and Administration Act.

THE EASTERN BENGAL AND ASSAM TENANCY (AMENDMENT) ACT. Act No. I of 1908. Supplement to Rampini's Bengal Tenancy Act with Notes and rulings, etc. *By Digambur Chaturji, M. A., B. L., Vakil, High Court, Calcutta. Calcutta, S. K. Lahiri & Co., 54, College Street. 1908. Price Rs. 2.*

We have great pleasure in welcoming this edition of the Amending Act. Each amendment introduced by the Act is explained by extracts from the Statement of Objects and Reasons and the Report of the Select Committee, which we noticed in these columns some time ago. The author agrees with us that the Eastern Bengal and Assam Amending Act is in several respects an improvement upon the Bengal Amending Act, specially in regard to the provisions about agreements and compromises and the provision serving the operation of sec. 310A of of the Code of Civil Procedure in rent execution cases. Notes of cases reported since the publication of the third edition of Rampini's Bengal Tenancy Act which we recently reviewed have been embodied at the end of this work which brings the case-law on the Bengal Tenancy Act up-to-date. The index furnishes the key to the provisions of the Amending Act as also to the notes.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. CRIMINAL REVISION No. 533 OF 1908. KALI PRASAD SINGH, 1st Party, Petitioner *v.* KALI SINGH AND OTHERS, 2nd Party, Opposite Party. 16th June 1908.

Costs in a proceeding under sec. 145, Cr. P. C.—Procedure in taxing costs.

In this case a rule was granted to show cause why that part of an order of the Magistrate under sec. 145, Cr. P. C., which referred to costs should not be set aside. It appears that at the conclusion of the hearing of a proceeding under sec. 145, the Magistrate said that the 2nd party would get his usual legal costs. Subsequently a list of costs was handed over to the Magistrate which he ordered to be reduced by half. When he made this order the second party was not present neither had any notice been given to the second party that such order would be made.

Their Lordships observed:—

"In so doing he (the Magistrate) obviously acted without jurisdiction, because costs ought not to be taxed without giving the party who is to pay them an opportunity of being present at the taxation. We therefore remit this case to the Magistrate in order that he may tax the costs to be paid after the second party has had an opportunity of being present, and we consider that the proper way to tax these costs will be to act in accordance with the recognised rule on the subject."

Babu Kshetra Mohun Sen for the Petitioner.

Babu Joy Gopal Ghosha for the Opposite Party.

Rule made absolute.

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 2191 OF 1906. BHAGTU SINGH, Defendant No. 1, Appellant *v.* RAGHU NATH SAHAI SINGH AND OTHERS, Plaintiffs, Respondents. 4th July 1908.

Admission—Evidence—Estoppel.

The appeal arose out of a suit for ejectment with mesne profits. The Defendant No. 1 had a lease of the land in suit from the Plaintiffs. The lease was dated 2nd July 1896 and was for a term of 7 years from 1304 to 1310. On the expiration of the term of the lease the Plaintiffs settled the land with Defendants Nos. 2 and 3, but there was a criminal proceeding between them and Defendant No. 1, and the Criminal Court passed orders against them and they surrendered their lease. The Plaintiffs thereupon themselves sought to recover possession from Defendant No. 1, but failed. Then they gave him a notice of ejectment and brought the present suit for ejectment. Their suit was dismissed on the ground that he (Defendant No. 1) was a non-occupancy raiyat, and as such, could not be ejected on the ground of expiration of term of lease except under the provisions of sec. 45, Bengal Tenancy Act, which the Plaintiffs failed to comply with. The Plaintiffs appealed and urged that the land being their *zerait*, the provisions of Chap. VI of the Bengal Tenancy Act, do not apply to the case. The Defendant No 1 did not admit that the land was the Plantiffs' *zerait* within the meaning of sec. 116, Bengal Tenancy Act, and the first Court's finding was that the Plaintiffs failed to show that it was their *zerait*. The Appellate Court on the facts decreed the suit and appeal. One of the pieces of evidence on which that Court relied was an admission made in a *kabuliyat* executed by the Defendants in favour of the Plaintiffs.

Defendant No. 1 appealed to the High Court.

Held—No admission operates as an estoppel except under very peculiar circumstances. An admission is evidence though it may or may not be a strong piece of evidence The question of probative force is a question for the Court dealing with facts.

An admission in a *kabuliyat* as to the character of land is relevant evidence.

Sher Bahadur Sahu v. *M. H. Mackenzie* (7 C. W. N. 400) distinguished.

Masudan Singh v. *Goodar Nath Pandey* (1 C. L J. 456) referred to.

Babu Chandra Sekhar Prosad Singh for the Appellant.

Babu Joy Gopal Ghosha for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. APPEAL FROM APPELLATE DECREE No. 39 OF 1907. RAM KISHORE GIR AND ANOTHER, Plaintiffs, Appellants *v.* BABU SURAJ DEO PERSHAD, Defendant, Respondent. 8th July 1908.

Transfer of Property Act (IV of 1882), sec. 90—Mortgage by Mitakshara father—No express covenant to pay if property found insufficient—Decree against son, if can be made.

On the 8th August 1893, the Defendant, Babu Dasarathi Singh, executed a simple mortgage in favour of the Plaintiffs which contained an unconditional promise to pay the amount covered by the bond with interest on the 30th Bhadra 1303, that is to say, the end of the fasli year which would correspond with 1896. A certain share of a zemindari was

hypothecated as collateral security. There was, however, no express covenant by the mortgagor to pay to the mortgagees any amount that would not be covered by the sale of the mortgaged property. The mortgagees instituted a suit on the mortgage on the 26th February 1899, that is to say, within 6 years of the expiry of the stipulated period of payment. They made the mortgagor and his son parties to the suit. In it, they asked for a decree for sale of the mortgaged property and, if the sale proceeds of the mortgaged property were insufficient to cover the decretal amount, they asked that other properties of the mortgagor might be made liable. A decree was passed for sale of the mortgaged property under sec. 88 of the Transfer of Property Act. The mortgaged property was sold and the sale proceeds were insufficient to satisfy the entire mortgage debt with interest and costs. The mortgagees then applied for an order under sec. 90 of the Transfer of Property Act. The original mortgagor was then alive. They put in, in their petition, the names of both the mortgagor and his son, the Defendant No. 2. Either during the pendency of the proceeding or shortly after the decision of the first Court the mortgagor died and the second Defendant, his son, was the survivor under the Mitakshara law by which the parties were governed.

The Subordinate Judge in whose Court the application under sec. 90 was presented came to the conclusion that no decree under sec 90 of the Transfer of Property Act could be made, inasmuch as there was no express covenant in the mortgage for the mortgagor to pay the balance of the mortgage debt if the sale proceeds were insufficient to satisfy the mortgage debt. The application was accordingly dismissed. The mortgagees appealed from the order of the Subordinate Judge. The District Judge upheld the decision of the Subordinate Judge. In appeal before the District Judge, the only person who was Respondent was the son, the second Defendant.

A second appeal was preferred to the High Court.

Held—That it was not necessary that there should be an express covenant to pay if the mortgaged property was not sufficient to satisfy the mortgage debt.

If a person promises to pay a certain sum of money with interest and hypothecates certain property as security without any covenant that he would be personally liable or without stating any mode of payment indicated in the Transfer of Property Act as to sales of the mortgaged property, he is personally liable and the right is not barred by limitation, a decree under sec. 90 should be passed.

Parbati Charan Roy v. *Gobinda Chandra Kundu* (4 C. L. J. 246) followed.

But no decree under sec. 90 could be passed against Defendant No. 2, but a decree should be passed against him for realisation of the balance so far as he is in possession of the assets left by his deceased father.

Amar Chandra Kundu v. *Sebak Chand Chowdhury* (I. L. R. 34 Cal. 642) applied.

Babu Kulwant Sahay (for *Babu Rajib Narayan Sahay*) for the Appellants.

Babu Dwarka Nath Mitra for the Respondent.

A. T. M. *Appeal allowed: Case remanded.*

Notice

RELATING TO PLEADERSHIP AND MUKHTEARSHIP EXAMINATIONS, 1909.

Pleadership and Mukhtearship candidates for 1909 are hereby informed that they will be examined in the Civil Procedure Code (Act XIV of 1882), and not from the New Civil Procedure Code (Act V of 1908), which will come into force, from January 1909. (See *Calcutta Gazette*, Part I C., p. 238, dated 15th July 1908).

High Court Notice.

After Rule 68, Chapter III, p. 92, of the High Court's General Rules and Circular Orders, Civil, *insert* the following:—

68A. The records of suits decided by officers vested with the powers of a Small Cause Court Judge shall be deposited in the District record-room at head-quarter stations, and in the record-room of the Munsifi at outlying Munsifis until such time as they are destroyed in accordance with the rules on the subject.

Legislation.

The further Report of the Select Committee on the Bengal Local Self-Government (Amendment) Bill as amended by the Committee, was published in the *Calcutta Gazette*, dated 22nd July 1908, Part IV.

NARSING PROSAD SINGH v. THE KING-EMPEROR

There is ample authority for holding that the enforcement of the contract cannot be asked for after the time fixed has expired. Vide *In re Chikka Putta* (1), *In re Matha Goundan* (2) and *In re Bettay* (6), and the dictum in *Khoda Buksh* v. *Moti Lal Johori* (3) extending this doctrine to the recovery of the money has my fullest concurrence.

It was pressed upon us by learned Counsel for the applicants for revision that the extension of the Act by a notification under sec. 5 does not extend the place of residence of the complainant which is fixed by the Statute within the Presidency towns and the limits of a Presidency town cannot be extended by extending the Act. But it appears that this Act has as a matter of fact been working in Bombay, Madras, Assam and elsewhere throughout the districts for many years without objection and however sound this technical objection may be as a question of drafting it is too late to raise it now. The doctrine of *factum valet* appears to apply and the ordinary rules for the interpretation of Statutes also seem to favour the contention that the extension of the Act extends all its incidents; even though in terms the extension of the residence of complainants is impossible.

But for the reasons I have already given I am of opinion that these rules should be made absolute and further proceedings dropped.

B. C. *Rule made absolute.*

(1) Weir's Rep. 470 (1884).
(2) Weir's Rep. 471 (1884).
(3) 11 C. W. N. 247 (1906).
(6) Weir's Rep. 473 (1884).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

RAMPINI, C. J.
BRETT, J.
WOODROFFE, J.

1908.
Heard,
12, June.
Judgment,
18, June.

In the matter of PURNA CHANDRA DUTT, an articled clerk.

Attorneyship examination—Board of Examiners, discretion of—Mandamus—Jurisdiction of the Court to interfere—Letters Patent, 1865, cls. 9 & 10—Specific Relief Act (I of 1877), sec. 45—Rules of the High Court, Nos. 111 to 118 and 132.

Semble, *the Court has no jurisdiction to interfere with the discretion of the Board of Examiners and cannot, where there is a discretion imposed on any body, issue a writ of mandamus to compel that body to exercise that discretion in any particular way, but can only compel the exercise of that discretion in a manner fair, candid and unprejudiced and not arbitrary, capricious or biased, much less warped by resentment or personal dislike.*

PER WOODROFFE, J.—*The Court cannot dispense with the production of the certificate mentioned in Rule No. 116 of the Original Side of the High Court.*

The Court will not interfere with the conscientious exercise by the examiners of the discretion which the Court has confided in them.

Hearing of rule *nisi*.

The applicant, Purna Chandra Dutt, was one of the candidates at the final examination held under the Rules of the Original Side of the High Court for the admission of attorneys, held in the month

IN THE MATTER OF PURNA CHANDRA DUTT.

of February 1908. Out of the six papers that are set on six different groups of subjects, the applicant passed in five, but failed to pass in the paper set on Equity for 20 marks. On the 20th March 1908, he applied to the Board of Examiners for the re-examination of his answer paper in Equity and allot him the 20 marks that he wanted to entitle him to a pass-certificate but the Board refused to do so. Thereupon, an application was made for, and, on the 21st May 1908, a rule obtained (from his Lordship Woodroffe, J.) calling upon "the examiners actually present at and conducting the final examination of Articled Clerks for admission as attorneys held in the month of February 1908 . . . . . to show cause why they should not produce the question papers in Equity set at the final examination aforesaid as well as the answer of the said Purna Chandra Dutt thereto for the inspection of this Court and why this Court should not look over the answer of the said Purna Chandra Dutt to question No. 4 in the said question paper and why, if this Court should be of opinion that the said answer is correct and according to law, this Court should not give the said Purna Chandra Dutt or direct the said examiners to give the said Purna Chandra Dutt proper marks therefor and why this Court should not direct the said examiners to strike out the questions Nos. 1 and 6 in the said question paper and to award the marks reserved therefor to the said Purna Chandra Dutt or to distribute the said marks over the other questions in the said question paper as to this Court may deem fit and proper and thus proportionately raise the marks already awarded to the said Purna Chandra Dutt and why, in the event of this Court being of opinion, in examining the answer of the said Purna Chandra Dutt or on the marks for the said questions Nos. 1 and 6 being awarded to the said Purna Chandra Dutt or distributed as hereinbefore mentioned, that the said Purna Chandra Dutt has passed in Equity, this Court should not direct the said examiners to certify that the said Purna Chandra Dutt has duly passed the final examination."

The rule came on for hearing before his Lordship Woodroffe, J., on the 1st June 1908, who delivered the following judgment, holding that he had no jurisdiction to hear the rule sitting by himself in the exercise of the Ordinary Original Civil Jurisdiction of the Court only :—

WOODROFFE, J.—I doubt whether sitting here as a single Judge on the Original Side, I have jurisdiction to entertain an application of this nature. It is said I have and that the case comes within Rule No. 132 but I do not think that is the proper construction of that rule. It is contended on behalf of the applicant that the meaning of that rule is that any application not expressly provided for by the other rules may be made under it. This application is not one specifically provided for by the rules as is the case of the certificate referred to in Rule No. 117, as regards which, Rule No. 118 admits of a petition to the Chief Justice. In my opinion, the meaning of Rule No. 132 is not that contended for but it is that, if any application may be made under the rules, but these rules do not provide specifically as to the Court or Judge to whom such application may be made, then the application may be made to the Judge or Senior Judge exercising the Ordinary Original Civil Jurisdiction of this Court.

I desire to say nothing at the present moment as to the merits of the rule which has not yet been heard before me or as to whether the

IN THE MATTER OF PURNA CHANDRA DUTT.

Court has jurisdiction. I think, if this Court has jurisdiction, that jurisdiction ought to be exercised by the whole Court or by a bench appointed by the Chief Justice to represent the full Court and not by a single Judge exercising the Ordinary Original Civil Jurisdiction of the Court only. It seems further desirable that the matter should be heard by that Court. It is a matter of some novelty and one of importance. The course, therefore, I propose to take is to refer this application to the Chief Justice for his orders with reference thereto, and if necessary, after speaking to him, I will mention the matter again in Court.

Under the direction of his Lordship the Chief Justice, the rule came on for hearing on the 12th June 1908 before a Special Bench, constituted for the purpose, consisting of Rampini, C. J. (Acting) and Brett and Woodroffe, JJ.

Mr. Eardly Norton (with him *Mr. B. Chakravarti*) for the applicant referred to Rules Nos. 111 to 118 of the Original Side Rules of the High Court and submitted that under Rule No. 132 of the said rules, the Court had ample jurisdiction to deal with this matter.

Mr. Chakravarti followed on behalf of the applicant on the point of jurisdiction and submitted that the Court had an inherent jurisdiction similar to those under the English Solicitors Act (40 and 41 Vict., Ch. 25) under cls. 9 and 10 of the Charter.

The Advocate-General (*Mr. S. P. Sinha*, with *Mr. H. N. Morison*) appeared for the Board of Examiners and submitted that unless Rule No. 116 was abrogated, the Court had no power to allow anybody to be enrolled as an attorney of this Court without a certificate from the examiners that he had satisfactorily passed the final examination. He cited, *In the matter Rudra Narain Roy* (1) and the unreported cases of, *In the matter of Krista Kissore De* (2), *In the matter of William Thomas Graham* (3).

He further submitted that where, there was a discretion to be exercised by any body under proper authority, the Court will not, by a mandamus, say in which way that discretion was to be exercised.

Vide, John Shortt on Mandamus and Prohibition (1887 edition), p. 260. *R.* v. *Archbishop of Canterbury* (4) (*per* Lord Ellenborough, p. 139), *The Queen, on the relation of R. J. Andrews* v. *Collins* (5).

He pointed out the difference that existed between ministerial duties and *quasi*-judicial duties. In the former case, the Court may interfere but not in the latter. *Rex* v. *Justices of Kingston Ex parte Davey* (6).

If, for instance, the marks were wrongly added up, or if the examiners had refused to examine the paper at all, the Court might have issued a mandamus, but not in a case of conscientious exercise of the discretion given to them.

Mr. Chakravarti in reply. The Court would no doubt ordinarily insist on a certificate being produced before enrolment, but that did not prevent the Court from saying that the examination was infructuous and the applicant ought to be re-examined. This was in the

(1) I. L. R. 28 Cal. 479 (1901).
(2) Unreported. Heard before Maclean, C. J. and Macpherson and Hill, JJ., on the 30th January 1900.
(3) Unreported. Heard before Couch, C. J., on the 9th September 1870.
(4) 15 East 117 (1812).
(5) L. R. 2 Q. B. D. 30 (1876).
(6) 86 L. T. R. 589 (1902).

IN THE MATTER OF PURNA CHANDRA DUTT.

nature of the Court's control over its officers. He cited, *Ex parte Stewart* (7).

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows:—

RAMPINI, C. J.—This is a rule on the examiners appointed to conduct the examination for the admission of attorneys, to show cause why the Petitioner, Purna Chandra Dutt, a candiate at the last examination, should not be granted a certificate that he has duly passed the final examination. This Bench has been constituted under Rule 132 of the Rules of the Original Side.

Mr. Norton for the Petitioner has argued that we have powers of supervision over the examination for attorneys under secs. 9 and 10 of the Letters Patent of 1865; that we have inherent powers corresponding to those conferred by the English Solicitors Act (40 and 41 Victoria, Ch. 25) to revise the proceedings of the examiners appointed by the Chief Justice of this Court for the examination of candidates for admission as attorneys; that in this particular case, we ought to exercise these powers, as the questions 1 and 6 of the Equity paper set at the last examination were improper, and that we should, therefore, either alter the marks awarded to the Petitioner by the Examiner in Equity or direct the Examiners to examine the candidate again in the subject of Equity.

The Advocate-General for the Examiners contends that we have no such powers. He cites Rule 116 of the Rules of the Original Side of the Court, and urges that unless the Petitioner produces a certificate granted by the Examiners under that rule, we cannot direct that he be enrolled as an attorney. He further urges that Rule 132, in accordance with which this Bench is constituted, does not enable us to deal with any application not provided for, but only with such applications as are provided for in the rules. He does not contend that, if the examiners appointed by the Chief Justice of this Court discharge their duties in an arbitrary, unreasonable or improper manner, there is no remedy, but that the proper course to adopt is to apply under sec. 45 of the Specific Relief Act, which corresponds to the former provisions for the issue of a mandamus, and which procedure has not been followed in this case. He has further called attention to certain passages in Shortt on Mandamus and Prohibition, according to which a writ of this nature should not, where there is a discretion imposed in any body, be issued to compel that body to exercise that discretion in any particular way, but only to compel the exercise of that discretion "in a manner fair, candid and unprejudiced" and not "arbitrary, capricious or biased, much less warped by resentment or personal dislike." The learned Advocate General has also cited to us previous applications to this Court, made by candidates for the examination, notably the application of William Thomas Graham* in 1870 on which Chief Justice Couch records as follows:—"The Chief Justice cannot dispense with the compliance by Mr. Graham with the rule of Court, which requires that no person shall be admitted

(7) 7 Ex. 202 (1872)

* Heard before Couch, C. J., order, dated 9th September 1870.

IN THE MATTER OF PURNA CHANDRA DUTT.

as an attorney except upon production of a certificate of examiners," and the application of Kristo Kishore Dey* in 1900, in which the present Chief Justice declined to interfere.

I am inclined to agree with the learned Advocate-General in his view as to our powers and duties in connection with this matter. But it is, I think, unnecessary to express any definite opinion on this point. I am convinced that, on the merits, the Petitioner's case is not one of hardship, that the Examiners have not treated him unfairly, that, as a fact, he has not come up to the standard required by the Examiners, or to that attained by the other candidates for examination to whom the Examiners have granted certificate of passing.

I would, therefore, discharge this rule with costs.

BRETT, J.—I agree.

WOODROFFE, J.—The Court cannot, by reason of Rule 116 of the Original Side Rules, dispense with the production of the certificate therein mentioned. No appeal is given by those rules from the refusal of the examiners to grant such a certificate as in the case of the certificate as to character referred to in Rule 117, against which an appeal is given by the following Rule. The ordinary remedy of a person who has failed at one examination is to go up for another. The Court has thus delegated to the Board of Examiners a descretion without making any such express reservation as was made by sec. 9 of the English Solicitors Act (40 and 41 Vict., Ch. 25) which provides that any person who has been refused a certificate may object to such refusal on account of the nature and difficulty of the questions or any other ground. The result of the provisions, therefore, which govern this Court is that it will not interfere with the conscientious exercise by the Examiners of the discretion which the Court has confided in them. It does not, however, follow that the Court has no control over those whom it has appointed to test the qualifications of others who seek to become its officers. The Court can compel the examiners, as any other body subject to its jurisdiction, to do its duty. That duty is to exercise the discretion given and to exercise it conscientiously. If, therefore, there is a refusal to exercise that discretion, the Court will direct them to do so. Or, again, if the discretion is not exercised honestly and conscientiously, the Court will interfere. It is not necessary to consider this question further as the present case is not of either of these kinds. It would be enough to say that there having been, in this case, a conscientious exercise of discretion, the Court will not enquire into the grounds on which it is based. Further, even if a case for interference is made out, the Court will not direct the Examiners to exercise their discretion in a particular way. It will not say to them (to use the language of one of the cases cited) "approve what we approve and say what we say." The Court will not assume their functions but direct their exercise. I think it, however, desirable to deal with the case on the facts, because, the charges made against the fairness of the examination have not been

* Heard and decided before Maclean, C. J. and Macpherson and Hill, JJ., on the 30th January 1900.

IN THE MATTER OF PURNA CHANDRA DUTT.

made out and the application, even if sustainable in law, fails in my opinion on those facts. The questions which have been objected to are Nos. 1, 4 and 6 in the Equity paper. The petition submits that the first question "is so vaguely and loosely worded as to make it difficult for the candidates to understand what is wanted by the Examiner." As a matter of fact, the Petitioner understood the question well enough to secure 18 marks out of 20. He next alleges that the Examiners awarded him no marks for question 4, though the answer was correct. As a matter of fact, he did obtain marks, but not as much as he thinks he ought to have got, because his answer was incomplete. The answer gave a special exception enacted by the Settled Land Acts, which have not been extended to this country, where the old rule of Chancery is still in force that the equitable tenant for life is not entitled to the custody of the title-deeds. It was subsequently suggested that this question was not sufficiently explicit to be understood. It was, however, understood by 4 out of the 7 candidates, three of whom obtained full marks for it and the fourth secured 15 marks out of 20. Lastly, the sixth question is complained of as being "unreasonably difficult and unfair." It is the fact that none of the candidates answered it. The first portion of this question might, I think, have been answered from the recognised text-books. It may be that the second portion sets a somewhat high standard, but that is a matter for the Examiner, and what we should have to look at, if we were to go into the question at all, is the paper as a whole and to see whether the candidates had a fair opportunity of showing their qualifications. Further, it is to be noted that the Petitioner wholly failed to secure marks for the second and third questions against which no exception is taken. Had these been answered, the point now before us would not have arisen, as the applicant would then have qualified in the Equity paper. Lastly, I may point out that the case of the applicant is not otherwise meritorious, for it appears that he secured pass marks only in two of the subjects and only 6 and 5 marks respectively more than pass marks in two of the other subjects.

I think, therefore, a certificate was rightly refused. The application fails on all grounds and I, therefore, agree that the rule should be discharged with costs.

Mr. J. C. Dutt, Attorney for the Applicant.

Messrs. G. C. Chunder & Co., Attorneys for the Board of Examiners.

P. R. C. *Rule discharged with costs.*

[CIVIL APPELLATE JURISDICTION.]

LETTERS PATENT APPEAL

No. 66 OF 1907.

RAMPINI, C. J.,
MITRA, J.
1907.
18, July.

RAJENDRA KISHORE ADHIKARI and others, Defendants, Appellants,

v.

CHANDRA NATH DUTT, Plaintiff, Respondent.

Occupancy-holding—Transferability—Usage—Growing usage not sufficient—Usufructuary mortgage by tenant—Subsequent relinquishment to landlord—Right of landlord to re-enter—Mortgage or out-and-out sale.

In 1894 an occupancy raiyat executed a usufructuary mortgage of the holding,

RAJENDRA KISHORE ADHIKARI *v.* CHANDRA NATH DUTT.

put the mortgagee in possession, and though it was arranged that the tenant would continue to pay rent to the landlord, the tenant left the village and abandoned all connection with the land. In 1901, the tenant executed a deed of relinquishment in favour of the landlord and surrendered the land to him, and it did not appear that he paid any rent since. BRETT, J., *held, on second appeal, upon a consideration of the terms of the mortgage-bond and the circumstances connected with the transaction, that although the document purported to be a usufructuary mortgage for sixty years, the transaction was really an out-and-out sale and the deed was drawn up in that form in order to evade the provisions of law against the transfer of occupancy-holdings,*

Held by RAMPINI, C. J. and MITRA, J.—*That 'apart from such considerations, the moment the deed of relinquishment was executed by the tenant,' the landlord became entitled to re enter.*

A growing usage of transferability of occupancy-holdings is of no effect against the landlord. The usage, to be effective, must have already grown up.

AMBIKA CHURN CHAKRAVARTI *v.* DYA GAZI (1), KASIK LALL DUTT *v.* BIDHU MUKHI DASI (2) *relied on.*

This was an appeal under sec. 15 of the Letters Patent, preferred on the 3rd of May 1907, against the decree of the Hon'ble Mr. Justice Brett, dated the 5th of April 1907, passed in Second Appeal No. 171 of 1905 which had been preferred on the 31st of January 1905, against the decree of Babu Purna Chandra Chowdhury, Officiating Subordinate Judge, 3rd Court of Zillah Mymensingh, dated the 6th of October 1904, affirming that of Babu Satish Chandra Banerjee, Munsif of Kishoregunj, 3rd Court, dated the 18th of September 1903.

The facts of the case material to this report will appear from the judgment of

BRETT, J.—The present appeal arises out of a suit brought by the Plaintiff-Appellant to recover *khas* possession with mesne profits of a holding of 4 bighas 18 cottahs odd which was originally in possession of one Manullah Sheik as a tenant under him. On the 10th Sravan 1301, Manullah executed a document which is described as a mortgage bond in favour of Defendant No. 1 hypothecating the whole of the holding as security for a loan of Rs. 180 and it was provided that the holding should remain in possession of Rajendra Kishore Adhicary for 60 years during which time he was to enjoy the profits and credit Rs. 3 yearly on account of principal and interest in order to clear off the mortgage-debt. In the same document there is a provision that interest is to be paid at the rate of 1 per cent. per mensem and that the whole rent of the holding is to be paid by the tenant Sheik Manullah.

The case for the Plaintiff was that after the execution of this document, Manullah removed to a different village dismantling and carrying away his huts with him and leaving the entire possession of the land of the holding to Rajendra Kishore Adhicary. His case further was that there was no custom in that locality by which *jotes* with rights of occupancy

(1) 10 C. W. N. 497 (1906).
(2) 10 C. W. N. 719 (1906).

were transferable and that as this mortgage by the tenant Manullah, to Defendant No. 1 was a transfer, therefore, it conferred no right on the transferee and that the Plaintiff was entitled to enter into *khas* possession of the holding.

Furthermore, it was alleged that on the 13th Kartik 1308, Manullah executed in favour of the Plaintiff a deed of relinquishment of the holding. On these grounds the Plaintiff claimed to be entitled to *khas* possession of the holding with mesne profits amounting to Rs. 63.

The defence set up was that the document executed by Manullah in favour of Rajendra Kishore Adhicary was a valid deed of mortgage and that there was a custom of executing such mortgage-deeds of *jote* lands in that locality.

Both the lower Courts have found that the right of the Plaintiff to the *jote* in question has been proved, and his *maliki* right is declared; but in each case they have disallowed his prayer for *khas*

The Plaintiff has appealed.

In support of the appeal it has been argued that the transaction of the 10th Sravan 1301 was not a *bonâ fide* usufructuary mortgage of the holding but that it was an out-and-out sale of the holding which was disguised under the form of a mortgage in order to void the provisions of the law; and in support of this contention it has been pointed out that though the *jote* comprised 4 kanis 18 gds. odd of land, yet the profit which Rajendra Kishore Adhicary was to credit every year on account of principal and interest was of Rs. 3 only.

It is argued that it is ridiculous to suppose that from the holding comprising of 4 kanis 18 gds. odd of land he would realise only such a small rate of profit; and furthermore that Rs. 3 per annum multiplied by 60, that is, the number of years for which the usufructuary mortgage was granted, would just amount to Rs. 180 which is the principal amount only of debt; so that after the termination of 60 years the tenant would be in the position of having to pay off the interest on the mortgage-debt which would then amount to something between Rs. 500 to 700. It is contended that no one in his senses would agree to such an arrangement by way of mortgage.

Furthermore, it is provided that the tenant is to pay the rent of Rs. 4-8 during the whole of the 60 years while the mortgagee remains in possession and appropriates the profits, that is to say, under the terms of this document, the tenant agrees, during the 60 years, to pay the amount of Rs. 270 as rent, while receiving no profits whatever from the holding which will remain in possession of the usufructuary mortgagee. It is argued that on the face of it this is merely a sham mortgage and that in fact the transaction was an out-and-out sale, and the fact that the tenant afterwards left the village carrying away with him his huts and leaving the so-called mortgagee in absolute possession of the property, indicates that after the sale, the tenant abandoned all interest in the holding.

On behalf of the Respondents, it has been argued that there is nothing in law to prevent a person from executing a usufructuary mortgage-deed and alienating landed property for a period of 60 years, that the document in the present

RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT.

case must be interpreted according to its terms and that it is not open to the Plaintiff to argue that this document, which on the face of it purports to be a mortgage-deed was in fact a deed of sale. So far as the first point is concerned, it may possibly be open to a person to create a usufructuary mortgage for so long a term as 60 years, but the question we have to consider in this case is not whether under the law a person could create such a mortgage, but whether the terms of this document indicate that it was in fact a mortgage and not a deed of sale.

The contention that it is not open to the Plaintiff to argue that the document is a deed of sale and operates as such, does not appear to me to be sound, for the case of the Plaintiff is that his tenant at the instigation of Rajendra Kishore Adhicary, Defendant No. 1, in order to defeat his rights as landlord, and contrary to the provisions of law and the conditions under which he held the holding, sold it to Rajendra Kishore, the transaction, in order to defeat the purposes of the law, being represented as a mortgage. It is certainly open to the landlord, in a case like this, where he alleges that his rights have been infringed to contend, as he does contend, that the transaction was not a mortgage at all, but was in fact an out-and-out sale.

The lower Courts do not appear to have taken this question into consideration, but to have confined their attention to the determination of the point whether the document, as creating the mortgage, was a valid document and operative to defeat the rights of the landlord by reason of the fact that there was a custom of granting such mortgages in the locality. The document in question was, however, before both the Judges of the lower Courts, and it was for them, on a consideration of its terms, to determine whether it was, as it was described, a mortgage or whether in fact it was an out-and-out sale. I have given my best consideration to the terms of the document and to the circumstances connected with the transaction, and it seems to me impossible to hold that the transaction was anything else but an out and-out sale and that the deed was drawn up in the form of a mortgage-bond at the instance of Rajendra Kishore Adhicary, in order to defeat the provisions of the law. I think that on that ground the Plaintiff was entitled to a decree, as it was apparently admitted that there was no custom in the locality by which holdings with occupancy rights were transferable.

As regards the question to which the lower Courts have directed their attention, namely, whether it has been proved that there was a custom of executing usufructuary mortgages similar to the present in the locality, I think that the findings of both the Courts are insufficient to support the existence of any such custom; for what both the Courts have found is that a usage for executing usufructuary mortgages of *jote* lands for a period of 8 or 9 years has been growing up in the locality. This is entirely different from a mortgage of the present description where the tenant parts with his profits and interest and possession in the holding for a period of 60 years. I think therefore that even on the findings of the two lower Courts it is im-

RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT.

possible to hold that the Defendants have made out that there was the custom in the locality by which usufructuary mortgages of occupancy-holding similar to that in the present suit, were executed by tenants.

The learned vakil for the Respondents has made a good deal of the fact that the Court of first instance has held that the deed of relinquishment which was executed by the tenant, Manullah, in favour of the Plaintiff was a collusive document. It may be possible that the Plaintiff in order to avoid litigation may have induced the tenant to execute this document in his favour, but whether the relinquishment was collusive or not as between the landlord and tenant, it would certainly be binding on the tenant. The lower Courts may be right in the view which they have taken that such a relinquishment would not be binding on the mortgagee if made without his knowledge or consent; but in the present case this question does not appear to me to arise as in my opinion the findings of the lower Courts are insufficient to prove that there is the custom in the locality by which usufructuary mortgages similar to that in the present case are executed by tenants of holdings in which they have the rights of occupancy.

Furthermore, it appears to me that on the facts, which do not seem to have been disputed, the Plaintiff had a sufficient case that after the transfer of the holding by Manullah to Defendant No. 1, Manullah abandoned the holding. As already noticed he is said to have removed his house and property from the holding and to have made over the entire holding to Rajendra Kishore Adhicary.

It has, however, further been contended on behalf of the Appellant that even if this deed be taken to be a valid usufructuary mortgage still, under the circumstances under which it was executed and taking into account the subsequent conduct of the parties, it must be regarded as an alienation which would entitle the landlord, the Plaintiff, to take *khas* possession; and in support of this view the case of *Krishna Chandra Dutta Chowdhury* v. *Khiran Bajania* (3) and the case of *Rasik Lall Dutt* v. *Bidhu Mukhi Dasi* (2) have been relied upon. In my opinion the contention is a sound one. In this case, the tenant was admittedly the tenant of a non-transferable holding, and if the deed be taken to be a valid mortgage-deed, he executed a usufructuary mortgage of his holding, placed the mortgagee in possession, abandoned the holding, and left the village. Such conduct has been held in the two cases relied on to be sufficient to entitle the landlord to treat the mortgagee as a trespasser and to ask for his ejectment. The learned vakil for the Respondent, when confronted with these two cases to which reference has been made, has argued that in the present case there has been no abandonment of the holding, because, under the terms of the document, the tenant agreed to pay the rent and it was stipulated thta when the whole amount of the mortgage-debt was paid off, he would be entitled to recover possession. So far as the payment of annual rent is concerned, there

(2) 10 C. W. N. 719 (1906).
(3) 10 C. W. N. 499 (1903).

RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT.

is no finding that the rent has, in fact, been paid by the tenant since the execution of the deed and it seems to me impossible to believe that such a condition could not have been carried out when under the terms of the transaction it was provided that the whole of the profits of the holding were to go to the mortgagee. It can hardly be suggested that a stipulation of this sort by which the tenant admitted his liability to pay the rent while deriving no benefit out of the holding, amounted to the retention of such an interest in the holding as would show that he had no intention to abandon it.

The other suggestion that under the terms of the deed, the tenant is entitled to recover possession after payment of the mortgage-debt, seems equally illusory, for, as already pointed out, at the end of 60 years, the tenant would have under the terms of this document a debt of between Rs. 500 to 700 to discharge and the likelihood of his recovering possession of the holding would appear to be so remote as hardly to deserve consideration. In my opinion the view taken by the lower Courts cannot be maintained. I think that on a proper interpretation of the document of the 10th Sravan 1301, and having regard to the conduct of the parties, it should be held that the transaction was an out-and-out sale and not a mortgage. As holdings with rights of occupancy were not saleable by custom or usage in that locality, the Plaintiff, after the transfer, was entitled to *khas* possession, and the transferee, Defendant No. 1, acquired no right under the transfer. I think that the lower Courts have erred in holding that the evidence to prove a growing usage of granting mortgages for 8 or 9 years in the locality was sufficient to prove that a mortgage like that which forms the subject of the present case, was sanctioned by usage or custom in the locality and I am further of opinion on the authority of the cases on which the Appellant relies, that even if the document be taken to be a mortgage, then after the tenant had executed it and had abandoned the holding, the Plaintiff was entitled to eject the so-called mortgagee and to obtain *khas* possession.

I, therefore, set aside the judgments and decrees of the lower Courts and direct that a decree be granted to the Plaintiff for recovery of possession of the lands in suit with the mesne profits claimed which will be assessed in the execution department.

The Plaintiff will recover costs against all the Defendants in all the Courts.

[The Defendants preferred an appeal from the above decision under sec. 15 of the Letters Patent].

Babus Nilmadhub Bose and *Gobind Chandra Dey Roy* for the Appellants.

Babus Jogesh Chandra Roy and *Ratan Chand Baral* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is a Letters Patent appeal against the decision of Mr. Justice Brett, dated the 5th April 1907.

The suit is one brought by a landlord for *khas* possession of a certain holding. This holding was formerly in the possession of a tenant, named Manullah. But in 1894 he executed a usufructuary

mortgage of this holding in favour of the present Defendants, put them in possession, and then arranged that he should pay the rent to the landlord. He then left the village and abandoned all connection with the land, except that he continued to pay rent to the landlord. But in 1901 he executed a deed of relinquishment in favour of the landlord and surrendered the land to him. Since then it is not alleged that he has paid any rent or kept up any connection with the land.

The first Court found in favour of the title of Plaintiff, but refused to give him a decree for *khas* possession.

The Subordinate Judge has affirmed the decree of the first Court.

In second appeal Mr. Justice Brett has found that the Plaintiff is entitled to *khas* possession.

The Defendants now appeal to us and contend that the Judge of this Court has held that the mortgage deed is not really a usufructuary mortgage but an out-and-out sale and that, when he has decided that there has been an abandonment of the land he has decided a question of fact, which he had no jurisdiction to do.

We think, however, that there is no doubt as to the correctness of the decision of Mr. Justice Brett.

We consider that even on the findings of the Subordinate Judge the Plaintiff is entitled to a decree for *khas* possession. It may be that the mortgage-bond of the 25th July 1894 is a mortgage-deed and not an out-and-out sale. But even if this be so, that would give the present Defendant no right to hold possession of the land against the landlord after the execution of the deed of relinquishment of the 30th October 1901 by the former tenant Manullah. From the moment that deed of relinquishment was executed the former tenant, Manullah, not only abandoned the land but gave up all connection with it and ceased to attorn to the landlord in connection with it; the landlord was certainly entitled to re-enter the land; and if the mortgagee has any grievances against Manullah, his remedy is against the latter, and does not consist in resisting the Plaintiff's claim to re-enter into possession of the land.

The Subordinate Judge has held that there is a usage of mortgaging *jote* lands growing up in the locality. It has been shown that such mortgages have been executed for 8 or 9 years. Now, in the first place, the present mortgage is not a mortgage for 8 or 9 years. It is apparently a mortgage to continue for ever till it is put an end to by the mortgagor. But, in any case, a usage which is growing up is not a usage which is of any effect as against the landlord. A usage to be of any avail must be, not one which is growing up but one which has already grown up. We consider, however, that such usage is a mere device to evade the provisions of the law, namely, that occupancy-holdings which are not transferable, are transferable against the will of the landlord. The view we take in this case is supported by the decisions in the cases of *Ambika Churn Chakravarti* v. *Dya Gazi* (1) and *Rasik Lall Dutt* v. *Bidhu Mukhi Dasi* (2).

(1) 10 C. W. N. 497 (1906).
(2) 10 C. W. N. 710 (1906).

RAJENDRA KISHORE ADHIKARI v. CHANDRA NATH DUTT.

We see no reason to interfere with the decision appealed against, and we dismiss this appeal with costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No 536 OF 1907.

Doss, J. 1908. Heard, 2 and 3, June. Judgment, 15, June.

SARAT CHANDRA DHAL, Defendant, Appellant, *v.* DAMODAR MANNA, Plaintiff and the remaining Defendants, Respondents.

Civil Procedure Code (Act XIV of 1882), sec. 108, hearing of application under, during pendency of appeal.

Where after preferring an application for setting aside an ex parte decree under sec. 108, C. P. C., the Defendant preferred an appeal against the decree,

Held—*That the first Court had jurisdiction to hear the application during the pendency of the appeal.*

MR. L. T. LUCAS *v.* W. STEPHEN (1) and RAMANADHAN CHETTI *v.* NARAYANAN CHETTI (2) *referred to.*

BHARAT CHANDRA MAZUMDAR *v.* RAMGUNGA SEN (3) and MAXWELL *v.* MARTIN (4) *relied on.*

This was an appeal from a decision of Babu Mohim Chandra Sircar, Sub Judge of Singhbhum, dated the 24th of January 1907, setting aside the decision of Babu Khagendra Nath Bose, Munsif of Chaibassa, dated the 13th of August 1906.

(1) 9 W. R. 301 (1868).
(2) I. L. R. 27 Mad. 602 (1904).
(3) B. L. R. F. B R., p. 362 (1868).
(4) 85 W. Va. 384, 14 S. E. 7.

The facts of the case appear from the judgment.

Babu Digambur Chatterjee for the Appellant.

Babu Sarat Chandra Khan for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

This appeal is from a decision of the Subordinate Judge of. Singhbhum in an action commenced by the Plaintiff for a declaration of his jote right in certain land in Mouzah Tentuldangri under the *pro forma* Defendant No. 4, the *mokuraridar* of the mouzah. The main defence of the Defendants was that the land in suit was part of Mouzah Bagula in which Defendant No. 1 had a *khorposh* right. On the 19th February 1906, the Court of first instance made an *ex parte* decree in favour of the Plaintiff. On the 9th March 1906, the Defendants made an application under sec. 108, C. P. Code, to set aside the *ex parte* decree and on the 29th idem preferred an appeal against the same to the Subordinate Judge. While this appeal was pending, the first Court on the 3rd April set aside the *ex parte* decree. Then on the 28th of July the appeal which was then pending in the Court of the Subordinate Judge was dismissed for default. Afterwards on the 13th of August, the first Court after trying the case *de novo* on evidence adduced by both parties held that the land in dispute appertained to Mouzah Bagula, belonging to the Defendants and accordingly dismissed the Plaintiff's suit. On appeal from that judgment by the Plaintiff the learned Subordinate Judge has held that during the

SARAT CHANDRA DHAL v. DAMODAR MANNA.

pendency of the appeal from the *ex parte* decree, the first Court had no jurisdiction to hear the application under sec. 108, C. P. C., to set aside that *ex parte* decree and being of that opinion, he has held that the subsequent judgment by the first Court, dated 13th of August 1906, which was under appeal before him, was made equally without jurisdiction. He accordingly restored the *ex parte* decree and decreed the Plaintiff's suit. From this judgment, Defendant No. 1 has appealed to this Court, and it has been contended on his behalf that the learned Subordinate Judge was in error in holding that the first Court had no jurisdiction to deal with the application under sec. 108, C. P. C., during the pendency of the appeal from the *ex parte* decree, and in the next place, it has been urged that the learned Subordinate Judge, while hearing the appeal from the judgment of the first Court, dated 13th August 1906, was error in going behind it and setting aside under sec. 591, C. P. C., the order of the first Court, dated 3rd of April, setting aside the *ex parte* decree.

I am of opinion that the first contention is right. In support of his view, the learned Subordinate Judge has relied upon two cases, namely, *Mr. L. T. Lucas* v. *W. Stephen* (1) and *Ramanadhan Chetti* v. *Narayanan Chetti* (2). In the first case what was held was that after a special appeal from a decree had been admitted, an application for review of the judgment on which the decree is based should not be entertained. This was quite in accordance with the provisions of sec. 376, Act VIII of 1859, which was the Code of Civil Procedure then in force. Sec. 376 of Act VIII of 1859 has substantially been re-enacted in sec. 623 of the present Civil Procedure Code and the statutory prohibition against the filing of an application for review of judgment after an appeal has been preferred from it is exactly the same under both the enactments. There is no bar to the filing of an application for review of judgment before an appeal from it has been preferred, nor was there any such bar under Act VIII of 1859. What we have to deal with here, however, is not an application for review of judgment after appeal from it has been admitted, but an application under sec. 108, C. P. C., to set aside an *ex parte* decree while an appeal from it is pending at the same time. Under the present Civil Procedure Code, there is no prohibition against the filing of such application before an appeal from it has been preferred, nor is there any express provision in the Code as there is in the case of an application for review of judgment barring an application under sec. 108, C. P. Code, after an appeal from the *ex parte* decree has been presented. Moreover, there is no express provision in the Code which prevents the hearing of an application under sec. 108, C. P. Code, while an appeal from the *ex parte* judgment is depending or *vice versa*. The case of *Ramanadhan Chetti* v. *Narayanan Chetti* (2), no doubt, goes a step further. It lays down that while an appeal from a judgment is pending, the lower Court has no jurisdiction to hear an application for review of that

(1) 9 W. R. 301 (1868)
(2) I. L. R. 27 Mad. 602 (1904).

(2) I. L. R. 27 Mad. 602 (1904).

SARAT CHANDRA DHAL *v.* DAMODAR MANNA.

judgment and this opinion is rested on the broad ground that when an appeal has been duly filed, all further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court, and that the lower Court has, pending the decision of the appeal, no jurisdiction over the cause, and can, as a rule, pass no order therein. In *Bharat Chandra Mazumdar* v. *Ramgungá Sen*, (3), a Full Bench of this Court presided over by Sir Barnes Peacock held with reference to the similar provision contained in secs 373 and 376 of Act VIII of 1859 that if a review be applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal, and that he has full power and is bound to proceed upon the application for review. This case has been differentiated by the Madras High Court on the ground that the appeal (as the report of the case showed) had in fact been withdrawn before the application for review was finally dealt with. It appears to me, however, that though that was so, it clearly is not the ground upon which the judgment of the Full Bench was rested. It was placed upon the wider ground that a Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal. In America, the converse rule prevails. There a party cannot appeal when he has a bill of review pending in the Court below for the same errors of law which are sought to be reviewed on the appeal [see *Maxwell* v. *Martin* (4), *Levy* v. *Lafountain* (5)], the real object of the rule evidently being to avoid the confusion which would result from inconsistent decrees. Hence it has been held there that where a bill of review is filed not to correct errors of law but is founded solely on subsequent discovery of new evidence the pendency of the bill of review has not the effect of preventing the hearing of the appeal. See *Gillespie* v. *Allen* (6). In such a case the questions presented to the two tribunals by the separate proceedings have hardly anything in common and no confusion can arise from this separate determination. Similarly the matter for investigation in a proceeding under sec. 108, C. P. Code, is entirely distinct from and has indeed, nothing in common with the matter for determination, in the appeal from the *ex parte* judgment. The one is concerned with the due service on the Defendant of processes necessary for founding the jurisdiction of the Court over him or with the sufficiency or otherwise of the cause justifying his non-appearance in the suit; whereas the proper function of the other is the determination of the merits of the controversy between the parties. There is no possibility of any conflict arising between the judgments that may be pronounced in the two proceedings respectively. I am, therefore, of opinion that the first Court had perfect jurisdiction to hear the application under sec. 108, C. P. Code, during the pendency of the appeal. In this view it is unnecessary to discuss the

(3) B. L. R. F. B R., p. 362 (1866).

(4) 35 W. Va. 384, 14 S. E. 7.

(5) 178 N. Y. 557; 81 App. Div. 636.

(6) 37 W. Va. 675, 17 S. E. 184.

SARAT CHANDRA DHAL v. DAMODAR MANNA.

second point raised on behalf of the Appellant or to express any opinion on it. For the foregoing reasons I am of opinion that the judgment of the learned Subordinate Judge ought to be set aside and the case remanded to him for deciding the appeal on the merits. The Appellant is entitled to have his costs of this appeal.

Appeal allowed:

S. C. S. *Case remanded.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER No. 471 OF 1906.

STEPHEN, J. MOOKERJEE, J. 1908. Heard, 6 and 7, January. Judgment, 17, January.	HARE KRISHNA MAHANTI v. BHUSAN CHANDRA MAHANTI and others

Act X of 1859, secs. 160, 161—Appeal heard ex parte*—Application for re-hearing—Refusal—Order if appealable—Applicability of Civil Procedure Code (Act XIV of 1882), secs. 556, 560 and 588 (27)—"Sufficient cause" for not appearing—Brief, transfer of—Vakalatnama, if necessary—Adjournments, previous, if ground for refusing adjournment for good cause*

When an appeal preferred under sec. 160 of Act X of 1859, against an order of a Deputy Collector was heard by the District Judge ex parte,

Held—*That under sec. 161 of the Act, secs. 556, 560 and 588, cl. (27) of the Civil Procedure Code applied to the case and an appeal lay to the High Court from an order of the District Judge refusing an application for the re-hearing of the appeal*

HALLODHAR BISWAS v. MOHESH CHUNDER HALDAR (5) and SADAI NAIK v. SERAI NAIK (4) *relied on.*

Quære—*Whether the proposition that Act X of 1859 is a complete Code in itself, in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in* NILMONI SINGH v. TARA NATH (3).

Where of two pleaders engaged by a Respondent, the leader fell ill and transferred his brief to a senior pleader, but the Judge refused to hear the latter on the ground that his name did not appear on the vakalatnama, *and the junior asked for one day's adjournment to prepare himself for conducting the case,*

Held—*That the Judge was wrong in refusing an adjournment. He should either have heard the pleader who offered to argue the case or granted the adjournment prayed for.*

This was an appeal preferred against a decision of J. J. Platel, Esq., District Judge of Cuttack, dated the 10th of September 1906.

The facts of the case appear from the judgment.

Babu Provas Chandra Mitter for the Appellant.

Babu Ram Chandra Mazumdar for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

STEPHEN, J.—The Plaintiff-Respondent

(5) S. D. A. Decisions for 1861, p. 144.

(4) 5 C. W. N. 279: s. c. I. L. R. 28 Cal. 532 (1901).

(3) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).

HARE KRISHNA MAHANTI *v.* BHUSAN CHANDRA MAHANTI.

in this case, a zemindar sued the Defendant, his agent for, an account of money received by him under sec. 24 of Act X of 1859. The suit was properly brought in the Court of the Deputy Collector of Cuttack, and was dismissed. The Plaintiff then appealed to the District Judge of Cuttack under sec. 160 of Act X of 1859 when the appeal was heard *ex parte* and decreed on 12th March 1906. On this the Defendant applied for a re-hearing under sec. 560, Civil Procedure Code, or for a review of judgment under sec. 623. This application was refused by an order of the 16th September against which the present appeal is brought.

On the facts two preliminary objections have been made before us. The first is that the District Judge had no power to entertain the application in which the present order was made: the second, that we have no power to hear this appeal. Though the points are different, they rest on the same ground, namely that Act X of 1859 is a complete Code in itself, and that sec. 558, under which the District Judge purported to act and sec. 588, Civil Procedure Code, under which we are invited to act have no application to the case. This contention is supported by the decisions in *Nogendra Nath Mullick* v. *Mythura Mohan Pasi* (1) and *Radha Madhub Santra* v. *Lukhi Narain Roy Chowdhry* (2), in the latter of which cases it is laid down that Act X of 1859 is "a complete Code in itself" which words, it is suggested, must be taken to mean that no section of the Code can be taken as applicable to a case arising under the Act. I doubt whether, in view of the Privy Council decision in *Nilmoni Singh Deo* v. *Tara Nath Mookerjee* (3), it would be right to attach this meaning to the words. But it is not necessary to decide this question because, as far as the present case is concerned, the Respondent's contention is answered by a study of the contents of the Act itself. It is not disputed that in this case there was an appeal from the Deputy Collector to the District Judge who now represents the Zillah Judge, under sec. 160 of the Act. The procedure to be followed before the Judge is provided in sec 161, which runs as follows:—"the rules in force in regard.........to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals to the Zillah Judge or Sudder Court under this Act." Here the "rules in force" must mean the rules ordinarily in force in the District Judge's Court, that is, the contents of the Civil Procedure Code; of these sec. 556 contains rules as to the manner in which an appeal will be heard, and if an Appellant attends and a Respondent does not, an appeal will be heard *ex parte*. Secs. 560 and 588 (27) mention proceedings which may be had in respect of such appeal. Consequently the Respondent against whom an *ex parte* decree has been made under sec. 556 may apply to have his case re-heard, and if he fails, may appeal to this Court This view is amply supported by the judgments in *Sadai Naik* v. *Serai Naik* (4) following as it does

(1) I. L. R. 18 Cal. 368 (1891).
(2) I. L. R. 21 Cal. 428 (1893).
(3) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).
(4) 5 C. W. N. 279: s. c. I. L. R. 28 Cal. 532 (1901).

HARE KRISHNA MAHANTI *v.* BHUSAN CHANDRA MAHANTI.

the Full Bench decision in the Sudder Dewani Adalut Court in *Hallodhar Biswas* v. *Mohesh Chunder, Haldar* (5) and *Nilmoni Singh Deo* v. *Tara Nath Mookerjee* (3). The result is that the decision appealed from was made on an application that the Judge had power to entertain, and that we have jurisdiction to hear this appeal.

As to the merits of the case there is not much to be said. It is not disputed, when the case came up for hearing on the 8th March 1906, the present Appellant had two pleaders, a leader and a junior. The leader was absent through illness, but had arranged that another pleader should do his work. This pleader was prepared to appear in the case but had no vakalutnama. The junior pleader engaged was not prepared to conduct the case relying on the presence of his leader. The result was that the Judge refused to hear the senior pleader who had no vakalutnama, and apparently refused to grant a postponement to the junior pleader who was not ready. I think he was wrong not to hear the pleader who was willing to conduct the case. There appears to have been no reason to doubt the good faith of the request for the substitution of the pleader who was present for the one who was absent, and the absence of a vakalutnama was not to my mind a reason for proceeding *ex parte*. Under the circumstances I think that he might well have granted an adjournment for the purpose of enabling the junior pleader to prepare himself to conduct the case, subject of course to any order he saw fit to make as to costs. The learned Judge bases his refusal to grant an adjournment on the fact that the case had been twice adjourned on the representation of the present Appellant's pleader. This is so; but it had otherwise been adjourned 13 times in 11 months. The adjournments were no doubt unavoidable but must have been none the less a cause of loss to the Appellant, and should have inclined him to a favourable reception of his application. As it was I consider that the Judge ought not to have shut out the Appellant from being heard when all reasonable steps for his being heard had been taken, and the appeal must be allowed with costs here and in the Court below, and the original appeal must be re-heard.

The rule is discharged.

MOOKERJEE, J.—The circumstances, which have given rise to the proceedings now before this Court, are not the subject of controversy. The Respondents commenced an action under sec. 24 of Act X of 1859, against the Appellant, in the Court of the Deputy Collector of Cuttack, for an account of sums collected by him as their agent. The claim was valued at above Rs. 100 and was dismissed by the Court of first instance. The Plaintiffs preferred an appeal to the District Judge of Cuttack under sec. 160 of Act X of 1859. The appeal was heard *ex parte* and decreed on the 12th March 1906. On the 6th April following, the Appellant made an application to the District Judge to set aside the *ex parte* judgment and to re-hear the appeal. This application was dismissed on the 10th September 1906 on the ground that

(3) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882)

(5) S. D. A. Decisions for 1861, p. 144.

HARE KRISHNA MAHANTI v. BHUSAN CHANDRA MAHANTI.

there had been laches on the part of the Appellant and that the evidence did not establish that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. The present appeal has been filed against this order of the District Judge.

A preliminary objection is taken to the hearing of the appeal on the ground that the order in question is not appealable and it is further suggested that the District Judge had no jurisdiction to entertain the application for revival. It is argued that Act X of 1859 is a Code complete in itself and that the Appellant is not entitled to the benefit of the provisions of sec. 560 of the Code of Civil Procedure. In support of this position, reliance is placed upon the cases of *Doyal Chandra* v. *Dwarka Nath* (6), *Nogendra Nath* v. *Mathura Mohan* (1), *Radha Madhub* v. *Lukhi Narain* (2) and *Mokunda Bulliv Kar* v. *Bhagaban Chunder* (7). In answer to this argument, it is contended on behalf of the Appellant that if these cases lay down broadly and without any qualification the principle that Act X of 1859 is a Code complete in itself in the sense that no provisions of the Code of Civil Procedure are applicable to proceedings under that Act, they are inconsistent with the decision of their Lordships of the Judicial Committee in *Nilmoni Singh* v. *Tara Nath* (3); and it is further contended that in any view of the matter, sec. 560 is applicable by reason of the provisions of sec. 161 of Act X of 1859. In my opinion, the second branch of the contention of the Appellant is manifestly well-founded and must prevail. As already stated, the appeal in the present instance lay from the Deputy Collector to the District Judge under sec. 160 of Act X of 1859. Sec. 161 provides rules regarding presentation and hearing of such an appeal and is to the following effect:—"The petition of appeal shall be written on the stamp paper prescribed for appeals from the Subordinate Civil Courts with reference to the amount of value of the property involved in the appeal; and the rules in force in regard to the time within which appeals from the decisions of such Courts may be received, and to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals to the Zillah Judge or High Court under this Act. It is obvious, therefore, that if the appeal preferred to the District Judge, is to be heard and determined in the manner in which appeals from the Subordinate Civil Courts are heard and determined, sec. 556 of the Code of Civil Procedure is applicable, and under the second paragraph of that section, if the Appellant attends and the Respondent does not attend, the appeal shall be heard *ex parte* in his absence. It is further plain that if all proceedings which may be had in respect of appeals from the Subordinate Civil Courts may also be had in respect of an appeal preferred from a decision of the Deputy Collector to the District Judge, sec. 560 of the Code of Civil Procedure is applicable; and if that section is applicable,

(1) I. L. R. 18 Cal. 368 (1891).
(2) I. L. R. 21 Cal. 428 (1893).
(3) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).
(6) Marshall 148 (1862).
(7) I. L. R. 21 Cal. 514 (1894).

HARE KRISHNA MAHANTI v. BHUSAN CHANDRA MAHANTI.

the order made by the District Judge, if it is one of refusal to re-hear the appeal, is itself appealable to this Court under sec. 588, cl. 27 of the Code of Civil Procedure. The view I take of the scope and effect of sec. 161 of Act X of 1859 is amply borne out by the decision of a Full Bench of the Sudder Court in *Hallodhar Biswas* v. *Mohesh Chunder Haldar* (5) and by the decision of this Court in *Sadai Naik* v. *Serai Naik* (4). As pointed out in the earlier case, the language of sec 161 shows that the Legislature intended that appeals under sec. 160 should be treated in every respect as regular appeals in the Zillah or Sudder Courts, as the case may be, and that Act X of 1859 having given the right of appeal to these Courts, intended to leave the Courts to deal with the appeals according to their own forms and mode of procedure and to place no sort of restriction upon the action of the laws by which the decisions of these Courts are ordinarily governed. If this view of the scope of sec. 161 is well-founded, as I think it plainly is, there can be no possible controversy as to the applicability of secs. 556 and 560 of the Code of Civil Procedure. In this view of the matter, it is unnecessary to deal at length with the first branch of the contention of the Appellant which raises the question, whether the proposition that Act X of 1859 is a complete Code in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in *Nilmoni Singh* v. *Tara Nath* (3).

As regards the merits of the present appeal, there can, I think, be no reasonable doubt that the Appellant is entitled to succeed. It appears that the appeal was preferred on the 29th April 1905 and was not heard till the 8th March 1906. Various dates for hearing were fixed from time to time and there appear to have been sixteen intermediate adjournments, twelve of which were made to suit the convenience of the Court, two for the convenience of the Appellant and two for the benefit of the Respondents. It appears that the present Appellant who was the Respondent in the appeal before the Judge, originally entered appearance through a pleader Babu G. C. Roy. Later on, he engaged a senior pleader, Babu Gokulanundo Chowdhury, to argue the case. When the appeal was called on for hearing, it was represented to the Court that Babu Gokulanundo could not attend on account of illness and that he had transferred his brief to another pleader, Babu Pitbas Patnaik, who appeared and offered to argue the case on behalf of the Respondent. The Judge declined to hear him as his name did not appear on the vakalutnama. The pleader through whom the Respondent had originally entered appearance stated that he had no instructions to argue the appeal, but if the case was adjourned for a day he would be ready. The Judge declined to adjourn the case and the result was that the appeal was heard *ex parte* and the judgment of the Court of first instance was reversed. In my opi-

(4) 5 C. W. N. 279: s. c. I. L. R. 28 Cal. 532 (1901)

(5) S. D. A. Decisions for 1861, p. 144.

(3) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).

nion, the course which was adopted by the Court was not in the interests of justice and that either the pleader who offered to argue the case should have been heard or an adjournment ought to have been granted to enable the Respondent to be properly represented. Under the circumstances stated, the Appellant would have been amply protected if the learned Judge had made a suitable order for costs in his favour. In my opinion, it is not at all desirable that cases should be disposed of in this manner without hearing one of the parties when it is manifest that he and his legal advisers had *bond fide* made every effort to be represented before the Court.

The appeal, therefore, must be allowed and the order of the Court below discharged; the *ex parte* decree made on the 12th March 1906 is set aside and the appeal before the District Judge will be re-heard after reasonable opportunity has been given to the present Appellant to be represented at the hearing. The Appellant is entitled to his costs in this Court as well as in the Court below.

Appeal allowed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1830 OF 1906

CASPERSZ, J.	SHEIKH GOLAM
SHARFUDDIN, J.	MAHOMED and others,
1908.	Defendants, Appellants,
Heard, 29 and	v.
30, June.	SIVENDRA PADA
Judgment,	BANERJEE, Plaintiff,
30, June.	Respondent.

Act X of 1859—Civil Procedure Code (Act XIV of 1882), sec. 373, applicability of.

The provisions of sec. 373, C. P. C., have no application to suits instituted under Act X of 1859.

Where a Plaintiff applied to withdraw a suit for rent and the Court permitted such withdrawal but dismissed the suit and did not give distinct permission to bring a fresh suit upon the same cause of action,

Held—*That a fresh suit was maintainable.*

This was an appeal preferred on the 12th of November 1906, against the decree of J. J. Platel, Esq., District Judge of Zillah Cuttack, dated the 14th of June 1906, confirming that of Babu Radha Kanta Banerjee, Deputy Collector of Puri, dated the 14th of April 1905.

The facts of the case appear from the judgment.

Babu Gunada Churn Sen for the Appellants.

Babu Provas Chandra Mitter for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for recovery of arrears of rent and cesses, together with damages, for the years 1308, 1309, 1310 and 1311, by Shivendra Pada Bandopadhya, a fractional co-sharer of the jaigir mehal in which the taluk in suit is situated. The suit was instituted in the Court of the Deputy Collector of Puri, under Act X of 1859.

It appears that the Plaintiff had previously brought a suit for arrears of rent for the years 1306, 1307, 1308, 1309, against the Appellants which he withdrew, and the suit was thereupon dismissed.

SHEIKH GOLAM MAHOMED *v.* SIVENDRA PADA BANERJEE.

In the first suit, which was subsequently withdrawn, the Plaintiff had put in an application on the 30th January 1903 for permission to withdraw from his suit, with liberty to institute a fresh suit, on which the order passed was to the following effect :—"The Plaintiff's pleader applies for withdrawing the suit. Withdrawal permitted, suit being dismissed. The application for withdrawal was filed before delivery of judgment." This order was passed on the 30th January 1903. In the present case, the first Court decreed the Plaintiff's suit, and that decree has been affirmed on appeal by the District Judge of Cuttack, on the 28th June 1906.

In second appeal before us, the points urged are, *first*, that the Plaintiff cannot recover any rent from the Appellants on the ground of want of title; *secondly*, that under sec. 373, C. P. C., the claim of rent of 1308 and 1309, is barred, inasmuch as, in withdrawing from the previous suit, the Plaintiff did not obtain any permission to institute a fresh suit, and, that not having done so, he cannot maintain this suit in respect of the years 1308 and 1309, and, *thirdly*, that the Plaintiff cannot maintain a suit for a proportionate share of the rent.

The findings of the lower Appellate Court on the first and third points conclude us, as there are distinct findings for the Plaintiff with regard to his title and separate collection. The findings are in the following terms :—"Now Plaintiff has conclusively shown himself to be entitled to 2 annas share of the rents payable by the *sikmi* tenure-holders. It does not matter whether Appellants have also a share as superior landlords or not. Appellants as tenure-holders cannot question the right, or title of a registered proprietor :" and the finding with regard to the separate collection is—"The estate has been split up and the several co-sharers are collecting their shares of the rents separately. Defendants' agent admits that the Collector of Puri is collecting his share of the rents separately. This being the case, Plaintiff was justified in suing for his share of the rents alone."

With regard to the second contention, as to whether sec. 373 has any application to suits under Act X of 1859, we think the authorities, to which our attention has been invited on behalf of the Appellants, are not in point. The case of *Nilmoni Singh* v. *Tara Nath Mookerjee* (1) is one of the authorities relied upon by the Appellants. The question raised in that case was whether the Deputy Commissioner of Manbhum, who had made certain decrees in rent suits under Act X of 1859, could transfer these decrees for execution to another district. The attention of their Lordships in that case was mainly directed to the question of transfer of decrees from the Court at Manbhum to another district, and the solution of this question depended upon the construction of the expression "Civil Courts", used in sec. 77 of Act X of 1859 and some other kindred sections. It was held that the rent Court is a Civil Court, in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and being a Civil Court in that sense, it comes within the provisions of

(1) L. R. 9 I. A. 174 s. c. I. L. R. 9 Cal. 295 (1882).

SHEIKH GOLAM MAHOMED v. SIVENDRA PADA BANERJEE.

Act VIII of 1859, which was the old Civil Procedure Code. It was decided that the rent Court being a Civil Court under that Act, it had the power of transferring decrees for execution to another district.

The next authority referred to for the Appellants is the case of *Sadai Naik* v. *Serai Naik* (2). This case deals with the question whether a second appeal would lie to this Court from an appellate decree of the District Judge in a suit under Act X of 1859, which suit had been tried by a Deputy Collector: and the first cited decision of the Privy Council in *Nilmoni Singh* v. *Tara Nath Mookerjee* (1) was relied upon; but it was held that, inasmuch as the suit was dealt with, on appeal, by the District Judge, though it was a suit for rent under Act X of 1859, the decree of the Appellate Court became a decree of Civil Court, and hence an appeal would lie to the High Court. Neither of the cases cited relates to the question whether sec. 373, C. P. C., applies to suits under Act X of 1859.

On the other hand, we find in *Mokunda Bullav* v. *Bhagaban Chunder* (3), that it has been distinctly held that sec. 373, C. P. C., does not apply to suits under Act X of 1859 which is a complete Code by itself. The same view was taken in the case of *Radha Madhub Santra* v. *Lukhi Narain* (4). We find that in these two cases, the facts were very similar to those of the present case, and that in both the cases the Plaintiffs, in withdrawing from the previous suits, had not obtained any permission to institute fresh suits.

In *Mokunda Bullav* v. *Bhagaban Chunder* (3), the decision of the Judicial Committee, in *Nilmoni Singh* v. *Tara Nath Mookerjee* (1), was referred to, and there, also, it was held that the question discussed by the Privy Council was simply whether a Revenue Court under Act X of 1859 had any authority to transfer an execution case from its own file to the Civil Court of another district for the purpose of execution of the decree

In *Nogendra Nath* v. *Mathura Mohan* (5), it was held that the provisions of sec. 14 of Act XX of 1877 (The Limitation Act) are not applicable to suits for arrears of rent under Act X of 1859, since that Act has always been considered as a complete Code by itself.

In *Hare Krishna* v. *Bhusan Chandra* (6), the learned Judge discussed the authorities with reference to Act X of 1859 being a complete Code by itself. In this case it was held that the provision of secs. 560 and 588 (27) were applicable by reason of the provisions of sec. 161 of Act X of 1859, and Stephen, J, in his judgment goes on to say: "This view is amply supported by the judgments in *Sadai Naik* v. *Serai Naik* (2) following as it does, the Full Bench decision in the Sudder Dewani Adalut Court in

(1) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).
(2) 5 C. W. N. 279: s. c. I. L. R. 28 Cal. 532 (1901).
(3) I. L. R. 21 Cal. 514 (1894).
(4) I. L. R. 21 Cal. 428 (1893).
(5) I. L. R. 18 Cal. 368 (F. B.) (1891).
(6) 12 C. W. N. 888: s. c. 7 C. L. J. 426 (1908)

SHEIKH GOLAM MAHOMED *v.* SIVENDRA PADA BANERJEE.

Hallodhar Biswas v. *Mohesh Chunder* (7) and *Nilmoni Singh* v. *Tara Nath Mookerjee* (1)." We would also cite, in the same case, the remarks of Mookerjee, J.: "In this view of the matter, it is unnecessary to deal at length with the first branch of the contention of the Appellant which raises the question, whether the proposition that Act X of 1859 is a complete Code in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in *Nilmoni Singh* v. *Tara Nath* (1)."

On a review of the cases, we are of opinion that the provisions of sec. 273, C. P. C., have no application to suits instituted under Act X of 1859, and, therefore, the Plaintiff, that is, the present Respondent, was not debarred from instituting a fresh suit with regard to rents for 1308 and 1309 notwithstanding the fact that he had not obtained distinct permission to do so.

We have already observed that, on the 30th January 1903, an application was made by the Plaintiff to withdraw from his suit, with liberty to institute a fresh suit, on which an order was passed on the same day giving permission to withdraw from the suit. Although nothing was said in that order, as to the Plaintiff's liberty to institute a fresh suit on the same cause of action, that order ought to be read along with the application on which it was passed. In that application we find a distinct prayer to be allowed to withdraw from the suit with liberty to institute a fresh suit on the same cause of action, and the Deputy Collector appears to have taken particular care in noticing that the application for withdrawal was filed before delivery of judgment, that is to say, before the order of dismissal was

In these circumstances, the judgment of the lower Appellate Court is correct, and we therefore dismiss this appeal with costs.

S. C. S. *Appeal dismissed.*

(1) L. R. 9 I. A. 174: s. c. I. L. R. 9 Cal. 295 (1882).

(7) S. D. A. Decisions for 1861, p. 144.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 442 OF 1908.

STEPHEN, J.
HOLMWOOD, J.
1908
11, June.

SHEIKH MANSAR ALI, 2nd Party, Petitioner,
v.
MATIULLAH and others, 1st Party, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 145, 146 and 148—Refusal to grant time for regular proceedings to be followed—Attachment under sec. 146, when the parties did not file written statements or produce evidence—Illegality.

In a proceeding under sec. 145, Cr. P. C., the parties appeared on the day of hearing but did not file any written statements, or produce any evidence. They prayed for time which the Magistrate did not grant. He then heard the parties and, being unable to satisfy himself as to which of them was in possession, attached the subject of dispute under sec. 146,

Held—*That the Magistrate in so doing refused to exercise jurisdiction. He ought to have granted time to allow regular proceedings to be followed or he might have informed himself of the facts of the*

THE
Calcutta Weekly Notes.

Vol. XII.] MONDAY, AUGUST 3, 1908. [No. 38

Contents:

NOTES.

AN IMPORTANT QUESTION AS TO THE VALIDITY OF MARriage between two sub-divisions of one of the primary castes was considered by the Chief Court of the Punjab in the case *Haria v. Kanhaya*, reported at p. 326 of the June number of the current *Punjab Record*, Vol. XLIII. Mr. Justice Pratul Chandra Chatterjee in an able and considered judgment came to the conclusion that such a marriage is valid according to the Hindu law and ought to be declared legal and that the issue of the marriage is legitimate and is entitled to inherit according to Hindu law.

IN THE PARTICULAR CASE THE QUESTION WAS WHEther a marriage between a Vadhyar *Rajput* and *Khatrani* was valid, the castes of the two persons admittedly being sub-divisions of the Khetri or military case. The learned Judges, Chatterjee and Johnstone, JJ., chiefly relying on the decisions of the Privy Council in the cases of *Inderun Valungypooly Taver* v. *Ramasawmy Pandia Talaver* (13 M. I. A 141) and *Ramamani Ammal* v. *Kulanthai Natchear* (14 M. I. A. 346), held that the marriage was valid according to Hindu law.

MR. JUSTICE CHATTERJEE IN NOTICING THE CALCUTTA decisions observes that the later decisions are in favour of the view that inter-marriage between subsects of Hindus is valid in Hindu Law. No doubt the earlier decision of Mr. Justice Dwarka Nath Mitter in *Mela Ram* v. *Thanu Ram* (9 W. R. 552), declares a marriage between a Dome Brahmin and a Haria girl invalid unless sanctioned by local custom. But we all know that there is no hard and fast long-established custom amongst such low class Hindus. They may observe certain practices as to marriage between particular classes, sects or sections of such sub-castes but variations in such practices are common. To declare that marriages between the sub castes of such castes are invalid unless custom in the legal sense can be proved would both be oppressive and absurd. In *Narain Dhara* v. *Rakhal Gani* (I. L. R. 1 Cal. 1), Mr. Justice Romesh Chandra Mitter inclined towards the view expressed by Mr. Justice Dwarka Nath Mitter, but Mr Justice Markby doubted the correctness of that view. This case was remanded for enquiry and therefore cannot be regarded as an authority on the question. In the case of *Upoma Kuchani* v. *Bhola Ram Dhubi* (I. L R. 15 Cal 708) no custom was alleged and Macpherson, J., said with regard to Mayne's view that such marriages are obsolete, that it does not necessarily follow that they are invalid according to law and referring to the Privy Council decisions already mentioned his Lordship held that the question had been concluded by the Judicial Committee. The decision in *Ram Kumary* (I. L. R. 18 Cal. 364) supports the same view.

IN THE CASE OF *Ram Lal Sookool* v. *Akhoy Charan Mitter* (7 C. W. N. 614), it was held by Prinsep and Handley, JJ., that marriage between a Vaidya and Kalasthya, according to the local custom in the Tipperah District was valid. There is an *obiter dictum* of their Lordships in this case that "the ancient Hindu Law did not regard such marriages with the condemnation expressed by later authorities which have been accepted by our Courts so as to make children from unequal marriages illegitimate." Their Lordships did not refer to or consider either the decisions of the Judicial Committee or the Calcutta cases which followed them and which have already been cited by us above. The Subordinate Judge, whose decision was affirmed by their Lordships on appeal, refers to the decision of the Judicial Committee "that when there was a marriage in fact there would be presump-

tion in favour of there being a marriage in law." In the Tipperah case the learned Sub-Judge found that marriage between Vaidyas and Kaisthyas were not unknown and that in the same family several instances of such marriages had taken place and therefore he rightly held that when the marriage had been proved by the Plaintiff in that case, the onus was on the Defendants to show that the marriage was invalid and the issues illegitimate.

In the Punjab case under review Chatterjee, J., says that "it is abundantly shown in the smrites or law treatises as well as other books of Sanskrit literature that in ancient India inter-marriage between different castes was legal and common. Those who maintain that it is forbidden rely upon a certain text in the *Vishnu Sanhita* that "castes should have intercourse with members of equal caste" or as it is rendered by others "that all members of mixed castes should have intercourse only between themselves." This text, even if it be not a modern interpolation, does not seem to be sufficiently explicit in its prohibition of inter-marriages between sub-castes of the primary castes or the sub-castes of *varna sankaras* (mixed castes). Chatterjee, J., says, that although *Vishnu Sanhita* is one of the oldest law treatises yet it is well-known that the existing book is a modern version. The learned Judge then refers to Mitakshara, which is an eleventh century commentary on the Institutes of Yajnyavalka, and points out that it is stated there that inter-marriages between the different castes were not unknown; further that it specifically says "under the sanction of the law instances do occur." This seems to us to knock on the head the theory that such marriages are prohibited in the *kaliyuga*. Chatterjee, J., concludes from a consideration of such later texts, that the supposed prohibition of *Vishnu Sanhita* cannot prevail against the view taken by the Judicial Committee.

Chatterjee, J., therefore, comes to the following conclusion as regards the present law regarding inter-marriages between sub-castes :—

It must be held in our opinion that Hindu Law, as has been interpreted by the Privy Council, does not forbid inter-marriages between sub-castes of Sudras though in practice they are extremely rare, and social usages discountenance them. But the rarity of such marriages and the disfavour of society cannot of themselves suffice to render them invalid and the issue of such unions illegitimate. These results can only flow from express texts prohibiting such marriages or unanimity of the commentators in treating them as unlawful according to their interpretation of the law. But we have seen that no such authentic text or unanimity of opinion exists. Well recognized and universally accepted local or tribal custom can also bring about such consequences, and this will be discussed hereafter. But among Jats, that leading Sudra subcaste in the Punjab, it is well known that the rules are notoriously lax and marriages with other sub-castes, except possibly those, whose touch is pollution, such as sweepers and *chamars* are generally recognized. (See *Chanda Singh v. Mela*, 73 P. R. 1897, and *Mangal Singh* v. *Chandi*, 15 P. R. 1900, so that we should be justified in holding that the declaration of the law as regards Sudras in respect of inter-marriage between sub-castes by the Privy Council is binding in the Punjab, though the cases in which the declaration was made arose in the Madras Presidency.

In the Punjab case under review no custom was alleged or proved. When the marriage is proved Chatterjee, J., rightly holds that the presumption of legality arises and it is for those who question it, to rebut it by proof of custom. This is what the learned Judge says at p. 335 of the report.

"It is beyond doubt that inter-marriage between different sub-castes of the primary castes as well as members of the primary castes are very rare and almost unknown, but they do occasionally take place. None of the witnesses speak as to custom applicable to such cases, nor refer to any instance in which such a marriage took place. They speak of *Sartoras* and *mudhkhulas* (kept women) whose rights have no real bearing upon the question before us. No instance is cited in which a marriage of a Khatrani or Arora woman with a Rajput has been held to be invalid on any previous occasion by Courts of Justice or by the brotherhood of Rajputs and the issue disinherited. It seems unquestionable that without such instances the presumption in favour of validity of the marriage cannot be rebutted.

We have in these columns expressed our views with regard to such marriages sufficiently clearly in 7 C. W. N. notes, pp. 237-239. We note with pleasure that Chatterjee, J., has also taken the same view. We need only add that there is yet one more aspect of the question which does not seem to have sufficiently attracted the attention of our law Courts. It is that even supposing that it is held in any case of inter-marriage outside sub-castes that it is not valid according to Hindu law, would the Court be justified in holding, if such marriage had actually taken place and did not offend against the rules of consanguinity, that such marriage is illegal? We are clearly of opinion that it would be unjust, inequitable and opposed to public policy and public morals to declare such a marriage null and void. The Court may declare the marriage to be not in accordance with Hindu law and deprive the issue of any right of inheritance under the same but it would be outrageous for that reason to stigmatize the wife as a concubine and the issue as a bastard. When people go through the ceremony of marriage intending to marry and live as husband and wife and such marriage is not opposed to public policy or public morals, the marriage should be declared lawful and the issues legitimate under the general policy of law, equity and justice.

CRIMINAL CASES OF 1907.

(Continued from p. cciii.)

Sanction.—[*Court*]. The word "Court" includes a successor in office within sec. 195 (*Re Lalit*, 5 C.

L. J. 176: *Emperor* v. *Molla*, 33 Cal. 19: *Dharamdas* v. *Sagore*, 11 C. W. N. 119: *Ambica* v. *Emperor*, 2 C. L. J. 650 and *Mad. H. C. Pro. 12, Nov., 1872*), but not within sec. 476 (*Re Krishna*, 9 C. W. N. 859, approved of in the Full Bench ruling of *Begu* v. *Emperor*, 34 Cal. 551, though doubted in *33 Cal. 193, 5 C. L. J. 176* and *11 C. W. N. 119*). A District Registrar is not a "Court" within sec. 622 of the Civil Procedure Code (*Manavala* v. *Kumarappa*, 30 Mad. 326). [*Application for sanction*]. An application for sanction should be made promptly or the delay satisfactorily accounted for (*Dharamdas* v. *Saggre*, supra: *Balwant* v. *Umed*, 18 All. 203: *see* also *19 All. 121, 124: 1 C. W. N 529*), though there is no fixed period of limitation for making such applications (*10 All. 350*, referring to *7 Bom. 13*, *4 Mad. 172, 6 Cal. 60, 6 Bom. 586*). [*Proper Court to grant sanction*]. It is the Court whose duty it is to consider the evidence and decide upon its truth or falsity that is the proper Court to grant sanction. Hence a Magistrate who examines a witness on commission for a Sessions trial cannot grant it (*Saadut* v. *Emperor*, 11 C. W. N. 909), nor a Magistrate who takes cognizance but transfers the case to another Magistrate who disposes of it (*3 C. W. N. 33: 6 C. W. N. 35*: see *3 C. W. N. 490*). [*When sanction should be granted*]. No sanction should be granted unless the Court has made up its mind that the accused has committed the offences for which he is to be prosecuted: this should not be left for consideration at the trial (*Habibur* v. *Khoda*, 11 C. W. N. 195: *see* also *19 Bom. 362: 7 Mad. 224: 23 Mad. 210: 26 Mad. 116: Ibid 193*). When there are no *primâ facie* grounds for instituting criminal proceedings, it ought to be refused (*29 Cal. 837: 2 Agra H. C. R. 318*: see *9 W. R. Cr. 3: Weir 849* and *7 All. 44*). It should not be granted as a matter of course, but only when the Court is satisfied that the interests of justice require it, and there are strong *primâ facie* grounds, (*6 All. 114*: see *1 Cal 450. 456: 1 C. W. N. 409: 6 Cal. 380* per C. J.: *Weir 846, 852*). The mere fact of a charge not having been proved is not a sufficient ground (*16 Cal. 661*). A clear case must be made out for granting a sanction (*Ram Rekha* v. *Emperor*, 11 C. W. N. xxxv). [*Contents of sanction*]. The Court must comply strictly with the terms of sec. 195 (*4*). A sanction which does not specify the place where, and the occasion on which, an offence was committed is defective, though these facts may be gathered by implication (*Girija* v. *Binode*, 5 C. L. J. 222: *Habibur* v. *Khoda*, 11 C. W. N. 195). Where it is couched in such general terms that it is impossible to say what offence is imputed to the accused, or what documents form the subject of the charge, it is bad (*Habibur* v. *Khoda*, supra). [*Sanction pending appeal*]. It is not desirable to grant sanction pending an appeal when its effect will be to delay if not to defeat the appeal (*Jadu* v. *Lewis*, 34 Cal. 848). [*Subordination of Courts*]. The cases on the question of the difference between the High Court's powers under sec. 195 (*6*) and those under sec. 439 are not satisfactory. The first section seems to refer to cases where applications for a grant or revocation of sanction are first made to the Appellate Court from an order of a lower Court, *e.g.*, from the Court of a Munsif to that of the District Judge, from a first class Magistrate to the Sessions Judge, from the District or Sessions Judge to the High Court. Sec. 439 applies where an application from the original Court to the immediately superior Appellate Court has been made, and the order of the latter Court is sought to be revised. The Author's view though consistent with that of Wallis, J., in *Muthuswami* v. *Veeni*, 30 Mad. 382, is opposed to that of the Full Bench in the same case and to that of other rulings. Thus it was held by the Full Bench that sec. 195 (*6*) was not restricted to the powers of the Appellate Court to which the first Court was immediately subordinate (which is the Author's view), but gave a second appeal to the High Court when the lower Appellate Court had revoked a sanction granted by the original Court. *See* also *Palaniappa* v. *Annamalai*, 27 Mad. 223, which the Full Bench approved of. So it was held by the Calcutta High Court that it has power under the same section to interfere with an order of a District Judge *affirming* a sanction granted by the Munsif (*Girija* v. *Binode*, 5 C. L. J. 222: *Habibur* v. *Khoda*, 11 C. W. N. 195), but not with one *revoking* the same (*10 C. W. N. 1026*). This latter case draws a difference between "*refusing*" and "*revoking*" a sanction, a distinction which was repudiated by the Madras Full Bench in *30 Mad. 382*, and also by the Divisional Bench in *27 Mad. 223*. [*Powers of Appellate Court*]. A Court to which an appeal is presented under sec. 195 cannot remand the case for a fresh enquiry. Sec. 647 of the Civil Procedure Code does not apply to proceedings under sec. 195, Cr. P. C. (*Rama* v. *Venkatachella*, 30 Mad. 311).

COMPLAINT.—Except as provided for under secs. 195 and 199, any one cognizant of the facts may be a complainant (*13 Bom. 600, Ibid 590: 21 Bom. 536: 18 All. 465: 25 Bom. 151, 155: 28 All. 554, 558: 14 Cal. 707, 721*), but not a person not personally cognizant of the facts (*Chamroo* v. *Emperor*, 11 C. W. N. 170: see *10 C. W. N. 1090*)

COMMITMENTS.—Sec. 215 applies only to commitments made under the chapter in which it occurs, but not to commitments directed under sec. 436 (*Muthia* v. *Emperor*, 30 Mad. 224; *Pirthi* v. *Sampatia*, 7 C. W. N. 327).

CHARGES.—[*Addition of*]. The addition of a charge under sec. 498, I. P. C., at the conclusion of the defence evidence is irregular and prejudicial to the accused. The conviction under sec. 498, I. P. C., was set aside and an enquiry into the other charges directed (*Emperor* v. *Isak*, 31 Bom. 218). [*Misjoinder*]. (*i*) *One head* of charge including *several offences of the same kind* committed *on the same day*. The

joinder in one charge of two offences committed on the same date, *e.g.*, criminal breach of trust in respect of 3 sums received from different persons, vitiates the trial, and is not covered by sec. 537. There should be a separate charge in respect of each sum. (*Tilakdhari* v. *Emperor*, 6 C. L. J. 757, following *10 C. W. N. 520* and *Ibid 53 dubitante*: cf. *Kasi* v. *Emperor*, 30 Mad. 328). But in *Mohatuddi* v. *Jadu*, 11 C. W. N. 54, it was held, distinguishing *10 C. W. N. 53*, that where three persons are charged in one charge for three offences against different persons committed on the same date, and forming part of the same transaction, though strictly three separate charges should have been drawn, yet the misjoinder was an error of form cured by sec. 537. This ruling is not correct. In the first place the act of each accused is distinct from that of a co accused, and the misjoinder is not one of form merely. The fact of the acts forming part of the same transaction, or being separated by letters, (*a*), (*b*), (*c*), cannot justify a misjoinder, though the offences mentioned in (*a*), (*b*) and (*c*) may be jointly tried. This case is clearly in conflict with *6 C. L J. 757*, supra, and also with *10 C. W. N. 53*. The joinder in one charge of two distinct offences (extortion of *muchilka* and a sum of money), though arising out of the same transaction is fatal (*Gul Mahomed* v. *Cheharu*, 10 C. W. N. 53).

(ii). A joinder in one charge of *two offences of the same kind* (attempting to cheat) committed on *successive* dates vitiates the trial, and is not cured by sec. 537 (*Johan* v. *King-Emperor*, 10 C. W. N. 520).

(iii). Joinder of *different offences on different heads of charge, not committed in the same transaction.* A charge of extortion (sec. 384, I. P. C.) alleged to have been committed on the 15th or 16th cannot be tried with one of assault (sec. 352, I. P. C.) committed on the 15th (*Gul Mahomed* v. *Cheharu*, supra). A trial on a charge alleging three distinct acts of criminal breach of trust and of falsification of accounts (secs. 409, 477A, I. P. C.) is bad. The misjoinder is not covered by sec. 234. Each act under sec. 409 may form part of the corresponding falsification, but it does not form part of the same transaction with the other offences under secs. 409, 477A. Though under sec. 222, a charge in respect of the gross sum is one offence within sec. 234, it does not constitute the acts so charged into one transaction within sec. 235 (*Kasi* v. *Emperor*, 30 Mad. 328). Three separate complaints by three persons against the accused for rioting, hurt and mischief cannot be tried together, though the origin and preparation for the offence was the same and no objection was taken in the lower Courts (*Nanda* v. *Emperor*, 11 C. W. N. 1128). Sec. 234 refers to different acts by the same individual or sets of individuals against the same complainant or complainants so connected as to form one person in law (*Ibid*). This view, though agreeing with that taken in *4 All. 147*, is opposed to that of *9 Cal. 371.*

(iv). *Various offences in one transaction.* Where the accused was tried at one trial on three charges under sec. 420, I. P. C., two of forgery (secs. 466, 468), one under sec. 471, I. P. C. and one under sec. 419: *held* that there was no misjoinder, as the offences were committed in one transaction though committed at different times (*Emperor* v. *Sri Narain*, 11 C. W. N. 715, distinguishing *Birendra* v. *Emperor*, 30 Cal. 822, and *Bhagwat* v. *Emperor*, 2 Cr. L Ind. 34 and following *Emperor* v. *Sherufalli*, 27 Bom. 135). [*Conviction for minor offence*]. Where the accused are charged under secs. 147, 304 and 325, I. P. C., read with sec 149, and the riot is disbelieved, they should not be convicted under sec. 323 for their individual acts with which they were not charged (*Dasarath* v. *Emperor*, 34 Cal. 325: *Panchu* v. *Emperor*, 34 Cal. 698: *Ram* v. *Emperor*, 6 C. W. N. 98)

COMPENSATION.—Sec. 250 does not apply where the complaint is dismissed under sec. 203 (*Bhagwan* v. *Harmukh*, 29 All. 137). Where the Magistrate merely states that cause was shown but not what it was, the order is bad. But if the order of acquittal gives reasons for holding the case to be false, it is sufficient compliance with cl. (*b*). (*Sekh* v. *Hiralal*, 11 C. W. N. lxii).

DISCHARGE—A Magistrate cannot discharge an accused without hearing all the prosecution witnesses. In a case of criminal misappropriation the Magistrate should consider whether the accused realized the money and did not credit it with criminal intent or through mistake. A statement by the accused that it was a matter of accounts, and that he would pay what is due is not a good ground of discharge (*Rakhal* v. *Monmotha*, 11 C. W. N. lxxxiii).

CROSS EXAMINATION.—Each accused has a right of cross-examining the complainant (*Lala* v. *Emperor*, 11 C. W. N. cxl). Where at the close of the prosecution the accused applied for process to cross-examine the prosecution witnesses: *held* that the Magistrate was wrong in refusing it, though the accused had the opportunity of cross examining after the charge under sec. 256 and had declined to do so, but had applied for time to do so (*Hemanta* v. *Sayad*, 11 C. W. N. ccciii). Under similar circumstances it was held that the accused could under sec. 257 call the prosecution witness *as his own*, and then cross-examine them (*Sheo* v. *Rawlins*, 28 Cal. 594). *See* also on the point, *1 C. W. N. 19*: *4 C. W. N. 241.*

PROCESS FOR WITNESSES.—Sec. 257 is imperative. It leaves no discretion to refuse process, *unless* the Magistrate considers the application to be for vexation and delay or to defeat the ends of justice. He must show in writing the grounds of refusal as to *each* witness (*Emperor* v. *Purshottam*, 26 Bom. 418, followed in *31 Mad. 131*). When the refusal of process in regard to any particular witness is not based on any ground mentioned in sec. 257 the illegality is incurable under sec. 537 (*Narayana* v. *Emperor*, 31 Mad. 131). If the Magistrate states facts which

led him irresistibly to the conclusion that the application was for vexation or delay, sec. 257 is sufficiently complied with, though he does not expressly say that the application was for that purpose (*Wahid* v. *Emperor*, 11 C. W. N. 789: *see* also *Chintamon* v. *Emperor*, 35 Cal. 243).

SUMMARY TRIAL —[*Procedure determined by complaint or police-report*]. If the complaint does not disclose an offence triable summarily, the Magistrate cannot so try it unless he makes up his mind at the outset that the complaint is exaggerated (*Kedar* v. *Khoshul*, 11 C. W. N. cciv). *See* also *2 C. L. R. 374: 21 W. R. Cr. 89: 22 W. R. Cr. 29: 4 Cal. 18: 5 C. W. N. 252: 25 W. R. Cr. 19: 29 Cal. 409: 3 Shome's Rep. 17*) It is the *offence* which the facts stated in the complaint constitute that determines the procedure, and not the *sections* of the law so mentioned therein (*16 Cal. 715:* cf. *10 All. 55*, distinguishing the above cases). Similarly where cognizance is taken on a *police-report*, it must regulate the character of the procedure (*24 W. R. Cr. 48: Ibid 71*), but the Court is not bound by the view of the law taken by the police (*22 W. R. Cr. 29, 30*).

MISDIRECTION.—[*Opinion of Judge*]. An expression of opinion by the Judge on the facts without telling the jury that they were at liberty to form their own opinion is a misdirection (*Panchu* v. *Emperor*, 34 Cal. 698; see *10 C. W. N. 153: 4 C. W. N. 576, Ibid 196: 10 Cal. 970: 19 W. R. Cr. 71: 20 Bom. 215, 224, 225: 25 Cal. 230*). If the opinion is so expressed as to leave the jury no option, it is a misdirection (*14 All. 25: 10 C. W. N. lix*). [*Facts to be stated*]. The omission to explain to the jury all the essential elements of the offence vitiates the conviction. The Judge should differentiate the evidence against *each* accused (*Mari* v. *Emperor*, 30 Mad. 44: *Mangan* v. *Emperor*, 29 Cal. 379). He should specifically call their attention to the medical evidence in favour of the accused (*Panchu* v. *Emperor*, supra), and also the fact of the original witnesses named in the First Information having been abandoned and of the prosecution witnesses being entirely new ones (*Dasarath* v. *Emperor*, 34 Cal. 325). The omission to instruct the jury as to their verdict if they found that there was no unlawful assembly but that hurt was individually caused by the accused is a serious misdirection (*Panchu* v. *Emperor*, supra). [*Record of charge*]. The charge should be recorded intelligibly and with sufficient fullness to satisfy the Appellate Court that all the points in the case were clearly and correctly stated to the jury (*Panchu* v. *Emperor*, supra).

(*To be continued.*)

E. H. MONNIER.

CURRENT INDIAN CASES.

EMPEROR *v.* QUADIR BUKSH, I. L. R. 30 All. 93. *Counterfeit coin—Penal Code, secs. 28, 231—Onus.*

". . . . . the coins manufactured by the accused are very good imitations of a genuine coin, and we have no hesitation in holding that persons might be deceived by the resemblance. That being so, the presumption referred to in the explanation" (sec. 28) "arises, and it is for the accused to prove that their intention was innocent or that they did not know that it was likely that deception would be practised" (*Per* Banerjee and Aikman, JJ.).

AMBICA *v.* DWARKA, I. L. R. 30 All. 95 *Mortgage by widow after adoption.*

Case where a mortgage executed by a widow in defiance of her adopted son's right was not allowed to be enforced against the adopted son.

INDAR SEN *v.* RIKHAI, I. L. R. 30 All. 103. *Court-fee—Additional relief—Refund.*

Where Plaintiff obtained reliefs which he did not ask and for which he paid additional Court-fee and the Appellate Court reversed that portion of the first Court's decree which gave those reliefs, *held* that the Appellant was entitled to get a refund of the Court-fee paid by him in the memo. of appeal for those reliefs.

BANARASI PRASAD *v.* RAM NARAIN, I. L. R. 30 All. 105. *Suit to set aside a decree.*

No suit lies where the only relief claimed is the setting aside by a Subordinate Judge of a decree passed by his predecessor. [In this case fraud was neither alleged nor proved and no specific relief was asked for, save and except the setting aside of the decree].

RAM DENI *v.* NAND LAL, I. L. R. 30 All. 109. *Criminal Procedure Code, sec. 195—Sanction to prosecute.*

A Sessions Judge has no power to set aside an order of a District Magistrate granting a sanction on refusal to do so by a Magistrate of the third class.

GORDHAN *v.* CHUNNI LAL, I. L. R. 30 All. 111. *Trust—Uncertainty.*

Case where it was held that a trust was not void for uncertainty.

SHAFAQUAT *v.* WALI AHMAD, I. L. R. 30 All. 116. *Criminal Procedure Code, secs. 437, 439—Revision.*

An application for revision was not entertained by the High Court as the applicant could have applied to the Sessions Judge.

HAIDAR HUSAIN v. ABDUL AHAD, I. L. R. 30 All. 117. *Civil Procedure Code, sec. 362—Death of sole Appellant.*

An appeal abated when some of the several heirs of the deceased Appellant were brought on the record and the others were not brought on the record either as Appellants or Respondents.

ISMDAR KHAN v. AHMAD HUSAIN, I. L. R. 30 All. 119. *Mortgage—Purchase—Adverse possession.*

By adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. In the present case it was held that the possession of a purchaser of an equity of redemption who was an usufructuary mortgagee did not amount to adverse possession against the other mortgagors.

RAMJI DAS PODDAR v. HOWSE, I. L. R. 35 Cal. 199. *Arbitration Act, sec. 19.*

Sec. 19 of the Arbitration Act applies only to cases where there has been a submission to arbitration before the commencement of legal proceedings, and gives the Court power to stay subsequent proceedings.

Review.

THE CODE OF CIVIL PROCEDURE, being Act V of 1908. *Edited by Babu Charu Chandra Bhattacharya, M. A, B. L., Vakil, High Court, Calcutta. Printed and published by J. N. Bose, Wilkins Press, Calcutta. Price Re. 1.*

This edition does not contain notes of cases but in the margin to each of the sections the references to the corresponding sections of the old Code and to the English Rules and Orders are given. This is an improvement over the system of giving them in tabular form as in the Act as published in the Government Gazette and its reprints by other private publishers. The report of the special committee appointed to consider the amendment of the Code and a table of the corresponding sections of the old and the new Code and a general subject index are also given. This edition promises to be more useful to the Bench and the Bar than others previously published.

Notes of Cases.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN. LORD ATKINSON. SIR ARTHUR WILSON.

1908. 3rd July.

KAIKHUSRU ADERJI GHASWALLA and others, v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

Special leave by consent—Interlocutory order, appeal from, treated as appeal on the merits of the whole case.

This matter was partly gone into and then adjourned. See 12 C. W. N., p. clxxxiv. It was again taken up on the above date.

LORD MACNAGHTEN.—We have got an answer from the India Office. I do not pretend quite to understand it, but I think it authorises us to grant you special leave to appeal. The special leave ought to be this. I do not know how it is to be carried out, but I should think it would be something in this form. "Special leave to appeal by consent; the appeal to be treated as an appeal from the decree on the merits," and then put in whatever words they wish in order to guard themselves.

Mr. DeGruyther.—I think the suggestion is this, that as one of the Courts in India and one of the Judges of the Court of Appeal has affirmed the findings of fact come to by the District Judge we should be precluded from suggesting to your Lordships that there were concurrent findings.

LORD MACNAGHTEN.—Of course that must be guarded against.

Mr. DeGruyther.—We consent to that. I doubt whether it would come within the ordinary rule of your Lordships' Board because the two Judges would have differed in the Court of Appeal on this question of fact.

LORD MACNAGHTEN.—You would be the Appellants? I should have thought they would prefer to be the Appellants but apparently they do not.

Mr. DeGruyther.—If your Lordships please, the order might be, by consent of parties, that the appeal from the interlocutory proceedings should be treated before your Lordships as an appeal on the merits, both as to facts and law?

LORD MACNAGHTEN.—On the merits, for a final decree.

Mr. DeGruyther.—Both on the facts and law?

LORD MACNAGHTEN.—Yes: then put in words to satisfy them.

Mr. DeGruyther.—I think "the facts and law" would cover it.

LORD MACNAGHTEN.—I think so. They ought to show you the order before it is drawn up.

Mr. DeGruyther.—If your Lordship pleases. I am obliged to your Lordship.

LORD MACNAGHTEN.—On those terms their Lordships will humbly advise His Majesty to grant special leave to appeal.

Mr. DeGruyther.—I am authorised on behalf of the Secretary of State to inform your Lordships of their consent to the course your Lordships have adopted.

Special leave given as prayed.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ. CRIMINAL REVISION No. 788 OF 1908. PHANINDRA NATH MITTRA, Petitioner *v.* KING EMPEROR, Opposite Party. 14th June 1908.

Criminal Procedure Code, secs. 208 and 347—Whether sec. 347 is to be read subject to sec. 208—Commitment to the Calcutta Sessions—Application to quash—Jurisdiction of the Appellate Bench.

The Petitioner was the printer and publisher of a vernacular newspaper called *Yugantar.* He was convicted by the Chief Presidency Magistrate, Calcutta, under sec. 124A, I. P. C., in May 1908 and was undergoing imprisonment for that offence. He was again placed before the said Presidency Magistrate to answer to another charge under sec. 124A, I. P. C, for having published certain articles in the *Yugantar* in its issue of the 9th day of May 1908. The Magistrate after finishing the examination-in-chief of the prosecution witnesses committed the Petitioner to the Court of Sessions and he refused an application put in on behalf of the Petitioner for an opportunity to cross-examine the prosecution witnesses and examining witnesses for the defence. This rule was obtained to quash the commitment.

Their Lordships observed :—

"The question which is raised by the application is whether sec. 347, Cr. P. C, is to be read as subject to the provisions of sec. 208, Cr. P. C, so as to render it imperative on a Magistrate after he has decided to commit an accused for trial to the High Court to allow him to cross-examine the witnesses for the prosecution and to call witnesses for the defence. In our opinion the question must be answered in the negative, and in this view we are supported by a decision of the Judges of the Bombay High Court in the case, *In re* Clive Durant (unreported Criminal cases, Bombay, p. 975)"

As to the question of the jurisdiction of the Criminal Bench, their Lordships expressed a doubt whether the application ought not to have been made to the Judge exercising the Original Criminal Jurisdiction of the High Court.

The cases reported in I. L. R. 20 All. 264 and I L R. 26 All. 177 were dissented from and the case in I. L. R. 21 Cal. 642 was distinguished.

Mr. C. R. Das and *Mr. S. K. Haldar,* with *Babu Narendra Kumar Bose,* for the Petitioner.

Mr. Gregory for the Crown.

Rule discharged.

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ APPEAL FROM APPELLATE DECREE No. 292 OF 1906 ABDUL MIAN AND OTHERS, Plaintiffs Nos. 1 and 2, Appellants *v.* AHAMADDIN SIRKAR AND OTHERS, Respondents. 22nd July 1908.

Decree, setting aside of—Correction—Irregularity.

The suit was brought for the purpose of having the decree which had been obtained by Defendant No. 1 against Defendant No 2 and another, set aside on the ground that it was fraudulently obtained.

One Pechul Mondul held a *jama* of 23 rupees comprising 16 Bighas and odd under Defendant No. 1. At his death his heirs sold the holding to Hamid Mahomed Sircar, the father of the Plaintiffs. In spite of that transfer some years afterwards Defendant No. 1 sued the heirs of Pechul Mondul for rent for three years assessing the rent at 32 rupees and odd instead of 23 rupees. That suit was decreed in favour of Defendant No. 1 *ex parte.* Thereon the Plaintiffs brought a suit for setting aside that decree on the ground that it was fraudulent. In that they succeeded in so far as that the enhancement of rent was declared to be fraudulent, and the *ex parte* decree was corrected in such a way that a decree was made against the Plaintiffs for the rent that was due from them. Before that suit had been decided the Defendant No. 1 brought a second suit for the rent for the successive three years against the heirs of Pechul Mondul which was decreed *ex parte.* It is that decision which the Plaintiffs now sought to have set aside.

The Munsif found that the decree was fraudulently obtained, because he considered that Defendant No. 1 was obtaining the right to execute a decree against a property which he knew to be the property of the Plaintiffs in a suit brought against the heirs of Pechul and held that any attempt to execute that decree would be evidence that the decree was fraudulent. The lower Appellate Court found that the suit was not fraudulent because it was for enhanced rent. The suit was also not necessarily fraudulent because a similar suit had previously failed. It substantially dismissed the Plaintiff's case, because it held that they had no cause of action. It went further and "corrected" the decree, that is, it made a decree ordering the Plaintiffs to pay the rent in a suit which was not at all before the Court. It also gave relief against the Plaintiffs which had been barred by the statute of limitation and gave relief against persons who were no parties to the suit in which it was given.

Held—That the proceedings in the lower Appellate Court were irregular and should be set aside.

Babu Mukunda Nath Roy for the Appellants.

Moulvi Syed Samsul Huda for the Respondents.

A. T. M. *Appeal allowed: Case remanded.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. APPEAL FROM APPELLATE DECREE No. 2415 OF 1906. SRIMATI SASHI BALA SEN, Defendant No. 1, Appellant *v.* JOGENDRA LAL CHOWDHURY (Plaintiff) and FOTEH ALI AND ANOTHER (Defendants), Respondents. 23rd July 1908.

Civil Procedure Code (Act XIV of 1882), sec. 373—Withdrawal of suit—Stranger to the suit, right of.

The Plaintiff sued the Defendants for rent of a taluk. The defence set up by the Defendants was that the predecessor in title of the Plaintiff split up the taluk of which the taluk now in question was one of the parts, and that having been done without the consent of the tenants the suit in the present form must fail.

The predecessor in title of the Plaintiff brought a suit for the rent of the years 1264 and 1265. That suit was decreed, but that decision was appealed against and during the pendency of the appeal the suit was withdrawn with liberty to bring a fresh suit. Meanwhile the taluk had been sold to the present Plaintiff, who sued for rent in respect of those years, and it was contended by the Defendant that he was not entitled to sue for them as the liberty to bring a fresh suit could not enure to his benefit.

Held—That on the case being withdrawn it was as though that suit had never existed. There might be a bar to the Plaintiff's bringing the same suit again, but that did not debar a stranger to that suit from bringing another suit on the same ground of action.

Babu Promotha Nath Sen for the Appellant.

Hon'ble S. P. Sinha (Advocate General), Babu Dhirendra Lal Kastgir and *Moulvi Z. R. Zahed* for the Respondents

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ APPEAL FROM APPELLATE ORDER No. 527 OF 1907. UMED ALI, Appellant *v.* ABDUL KARIM CHAPRASI, Respondent. Heard, 13th July 1908. Judgment, 16th July 1908.

Limitation Act (XV of 1877), Sch. II, Art. 179, cl. (4)—Step in aid of execution—Service of notice on the judgment-debtor—Failure to appear if debars taking objection in subsequent proceeding.

The Appellant, judgment-debtor, applied for a declaration that the decree-holder's fifth application for execution was barred by limitation.

The first application for execution was made on 28th November 1901; notice was served on 6th December, time allowed to decree-holder on 21st December 1901; the application was dismissed for default on 4th January 1902. The second application for execution was made on 13th December 1904, notice served on 24th December; it was dismissed for default on 14th February 1905. There was a third and fourth petition on the 25th April 1906 and 14th July 1906, respectively, which were also dismissed for default. The next application was dated 9th April 1907.

Two grounds were urged by the decree-holder in the lower Courts for holding that the execution was not barred. *First*, that the application for time on the 21st December 1901 was a step in aid of execution; *secondly*, that the judgment-debtor was estopped by his conduct in not objecting to the subsequent execution proceedings of which he got notice.

The Munsif held that the first ground was untenable as the order for time was not a step in aid of execution, inasmuch as it was not shown that the decree-holder had applied either by a petition or orally for time. He however found that the judgment-debtor could not now question the validity of the execution case of 1904 inasmuch as notice was served upon him and he did not appear to contest the execution proceedings.

On appeal it was held that there could be no estoppel inasmuch as the rule laid down in *Mangal Pershad Ditchit's* case (I. L. R. 8 Cal. 51) did not apply to the present case. The Court however held that the order of the Court to the decree-holder to take steps which was passed on the 21st December 1901 must have been based on some application of the decree holder and that as his application for time was granted the order must be taken to be a step in aid of execution. The Appellate Court therefore dismissed the judgment-debtor's appeal.

Held—An application for time was not a step in aid of execution.

Kartick Nath Pandey v. *Jagannathram Marwari* (I. L. R. 27 Cal. 285), *Hira Lal Bose* v. *Dwija Charan Bose* (10 C. W. N. 209: S. C. 3 C. L. J. 240) followed.

A mere service of notice on the judgment-debtor after the decree was barred was not a proceeding in execution merely because the judgment-debtor did not come in and oppose it.

Mangal Pershad Ditchit (I. L. R. 8 Cal. 51) and *Narendra Nath Pahari* v. *Bhupendra Narain Roy* (I. L. R. 23 Cal. 574) distinguished.

Bisheshur Mullick v. *Maharaja Madhab Chunder* (10 W. R. F. B. 8) followed.

Dr. Priya Nath Sen for the Appellant.

Moulvi Nuruddin Ahmed for the Respondent.

A. T. M. *Appeal decreed.*

SHEIKH MANSAR ALI v. MATIULLAH.

case either by local enquiry under sec. 148, Cr. P. C., or in other ways. As he did neither, his order under sec. 146 is bad in law and ought to be set aside.

This was a rule granted on the 25th of April 1908, against an order of Moulvie A. N. Ali, Deputy Magistrate of Habiganj, dated the 2nd of March 1908, attaching the land in dispute under sec. 146, Cr. P. C., until a competent Court has determined the rights of the parties thereto.

The facts material to the report are briefly as follows :—

A proceeding under sec. 145, Cr. P. C., having been instituted the parties were called upon to file written statements and produce evidence. On the day fixed for hearing, the parties neither filed written statements nor produced any evidence, oral or documentary, but prayed for time to enable them to see their documents and take legal opinion. The Magistrate did not accede to their prayer but proceeded to examine them, and then attached the subject of dispute under sec. 146, Cr. P. C., recording the following order :—

"No written statements filed. No evidence oral or documentary produced, though the parties were ordered to produce it. Time is prayed for in order to see documents and consult legal opinion. This means that the parties don't want to make any straightforward statements and so time cannot be granted. Heard the parties. I am unable to satisfy myself which party is in possession of the subject of dispute, and so I attach it until a competent Court has determined the rights of the parties thereto."

Mr. A. Rasul and *Babu Biswa Nath Bose* for the Petitioner.

Babu Bepin Chandra Mullick for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

In this case proceedings were instituted under sec. 145, Cr. P. C., and the 2nd March was the day appointed for the hearing. On that day no written statement had been filed and no evidence was produced. The Magistrate thereupon heard the parties and then, being unable to decide which was in possession, proceeded to attach the land under sec. 146. In our opinion in doing this he refused to exercise his jurisdiction. In the first place he plainly ought to have given more time for regular proceedings to be followed. In the second place, in the absence of information, he might have himself held a local enquiry under sec. 148, and in various ways might have informed himself as to the facts of the case. As he had not done so we hold that he has declined jurisdiction, and the rule must be made absolute and the order complained of set aside.

B. C. *Rule made absolute.*

ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT NO. 785 OF 1903.

WOODROFFE, J
1908.
23, June.

RAJA SREENATH ROY and others,
v.
ROMESH CHANDRA ACHARYYA CHAUDHURI and others

Practice—Notice—Application for transmission of decree—Execution—Court which

RAJA SREENATH ROY v. ROMESH CHANDRA ACHARYYA CHAUDHURI.

should issue notice—Code of Civil Procedure (Act XIV of 1882), ss. 223 and 248.

The notice under sec. 248 of the Code of Civil Procedure may be served by the Court to which the decree is transmitted for execution and not necessarily by the Court which passed it and to which an application is made for transmission under sec. 223 of the Code.

The Court has a discretion whether or not it will issue a notice before ordering transmission.

Ordinarily, in a case like the present, it should be left to the Court to which the decree is to be transmitted to issue the notice.

Ex parte application in Chambers.

By a decree made in this suit, on the 1st February 1905, it was ordered and decreed that the Defendant, Ramesh Chandra Acharyya Chaudhuri, personally and the Defendants the Official Receiver and Srimati Sindhubala Debi do out of the estate of Dakshina Mohan Roy, deceased, pay to the Plaintiff Rs. 93,989 13 10 with interest and costs on Scale No. 2. Some of the properties belonging to the estate of the said Dakshina Mohan Roy were acquired by the Government for public purposes and Rs. 59,500, being the compensation awarded in respect of the properties so acquired, was lying in deposit in the Court of the Land Acquisition Judge of 24-Pergunnahs.

This was an application, in Chambers, under sec. 223 of the Code of Civil Procedure to have decree transmitted to the Court of the District Judge of 24-Pergunnahs for execution. As fairly long time would be necessary for the issue and return of the usual notice to the Defendant for showing cause against the execution of the decree under sec. 248 of the Code of Civil Procedure, and as the Plaintiffs apprehended that, during such time, the Defendants would withdraw the money in deposit, they prayed that such notice might be dispensed with and the decree transmitted: they undertook to have such notice being issued from the District Court.

The JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—This is an application under sec. 223 for the transmission of a decree from this Court for execution to another Court. The decree is one more than a year old and therefore notice must be given to the judgment-debtor. The question is whether this notice must be issued by this Court or by the Court to which the decree is transmitted. I am informed that the general practice of the Court has hitherto been to allow notice under sec. 248 to be issued by the Court to which the decree is transmitted and that it is not necessary that it should be, though it may be, issued by this Court. On the other hand, my attention has been drawn to a judgment of Mr. Justice Chitty* in which he held that notice must issue from this Court. The question must be determined with reference to the terms of the Code. I have consulted my learned brother and he agrees with me that the practice as here laid down should be followed. The explanation to sec. 248 says that in that section the phrase "the Court" means the Court by which the decree

* Unreported: Suit No. 258 of 1896: *Joy Chand Lall* v. *Chuterput Sing*: Order, dated 2nd September 1907.

was passed, unless the decree has been sent to another Court for execution, in which case, it means such other Court. Now, that explanation can only apply to cases which fall within that section and sec. 248 requires the issue of notice only where execution is applied for. In the present case, execution is not applied for under sec. 248 but application is made under sec. 223 for the transmission of the decree, under which section no notice is required to issue. The application though one on execution is not for execution. Moreover, the explanation refers to the case where a decree has been sent to another Court. That is not the case here, as the decree has not been transferred, though an application has been made for that purpose. It may, no doubt, be contended that it is advisable for a Court, before transmitting a decree, to issue notice and to determine whether there is any objection to execution. But the question before me is whether this is execution. I think not. In some cases, it may be more convenient that a decree be transmitted to another Court without notice being first issued by the trasmitting Court. In other cases, the balance of convenience may be the other way.

The Court has a discretion in the matter. The considerations which apply in the case of a decree transmitted to this Court are not the same as those which apply to a decree which this Court transmits. Ordinarily, I think, it is more convenient, in cases such as those before me, that notice should issue by the Court to which the decree is transferred and within whose jurisdiction the judgment-debtor probably is. I think, this is the case here and I, therefore, direct the transmission of the decree as prayed and that notice under sec. 248 be given by the Court to which the decree is hereby directed to be transmitted.

Messrs. Bannerjee and *Halder*, Attorneys for the Plaintiffs.

P. R. C. *Application allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE
No. 658 OF 1906.

MOOKERJEE, J.	RAM PERSHAD KOERI
CASPERSZ, J.	and ors., Plaintiffs,
1907.	Appellants,
Heard,	*v.*
26, August.	JAWAHIR ROY and
Judgment,	ors, Defendants,
27, August.	Respondents.

Bengal Tenancy Act (VIII of 1885), sec. 87, cls. (1) and (2)—Non-transferable occupancy holding—Abandonment—Notice by landlord if necessary—Mortgage of holding—Sale by mortgagee if constitutes abandonment.

Service of notice under cl. (2) of sec. 87 of the Bengal Tenancy Act is not indispensable to effect a legal abandonment and to allow a valid re-entry by the landlord.

The only effect of service of notice under sec. 87, cl. (2) is to make it obligatory upon the tenant to have speedy determination of the question whether there has been an abandonment or not.

Abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due and for cultivating the land.

Whether there has been abandonment or

RAM PERSHAD KOERI v. JAWAHIR ROY.

not in any individual case is a question of intention to be determined upon the facts of the particular case.

When an occupancy raiyat mortgages his (non-transferable) holding and the mortgagee enforces the mortgage, has the holding sold, and purchases it himself, the possession of the raiyat completely ceases and there is an abandonment of the holding by him.

This was an appeal preferred against the decision of Babu Nistaran Banerjee, Subordinate Judge of Shahabad, dated the 3rd of February 1906, reversing that of Mr. S. N. Ahmad, Munsif of Shahabad, dated the 17th of August 1905.

The facts of the case appear from the judgment.

Babus Mohendra Nath Roy and *Makhun Lal* for the Appellants.

Babu Dwarka Nath Mitra for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MOOKERJEE, J.—The subject-matter of the litigation which has given rise to this appeal is an agricultural tenancy held by the Plaintiffs-Appellants under their landlords, the Defendants-Respondents. It appears that the Plaintiffs executed a mortgage of this property in favour of the fifth Defendant, who obtained an *ex parte* decree thereon in the year 1892. Subsequently, in execution of the decree, the holding was sold and purchased by the decree-holder who obtained delivery of possession in 1898. In 1902, the landlords brought a suit for declaration that the holding was non-transferable and that the purchaser at the mortgage sale had not acquired any interest therein. The present Plaintiffs were not made Defendants to that litigation. In 1903, the landlords obtained a decree for ejectment as against the purchaser at the execution sale. They executed the decree and on the 30th June 1904 obtained delivery of possession through the Court. On the 30th August 1904, the Plaintiffs commenced this action for recovery of possession. Their case as laid in the plaint is that at the date of the institution of the suit they had a subsisting tenancy right, and that the re-entry by the landlords was unlawful. The Courts below have concurrently held that there was a mortgage decree in 1892, followed by a sale in 1898, and that since the date of the sale, the Plaintiffs have not been in possession of their holding. The Court of first instance, however, made a decree in favour of the Plaintiffs on the ground that their tenancy right had not been extinguished. The Subordinate Judge has reversed that decision on the ground that there was an abandonment by the Plaintiffs, and that at the date of the institution of the suit, there was no subsisting tenancy on the basis of which they were entitled to recover possession.

The Plaintiffs have now appealed to this Court, and on their behalf it has been contended, that the tenancy was subsisting at the date of the commencement of the action, inasmuch as admittedly, the landlords did not re enter after they had complied with the provisions of sec. 87 of the Bengal Tenancy Act. The substantial question, therefore, which calls for decision is whether the provisions of sec. 87 are exhaustive, or whether

RAM PERSHAD KOERI v. JAWAHIR ROY.

a tenancy may be terminated by voluntary abandonment and the landlord may lawfully re-enter even though he does not follow the procedure laid down in that section.

The first sub section of sec. 87 provides that if a raiyat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due and ceases to cultivate his holding either by himself or by some other person, the landlord may at any time after the expiration of the agricultural year in which the raiyat so abandons and ceases to cultivate the holding, enter on the holding and let it out to another tenant or take to cultivation himself. The reasonable construction of which this sub-section admits, appears to us to be that, abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land. If a tenant ceases to cultivate his holding either by himself or by some other person, if he omits to make arrangement for the payment of rent as it falls due, and if he does these acts without notice to his landlord, there is an abandonment. No doubt whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case. But we are unable to accept the contention of the learned vakil for the Appellants that in order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-sec. 2 of sec. 87 is necessary. One test seems to be conclusive upon the point. If the service of notice by the landlord is necessary for the determination of the tenancy, how is it that under sub sec. 3, it is open to the tenant even after such notice has been served, to recover possession from the landlord, on the ground that as a matter of fact there was no abandonment, because although he might have temporarily vacated his holding, he had no intention to abandon it. Sub-sec. 3 conclusively shows that the abandonment, if there is one, is independent of the service of notice. The only effect of the service of notice is to make it obligatory upon the tenant to have speedy determination of the question, whether there has been an abandonment or not. If the landlord re-enters without service of notice under sub-sec. 2, it is open to the tenant to bring a suit for recovery of possession till his rights have been extinguished by the law of limitation. In other words, if the tenant is an occupancy raiyat, he has two years from the date of dispossession within which to bring a suit under Sch. III, Art. 3 of the Bengal Tenancy Act. If on the other hand, he is a non-occupancy raiyat, he could sue within a period of six, if not twelve, years upon the authority of the Full Bench decision of this Court in the case of *Tamizuddin* v. *Ashrub Ali* (1). [Reference may be made to Art. 3, as recently amended, which fixes a period of two years for all raiyats and under-raiyats]. When, however, the notice under sub sec. 2 has been served, the tenant, who wishes to recover possession of the holding, must, if an occupancy raiyat, bring the suit not later than the expiration of two years and if a non-

(1) I. L. R. 31 Cal. 647 (1904).

RAM PERSHAD KOERI *v.* JAWAHIR ROY.

occupancy raiyat, must bring a similar suit not later than the expiration of six months, from the date of the notice. We are, therefore, unable to uphold the contention of the learned vakil for the Appellants, that sec. 87 is exhaustive and that the landlord is a wrong-doer if he re-enters upon the holding before he has followed the procedure laid down in that section. We have arrived at this conclusion upon a construction of the section itself and independently, of the decided cases on the point. The learned vakil for the Appellants has, however, invited our attention to the cases of *Lal Mamud Mandul* v. *Arbullah Sheikh* (2), *Samujan Roy* v. *Munshi Mahaton* (3), *Madan Mondal* v. *Mahima Chandra Mazumdar* (4) and *Rajani Kanta Biswas* v. *Ekkari Das* (5). In the first of these cases, it was held expressly that the provisions of sec. 87 are not exhaustive, as that section does not define abandonment, or give an exhaustive description of the facts which constitute abondonment. This case, therefore, is clearly opposed to the contention of the Appellants. The second case is also against the view urged on behalf of the Appellants, at any rate, it undoubtedly does not justify an inference in their favour. The learned Judges who decided that case held that where a raiyat had sold a non-transferable holding, was no longer in possession of the same and paid no rent for it and the landlord brought a suit to eject both the transferor and transferee, the landlord was entitled to a decree; it was observed that no notice under sec. 87 was necessary to enable the landlord to obtain possession of the holding, inasmuch as the provisions of that section were not exhaustive. If the contention of the present Appellants were well-founded, 'in a suit by the landlord as against the tenant and his transferee, the Plaintiff would not be entitled to decree as against the tenant, because if the service of notice under sub-sec. 2 of sec. 87 was essential to complete a valid abandonment, there was no termination of the tenancy, and the landlord would consequently be entitled to a decree only as against the transferee but not as against the transferor. This is unquestionably not the view taken in the case of *Samujan Roy* v. *Munshi Mahaton* (3). In the judgment in the third case, there is one passage which the learned vakil for the Appellants contends is at least ambiguous and may possibly be construed in his favour, the passage in question is as follows:—If we read the words of Sir Richard Couch in his judgment in *Narendro Narain Roy* v. *Ishan Chunder Sen* (6) along with sec. 87, "there can be no doubt, that in order to entitle the landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of sec. 87, namely, that the raiyat voluntarily abandons his residence without notice to the landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate. In such a case the landlord's entry would be legal and he may then let out the land to another tenant or take it into cultivation him

(2) 1 C. W. N 198 (1896).
(3) 4 C. W. N. 493 (1900).
(4) I. L. R. 33 Cal. 581 (1906).
(5) 11 C. W. N. 811 : s. c. I. L. R. 34 Cal. 689 (1907).
(6) 4 C. W. N. 493 (1900).
(6) 22 W. R. 22 (1874).

RAM PERSHAD KOERI v. JAWAHIR ROY.

self." Now, it is to be observed that the learned Judges do not say expressly that service of notice under sec. 87 is essential for the purpose of a valid and complete abandonment, and lawful re-entry by the landlord on the basis thereof. On the other hand, the language used is certainly consistent with the view that for the purposes of a valid abandonment, two things are necessary, namely, the abandonment by the tenant of his residence and cessation of cultivation and omission on his part to make arrangement for the payment of rent as it falls due. No doubt the passage in question has been somewhat differently interpreted in the fourth case cited before us, namely, *Rajani Kanto Biswas* v. *Ekkari Das* (5). But the learned Judges who decided the last case expressed an opinion that the provisions of sec. 87 are not exhaustive. It is clear, therefore, upon a review of all these decisions, that there is no authority in support of the position taken up by the Appellants, and as we have already explained upon reason and principle also, that view cannot be maintained. We are fortified in this opinion by the circumstance that sec. 87 has been left untouched in the recent amendment of the Bengal Tenancy Act; it is not unreasonable to conclude, therefore, that the construction put upon the section in the case of *Lal Mamud* v. *Arbullah* (2), which was decided ten years ago, and has never been challenged during this period, is in accordance with the true intentions of the Legislature.

(2) 1 C. W. N. 198 (1896).
(5) 11 C. W. N. 841 : s. c. I. L. R. 34 Cal. 689 (1907).

What then is the position of the parties in this case if tested in the light of these principles? The holding in question is non-transferable; the Plaintiffs executed a mortgage in favour of the 5th and 6th Defendants; the mortgage in question was inoperative as against the landlord, but by reason of the doctrine of estoppel, as between the mortagor and mortagee, the mortgage was unquestionably operative [See the decision of this Court in *Bhagirath* v. *Shafield* (7)]. The mortgagee then brought a suit to enforce the security, it was not open to the mortgagor to deny the title of the mortagee; the mortgagee, therefore, obtained a decree. He executed it, had the property sold, purchased it himself and took possession. The result of this was that the possession of the Plaintiff completely ceased and the holding passed into the occupation of the mortgagee. As against the landlord the mortgagee, auction-purchaser, was undoubtedly a trespasser. The landlord, therefore, was entitled to sue him as he did, and to obtain a decree for ejectment. It is suggested, however, that the landlord was bound to join the tenant as a Defendant in that action. In our opinion, there is no substance in this contention. There was plainly no cause of action as against the tenant. An action for ejectment could not be maintained against the tenant who was admittedly not in occupation of any portion of the lands and if the tenant had been joined as a Defendant he would have been entitled to ask for dismissal of the suit as against him, on the ground of want of cause of action. In our opinion, the landlord

(7) 4 C. W. N. 679 (1900).

RAM PERSHAD KOERI v. JAWAHIR ROY.

rightly ejected the mortgagee, auction-purchaser. The tenant now turns round and contends that he is entitled to re-enter, because although he has been out of possession since 1898, that is for a period longer than six years before the institution of the suit, there was no abandonment and the tenancy did not terminate. Upon no conceivable principle, can this position be maintained, and a bare statement of the facts is sufficient to show that there is no foundation for the contention of the Appellants.

It was further suggested faintly, that the abandonment in this case, if there was any, was not voluntary. It was argued that the Plaintiffs lost possession by an involuntary act, namely, by reason of an execution sale. It must be remembered, however, that the execution sale was due directly to a voluntary act of the tenant and is not properly attributable to the act of a stranger. The mortgage was no doubt a voluntary act on the part of the tenant. His omission to pay the mortgage debt was admittedly voluntary; and his failure to satisfy the mortgage decree, when obtained, was equally voluntary. How can it be contended then with any show of reason, that he lost possession of the holding by an involuntary act? In our opinion, the facts found conclusively show that the holding in question has been abandoned, and that at the date of the institution of this suit, the Plaintiffs had no subsisting title on the basis of which they could justly claim to recover possession thereof from the landlords.

The appeal consequently fails and is dismissed with costs.

Appeal dismissed.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1258 OF 1907.

Doss, J. 1908. Heard, 16, June, Judgment, 17, June.	MAHARAJA RADHA KISHORE MANIKYA BAHADUR, Plaintiff, Appellant, v. UMED ALI, Defendant, Respondent.

Bengal Tenancy Act (VIII of 1885), secs. 30, 37, 50, 52, 115—Res judicata—*Presumption as to status from uniform payment of rent, after record-of-rights published—Suit for increase of rent for increased area—Civil Procedure Code (Act XIV of 1882), sec. 13*—Res judicata.

Where after an entry in the record of-rights that the tenant is an occupancy-raiyat, the landlord brought a suit for enhancement of rent,

Held—*That notwithstanding the provisions of sec. 115 of the Bengal Tenancy Act the tenant was entitled upon proof of uniform payment of rent for 20 years, before the record-of-rights were framed, to the benefit of the presumption under sub-sec. (2) of sec. 50.*

That the word "thereafter" in sec. 115 refers to a period subsequent to publication of the record-of-rights.

A suit for assessment of additional rent on the same additional area which formed the subject-matter of a previous suit, is barred as the decision in the previous suit operates as res judicata.

This was an appeal from a decision of Babu Hari Lal Mukerjee, Sub-Judge of Tipperah, dated the 20th of March 1907, confirming a decision of Moulvi M. Zahur, Munsif, 1st Court at Comilla, dated the 28th of February 1906.

MAHARAJA RADHA KISHORE MANIKYA BAHADUR *v.* UMED ALI.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Govind Chandra Dey Roy* for the Appellant.

Moulvi N. Ahmed and *Moulvi Samsul Huda* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal by the Plaintiff in a suit for assessment of additional rent for additional area said to be comprised in a raiyati-holding, and for enhancement of rent of that holding on two-fold grounds:—*first*, that the rent paid by the Defendant was below the prevailing rate paid by occupancy-raiyats for land of a similar description and with similar advantages; and, *secondly*, that there has been a rise in the price of staple food-crops.

The Defendant contested the suit on the ground that the claim for additional rent is barred by the judgment in a previous suit between him and the Plaintiff, that he is a raiyat holding at fixed rates, that he has been paying rent at a uniform rate since the time of the permanent settlement, and that, therefore, the rent of his holding could not be enhanced.

After the institution of the suit, the Plaintiff applied for permission to withdraw the suit in so far as it claimed assessment of additional rent for additional area, and for enhancement of rent on the first of the two grounds with liberty to bring a fresh suit upon those two grounds. The Courts below have refused that permission. On the merits, the Courts below have held that the Defendant has succeeded in proving that he has been paying rent at a uniform rate for a period of twenty years immediately before the institution of the suit as well as before the framing of the record-of-rights of the estate in which his holding is situated and that consequently he is entitled to the benefit of the presumption laid down in sec 50, sub-sec. (2) of the Bengal Tenancy Act, and that the Plaintiff has not been able to rebut that presumption by any evidence. Both the Courts below have accordingly dismissed the Plaintiff's suit.

The Plaintiff has appealed and, on his behalf it has been contended that inasmuch as in the record-of-rights the status of the Defendant has been entered as a mere occupancy-raiyat he is by reason of the provisions of sec. 115 of the Act, precluded from invoking the aid of the presumption laid down in sub-sec. (2), sec. 50 of the Act. This contention was raised in the Courts below but without success. Though there might possibly have been some plausible ground for the interpretation sought to be placed upon sec. 115 by the learned vakil for the Appellant, if the section had not contained the word "thereafter,"—I think the presence of that word materially alters the meaning of that section. Some significance undoubtedly attaches to the word "thereafter" in the section; what that significance is will be shown later. It seems to me at present that the construction put upon the section by the learned vakil for the Appellant is inconsistent with the language of sec. 103B, sub sec (3) which enacts that "every entry in the record-of-rights so published shall be evidence of the matter referred

MAHARAJA RADHA KISHORE MANIKYA BAHADUR v. UMED ALI.

to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect." According to the construction put upon sec. 115 by the Appellant, the meaning of that section is that, if the status of a tenant has once entered in the record-of-rights as an occupancy-raiyat, that entry shall not only be presumed to be correct until it is proved by evidence to be incorrect but that the presumption of the correctness of that entry is irrebuttable, and that it precludes the tenant from even showing that his status is that of a raiyat holding at fixed rates, by invoking the aid of the presumption laid down in sec. 50, sub-sec. (2). In the next place, if the contention of the Appellant were sound, the provisions of sec. 106 of the Act, in so far as they enable the tenant to institute a suit within three months from the date of the certificate of the final publication of the record-of-rights for the decision of any dispute between him and the landlord as regards, among other things, his status, will be wholly nugatory. That section provides in clear terms that notwithstanding an entry as to the status of a raiyat in the record-of-rights, if there is any dispute with regard to such entry, the tenant may, within a certain period, bring a suit before a revenue officer for a decision of that dispute; and the principal mode in which a tenant may be able to establish in that suit that he is a raiyat holding at fixed rates and not a mere occupancy-raiyat, is by calling in aid the benefit of the presumption laid down in sec. 50, sub sec (2) of the Act, that is to say, that he has been paying rent at a uniform rate for a period of twenty years before the institution of the suit. Such a suit would be manifestly opposed to the provisions of sec. 115, if the construction of that section as contended for by the Appellant were allowed. If, then, the tenant, notwithstanding the provisions of sec. 115, has a right to bring a suit under sec. 106 to be declared that he is a raiyat holding at fixed rates, by invoking the benefit of the statutory presumption arising from uniform payment of rent for twenty years prior to the institution of the suit, the significance of the word 'thereafter' in sec. 115 becomes perfectly apparent. It must refer to a period subsequent to the publication of the record-of-rights. And, this view gains support from the case of *The Secretary of State for India in Council* v. *Kajimuddi* (1), where, at p. 622, the learned Judges observed that "sec. 115 seems to contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record-of-rights was framed." I am of opinion that the interpretation sought to be placed upon sec. 115 by the learned vakil for the Appellant it is not well-founded.

It was next contended by the learned vakil for the Appellant that the Courts below are wrong in refusing to the Plaintiff permission to bring a fresh suit for assessment of additional rent on the ground of increase in the area of the holding. The Court of first instance was of opinion that the Plaintiff would be debarred by the provisions of sec. 37 of the Act from bringing the present suit as it has been instituted within a period of fifteen years after his failure in a

(1) I. L. R. 26 Cal. 617 (1899).

MAHARAJA RADHA KISHORE MANIKYA BAHADUR v. UMED ALI.

previous suit, for assessment of additional rent under sec. 52 of the Act. The Court of Appeal below, however, has not stated any reason why another suit under sec. 52 of the Act for assessment of additional rent could not be brought within a period of fifteen years from the decision in a previous suit of the same kind. But if the Court of Appeal below was of opinion that sec. 37 was a bar to such a suit, it seems to me that it was in error. The very nature of the claim in a suit under sec. 52, shows that such a suit may be brought after any interval of time, for instance, where the increase in the area of a holding is due to accretion or encroachment on the landlord's waste, there is no reason why assessment of additional rent for the additional area should not be allowed as often as there is such addition to the holding. But I think the Appellant is not entitled to ask for permission to institute a fresh suit under sec. 52, because if the suit is for assessment of additional rent on the same additional area which formed the subject-matter of the previous suit, the decision in the previous suit, operates as *res judicata*. If, however, the suit, is for assessment of additional rent for any additional area outside the area comprised in the previous suit, the cause of action of the latter suit would be different from the cause of action in the previous suit: and, hence, there is no need to ask for permission to bring a fresh suit.

On these grounds I am of opinion that the judgments and decrees of the Courts below ought to be affirmed and this appeal ought to be dismissed with costs.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 392 OF 1906.

COXE, J.
DOSS, J.
1908.
Heard, 14 and 15, July.
Judgment, 15, July.

SREMATI AYATUNNESSA BIBI, Defendant No. 1, Appellant,
v.
KARAM ALI, Plaintiff, Respondent.

Mahomedan Law—Divorce—Marriage contract, option of talak *given to wife in—Exercise of option—Delay, effect of, when not unreasonable.*

When a power is given to a Mahomedan wife by the marriage contract to divorce herself on her husband's marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears of the news. The injury done to her is a continuing wrong and she has a continuing right to exercise the power.

MEER ASHRUF ALI *v.* MEER ASHAD ALI (1) *followed.*

HAMIDOOLLA *v.* FAIZUNNISSA (2) *referred to.*

The rules relating to the exercise of a power of divorce given to the wife by the husband after marriage should not govern the exercise of a similar power given in the marriage contract itself.

Held—*That the delay in exercising the power in this case was not unreasonable.*

This was an appeal preferred on the 12th of November 1906, against the decree of Babu J. C. Das, Subordinate Judge of Zillah Dacca, dated the 30th of June 1906.

(1) 16 W. R. 260 (1871).
(2) I. L. R. 8 Cal. 327 (1882).

SREMATI AYATUNNESSA BIBI v. KARAM ALI.

The appeal arose out of a suit brought by the Plaintiff Karam Ali for the recovery of his wife the Defendant No. 1, Ayatunnessa Bibi, the other Defendants being the father and other relations of Defendant No. 1. The Plaintiff's case was that he married the Defendant No. 1 on the 11th Sraban 1305 (1898), that for five years thereafter they lived together, but there being no issue born of the marriage, he married a second time with her consent. That after this the Defendant No. 1 continued to live with him for a year, and then in the latter end of Assar 1310 (1903) she was taken away by the Defendants Nos. 3 and 4 in the Plaintiff's absence, and that since then she had been prevented by the other Defendants from coming back.

The Defendant's case was that at the time of her marriage the Plaintiff verbally agreed not to marry again but that if he did the Defendant No 1 would have the right to divorce herself; that this and other conditions of the marriage were embodied in the register of marriages as would appear from an entry dated 28th July 1898; that two years after the marriage the Plaintiff began to ill-treat her till she was compelled to leave his house and seek shelter in her father's; that since then the Plaintiff did not make any inquiries about her or take any notice of her; but on the other hand he broke his marriage contract with her by marrying a second time; that on the 27th Augrahayan 1311 he gave herself *talak*, in the presence of *mutbars* of the village, and she also had this registered in the marriage register on the 13th December 1904.

The learned Subordinate Judge in decreeing the Plaintiff's suit observed that in this case option was delegated on the happening of a condition, namely of a re-marriage and there was no time specified within which this option should be exercised. The option, in his opinion, should under such circumstances have been exercised "just on hearing that the condition happened," But it appeared to him upon the evidence taken along with her written statement that the Defendant No. 1 "did not exercise her option in time but that she divorced herself long after having heard of the re-marriage by her husband." He held that on the authorities such a divorce given by the wife under authority delegated by the husband was inoperative. He accordingly made a decree against Defendant No. 1 for restitution of conjugal rights.

The Defendant No. 1 preferred this appeal to the High Court.

Moulvi Serajul Islam for the Appellant.

Dr. Priya Nath Sen for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This appeal arises out of a suit for recovery of a wife.

The defence is that at the time of the marriage it was stipulated between the parties that in the event of the husband taking another wife the wife should have the power to divorce herself and that in the exercise of that power the Defendant divorced herself in December 1904.

The Subordinate Judge has found that the stipulation was made and that the Plaintiff broke it by marrying a second time. But he has held that the divorce

SREMATI AYATUNNESSA BIBI *v.* KARAM ALI.

is invalid, because the Defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

The wife appeals. The learned vakil for the Appellant relying on the decision in *Meer Ashruf Ali* v. *Meer Ashad Ali* (1) argues that the wife did not lose her option of declaring herself divorced by reason of the delay between the time when she heard of the second marriage of her husband and the time when she exercised her right. We cannot see that there is any real distinction between the case cited and the present one. If we follow that decision, we are bound to hold that the Defendant's divorce was valid and the suit must necessarily fail.

The learned pleader for the Respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's Anglo-Mahomedan Law, second edition, p. 162. But the passages which have been read to us from these authorities appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced. In Wilson's Anglo-Mahomedan Law, p. 168, it is stated: "It is a fact that nearly all of what is said on the subject in the Fatwa Alamgiri and the Hedaya has reference to permission given by the husband to the wife after marriage to divorce herself at her option in specified contingencies." The cases referred to are, therefore, different from the case now before us in which the parties entered, before marriage, into this contract that the wife should have power to divorce herself under certain circumstances. This stipulation was a most important element in the marriage contract. That the above is a true distinction appears to be accepted in *Hamidoolla* v. *Faizunnissa* (2) in which the learned Judges say: "the Mahomedan Law on the subject which has been laid before us provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but in no way, so far as it has been laid before us, limits the exercise of that power to those occasions. . . . . We are aware of no reason why an agreement entered into before marriage between parties able to contract under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan Law, should not be carried out." We agree with this decision and think that we are not bound, in dealing with a stipulation in a marriage contract, to be strictly governed by the rules laid down in the passages which have been read to us which deal with the exercise of the power of divorce by a wife when an option is given by a husband after marriage. We think that when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise

(1) 16 W. R. 260 (1871).

(2) I. L. R. 8 Cal. 327 (1882).

SREMATI AYATUNNESSA BIBI *v.* KARAM ALI.

the power. This was the view taken by the Court in the case of *Meer Ashruf Ali* v. *Meer Ashad Ali* (1) which has already been cited. And that view was followed in *Nuruddin* v. *Mustt. Chunuri* (3) in which it is clear that the wife exercised the power of divorcing herself some time after the contingency which gave rise to it occurred.

On reading the evidence we do not think that the delay which the wife made in this particular case was under the circumstances unreasonable.

Accordingly we must hold that the divorce was valid and the suit should have been dismissed.

The appeal is accordingly allowed with costs in both the Courts. We assess the hearing fee in this appeal at 3 gold mohurs.

N. G. *Appeal allowed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1456 OF 1906.

STEPHEN, J. HOLMWOOD, J. 1908. 28, February.

ABDUL KADIR and another, Defendants, Appellants, *v.* HAMDU MIAH, Plaintiff, Respondent.

Limitation Act (XV of 1877), Sch. II, Art. 45—Alluvial accretion—Settlement of khas *mehal land—Suit to set aside an order refusing settlement—Reg. IX of 1825.*

A suit to set aside an order of the Commissioner refusing to make a settlement of* khas *mehal land with the Plaintiff who claimed settlement of it as an accretion to his jote is governed by Art. 45 of Sch. II of the Limitation Act and not by Art. 14.

This was an appeal preferred on the 16th of August 1906, against the decree of Babu Promotha Nath Banerjee, Subordinate Judge of Zillah Chittagong, dated the 1st of May 1906, confirming that of Babu Ananta Nath Mitter, Munsif of Hathazari, dated the 26th of July 1908.

The facts of the case appear from the following portion of the judgment of the 1st Court:—

"The suit arises out of a settlement of a piece of Government land. The Plaintiff states that the disputed land is an alluvial accretion to his lands described in Schs. 1 to 3, the land of Sch. 1 being recorded in the name of his father and that of Sch. 2 in his own name and that of Sch. 3 has been purchased by him from the recorded *jotedar*, Rakimuddin; that the disputed land was recorded as in his possession along with the land of Sch. 2 in the recent survey; that the Collector gave him settlement and he executed a *kabuliyat*, dated the 26th September 1902 and the Collector granted a *pottah*, dated 31st March 1903, and that he has made over the *pottah* to the Collector as it was called from him; that on his coming to take back the *pottah* he learnt that the Defendant No. 2 preferred an appeal to the Commissioner against the order of the Collector and that the Commissioner ordered settlement to be made with the Defendant No. 2; that under the circumstances he has brought the present suit for asking for declaration of his right to the disputed land as an alluvial accretion."

Moulvi Syed Samsul Huda and *Babu*

(1) 16 W. R. 260 (1871).
(3) 8 C. L. J. 49 (1905).

ABDUL KADIR v. HAMDU MIAH.

Girija Prosanno Roy Chaudhury for the Appellants.

Babu Krishna Prosad Sarbadhikari for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff in this case obtained settlement of a certain land from the Collector. On the application to the Commissioner this was set aside and the land was settled with Defendant No. 2, one of the Appellants before us. The Plaintiff instituted this suit in order to have it declared that he was entitled to the settlement of the land as an accretion to his jote. In the lower Court he was successful and the judgment of the Munsif was, on appeal, affirmed by the Subordinate Judge. This judgment now comes before us only on one point, namely, whether the Plaintiff's suit was or was not barred by limitation. It is alleged by the Appellants, that this action comes under Art. 14 of the Second Schedule of the Limitation Act. Both parties, however, have treated the land as *khas* mehal of the Government, and it is plain that we must take the Commissioner's order as being made under Reg. IX of 1825 and that it has nothing at all to do with Reg. XI as far as limitation is concerned.

Under these circumstances the article under which the case falls is Art. 45 and consequently this suit is brought in time and the appeal must be dismissed with costs.

S. C. S. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE

No. 858 OF 1907.

RAMPINI, C. J.
RYVES, J.
1908.
Heard,
19, June.
Judgment,
30, June.

BASIRUDDIN BISWAS,
Plaintiff, Appellant,
v.
DEBENDRO NATH BISWAS, and others,
Defendants,
Respondents.

Transfer of Property Act (IV of 1882), sec. 85—Mortgage suit—Parties—Omission to join all the heirs of a purchaser of mortgaged property within time—Effect—Limitation—Notice—Apportionment of debt.

Where three days before the period of limitation would expire a mortgagee instituted a suit on his mortgage making the original mortgagors and one out of several heirs of a purchaser of the mortgaged properties Defendants and the latter in his written statement filed after the period of limitation had expired objected that the suit was not maintainable by reason of the other heirs of the purchaser not having been made parties,

Held—*That the suit could not be dismissed on the ground of defect of parties unless it was found that the Plaintiff was aware at the date of the suit, of the interest of these persons in the mortgaged property;*

Held further, *that the proper procedure was to add these heirs as parties, and if it appeared that at the date of the suit the Plaintiff was not aware of their interest in the property, to ascertain what proportion of the debt was due by the heir who had been made a party in time and to pass a decree against his share for that amount.*

BASIRUDDIN BISWAS v. DEBENDRO NATH BISWAS.

HARI KISSEN v. VELIAT HOSSEIN (2) and GHULAM KADIR v. MUSTAKIN KHAN (1) *referred to.*

This was an appeal preferred on the 7th of May 1907, against the decree of Babu Bhagabati Charan Mitra, Subordinate Judge of Zillah Nadia, dated the 4th of February 1907, reversing that of Babu Bankim Chandra Mitra, Munsif of Chuadanga, dated the 11th of May 1906.

The facts of the case will appear from the judgment.

Babu Sasi Sekhar Bose (for *Babu Jogendra Chandra Dutt*) for the Appellant.

Dr. Priya Nath Sen for the Respondents.

The JUDGMENT OF THE COURT was as follows:—

RYVES, J.—This appeal arises out of a suit for sale on a mortgage brought by the mortgagee against Defendants Nos. 1 and 2, the representatives of the deceased mortgagor, and Defendant No. 3 who, the Plaintiff alleged in his plaint, had purchased the mortgaged property. The mortgage, which was a registered one, was executed on the 9th Bhadra 1299 and the mortgage money was re-payable in the month of Chaitra of the same year.

Plaintiff alleged that nothing had been paid towards either principal or interest and that his cause of action accrued on the 1st of Bysack 1300, *i.e.*, 15th April 1893.

The plaint was filed on the 12th April 1905 exactly, 3 days before the period of limitation for the suit expired.

Defendant No. 3 alone defended the suit. He stated in his written statement that the property in suit had not been purchased by him, but by his grandmother, and that, on her death, he and his three brothers, who were joint with him, jointly inherited the property and were in possession of it, and pleaded that, as they had not been made parties, the suit was not maintainable. He also contended that the mortgage deed was not genuine and was void for want of consideration. This written statement was filed on the 17th July 1905.

The learned Munsif found that the mortgage was proved and was valid. He also found that Defendant No. 3's three brothers were jointly interested in the property as alleged by the Defendant No. 3, but held that, as Plaintiff was not aware of the interest of these brothers the suit was maintainable, and decreed the suit. He says in his judgment "the decree will evidently be infructuous as against the brothers who are not parties to the suit."* Defendant No. 3 appealed. The learned Subordinate Judge decreed the appeal and dismissed the Plaintiff's suit. He only tried one issue apparently. His judgment runs as follows:—"It is admitted that the property now belongs to Debendra (Defendant No. 3 in this case) and to his brothers, Monmotha, Brojendra and Jogendar, the heirs of the auction-purchaser, Modhu Sundari, but that the latter were not made parties though the plea of their non-joinder was taken by the Defendants

(1) I. L. R. 18 All. 109 (1895).

(2) 7 C. W. N. 723 : s. c. I. L. R. 30 Cal. 755 (1903).

* Cf. *Ram Taran v. Rameswar*, 11 C. W. N. 1078.—REP.

BASIRUDDIN BISWAS v. DEBENDRO NATH BISWAS.

in their written statement. It cannot be denied that those people being interested in the mortgaged property were necessary parties and they should have been added immediately upon the objection of the Defendant to prevent multiplicity of suits. Vide sec. 85 of the Transfer of Property Act and *Ghulam Kadir* v. *Mustakin Khan* (1). The Plaintiff not having complied with the provisions of law, the suit should stand dismissed. The learned Munsif has taken an erroneous view of the law by awarding a decree, for equity of redemption can't be partial." He did not try the issue found in Plaintiff's favour by the first Court, namely, that at the date of suit Plaintiff was unaware of the interest of the three brothers of Defendant No. 3 in the property. Until he had tried that issue and found it against the Plaintiff, I do not think he could have dismissed the suit, having regard to the proviso to sec. 85 of Act IV of 1882. In the case in the Allahabad Court relied on by the lower Court, it was apparent from the plaint itself that a person, who was interested in the property, admittedly to the knowledge of the Plaintiff, had not been made a party.

What that case lays down is that the non-joinder in a suit to which Chap. IV of Act IV of 1882 applies, of a party interested in the mortgaged property within the meaning of sec. 85 of that Act (*i.e.*, of whose interest the Plaintiff has notice) is a fatal defect in the suit unless cured by the action of the Court under sec. 32 of the Code of Civil Procedure. In that particular case, the High Court was moved to add the party omitted as Defendant, but declined to do so primarily on the ground that the mortgagees there sued to recover Rs 25,000 in lieu of Rs. 22,701 originally lent by them, although they had already realised more than the principal amount, and were "therefore persons who are not entitled to the sympathy of the Court."

The learned pleader for the Appellant informs us that the reason why the Plaintiff did not ask the Court to add the brothers of Defendant No. 3 to the array of parties when he had notice of their interest in the written statement was because the suit as against them was then time-barred, and, on the pleadings, this would seem to be the case. It seems to me that there was no duty on the Plaintiff to bring on the record persons against whom he could get no relief. It may be said that at the date when the suit went to trial the only "mortgaged property" about which an adjudication was possible was limited to the undivided share of Defendant No. 3, and that, as against the rest of the property originally mortgaged, there was then no subsisting mortgage. The shares of the other brothers were no longer "mortgaged" in law.

I do not think there is in principle much difference between the case where a mortgagee releases one of his mortgagors and sues to recover their proportionate share of the mortgage money from the other mortgagors [vide *Hari Kissen Bhagat* v. *Veliat Hossein* (2)] and the case where a mortgagee by his default (as in this case by waiting till almost

(1) I. L. R. 18 All. 109 (1905).

(2) 7 C. W. N. 723: s. c. I. L. R. 30 Cal. 755 (1903).

the last moment to bring his suit) finds that as against some of the mortgagors or persons who have become their representatives in interest his lien has become extinct.

We have been asked to remand the suit so that the Plaintiff may recover from the Defendant No. 3 the proportionate share of the mortgage debt to which he is entitled as against him and to allow the brothers of the Defendant No. 3 to be made parties now, and I think we should direct the lower Court to do so, so as to allow a final adjudication to be arrived at in this litigation.

The Munsif found that the Plaintiff had a good mortgage and that, as against the Defendants then before him, the Plaintiff was entitled to a decree.

I think, therefore, that the decree of the lower Court should be set aside and the three brothers of Defendant No 3 should now be made parties and the suit remanded to the lower Court under sec. 562, C. P. C., for trial on its merits. If the lower Court finds that Plaintiff had notice of the interest of the three brothers of Defendant No. 3 at date of suit, then I think he should in any event pay the cost of the appeal below and of this Court, otherwise, I think costs here and in the Court below should be costs in the case.

If the lower Court agrees with the decision of the learned Munsif, he should ascertain what amount is due under the mortgage by Defendant No. 3 and prepare a decree accordingly under sec. 88 of Act IV of 1882.

RAMPINI, C. J.—I agree.

N. G. *Case remanded.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 2279 OF 1906.

MACLEAN, C. J. DOSS, J. 1908. Heard, 24, April Judgment, 28, April.

BEPIN BEHARI KUNDU and anr., Defendants, Appellants, *v.* DURGA CHURN BANDOPADHYA, Plaintiff, Respondent.

Hindu Law—Alienation by Hindu widow —Consent of female reversioner, if passes absolute title—Propriety of transaction—Presumption of law.

An alienation of her husband's estate by a Hindu widow without legal necessity but with the consent of the next reversioners who if they had succeeded to the estate would themselves have been entitled to the limited estate of a Hindu widow does not pass an absolute estate to the transferee.

No presumption of the propriety of the transaction arises from such consent.

This was an appeal preferred on the 4th of December 1906, against the decree of Mr. W. S. Coutts, District Judge of Zillah Faridpur, dated the 29th of October 1906, affirming that of Babu Bimola Charan Majumdar, Subordinate Judge of that district, dated the 30th of July 1904.

The facts of the case material to this report will appear from the judgment.

Dr. Priya Nath Sen for the Appellants.

Babu Baikuntha Nath Das for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—As I concur in the

BEPIN BEHARI KUNDU v. DURGA CHURN BANDOPADHYA.

fuller judgment about to be delivered by my brother Doss, I propose to say but little.

This is a suit for possession of certain property. Both Courts have decreed the suit. The facts are stated in the judgment of the lower Appellate Court and I need not recapitulate them. The Defendants claim the property under certain conveyances made by one Sona Moni who enjoyed, in that property, the estate and interest of a Hindu widow. The Plaintiff, who is the reversioner, contends that those conveyances are not binding on him. It has been found that the sales were not effected for legal necessity. It is, however, urged for the Appellant that the sales were made with the consent of the then reversioners, Bindo Bashini and Baroda, both of whom were purdanashin women. There is no finding that there was any such consent: and this strictly should dispose of the appeal. But if there were, it is only the consent of two women, whose interest was the limited one of Hindu widows: This consent could not bind or affect the present Plaintiff who takes an absolute estate. Then it is said their consent raises a presumption of the propriety of the transaction. I do not think that the consent even if any there were, which is not found, of these two purdanashin women, whose position of dependence is so well recognised in India, could have any such effect.

These views are in accordance with the authorities cited in the judgment of my learned colleague. All the points fail, and the appeals must be dismissed with costs.

Doss, J.—The Plaintiff, who is the Respondent in this appeal, sued as the sole reversionary heir of his maternal grandfather, Kali Kant Roy, to recover possession of certain properties from the Defendants, who claimed to hold them under a purchase from the widow of Kali Kant Roy.

Kali Kant died leaving a widow Sonamoni and three daughters, Baroda Sundari, Bindu Bashini and Mokshoda. Sona Moni died on the 4th Bysack 1307, *i.e.*, the 16th April 1900. Baroda Sundari predeceased her mother, without leaving any male issue. Bindu Bashini who survived her mother died on the 4th Assin 1307, that is, the 20th September 1900, leaving a son, the present Plaintiff. Mokshoda became a widow, when she was a child and consequently could not be an heir under the Hindu law. Sona Moni inherited a widow's estate in the properties left by her husband, and her two daughters were the next reversionary heirs at the time.

On the 17th Pous 1287, that is, the 31st December 1880, when both Baroda Sundari and Bindu Bashini were living and Plaintiff had been born, and was a minor, the widow Sona Moni conveyed by a *kobala* the properties in suit to the father of the Defendants.

Plaintiff seeks to recover possession of this property on the ground that on the death of his mother, Bindu Bashini, on the 20th September 1900, he became solely entitled to succeed to it as his reversionary heir. The principal ground, (among others, to which it is needless now to refer) upon which the claim was resisted by the Defendants was that the alienation was made by the widow for legal necessity, and with the assent of her two daughters.

BEPIN BEHARI KUNDU *v.* DURGA CHURN BANDOPADHYA.

Both the Courts below have concurrently found that the Defendants have totally failed to prove the existence of any legal necessity justifying the sale, and have accordingly decreed the Plaintiff's suits.

The only point which has been raised before us in second appeal is, that the Courts below ought to have held that the consent of the daughters to the alienation by the widow raised a presumption of law that the purpose for which it was made was proper, or that, at any rate, it is some evidence of the propriety of the transaction.

There is no finding by either of the Courts below that the daughters assented to the sale. That being so the foundation of the contention fail.

But even assuming for a moment that the daughters did, in fact, give their consent to the sale, I am still of opinion that in the circumstances of this case, it does not raise any presumption of law that the purpose for which the alienation was made was proper, so as to pass an absolute and indefeasible estate in favour of the alienee. The reversionary estate of the daughters at the date of the alienation was of a limited and qualified character, and was contingent upon their surviving the widow. If the widow had made a gift of the property to the daughters, the effect of the transaction would have been to accelerate the contingent limited estate of the daughters, and to reduce it into an estate in possession. It would not have conferred on them any larger estate than the limited and qualified estate to which they would have succeeded had they survived the widow. It would not have conferred on them, an estate transmissible to their own heirs: *Isri Dut Koer* v. *Musst. Hansbutiti Koerin*(1), *Duli Singh* v. *Sundar Singh* (2), *Bhupal Ram* v. *Lachma Koer* (3). For the same reasons, if the widow had, with the concurrence of the daughters, alienated the property in favour of a stranger, the alienee would not have taken any larger estate than the limited and qualified estate of the widow or of the daughters, for the alienee cannot have a larger estate than that possessed by the alienors, the coalition of the estate of the widow with that of the daughters not having the effect of amplifying the quantum of the resultant estate: *Koer Goolab Sing* v. *Rao Kurun Singh* (4), *Varjivan Rangi* v. *Ghelji Gopal Das* (5), *Vinayak* v. *Govind* (6), *Abinash Chandra* v. *Hari Nath* (7).

The result, no doubt, would have been different, if the next reversionary heirs concurring in the alienation had not been females, but males entitled under the law to succeed to an absolute estate of inheritance: *Bajrangi Singh* v. *Manokarnika* (8), *Nobo Kishore* v. *Hari Nath* (9).

If then the real operative effect of consent by a female reversioner to an alienation by a widow, be such as I have stated, it is somewhat difficult to see how

(1) L. R. 10 I. A. 150 (1883).
(2) I. L. R. 14 All. 377 (1892).
(3) I. L. R. 11 All. 253 (1888).
(4) 14 M. I. A. 176 (1870).
(5) I. L. R. 5 Bom. 563 (1881).
(6) I. L. R. 25 Bom. 129 (1900).
(7) 9 C. W. N. 25: s. c. I. L. R. 32 Cal. 62 (1904).
(8) 12 C. W. N. 74: s. c. L. R. 35 I. A. 1 (1907).
(9) I. L. R. 10 Cal. 1102 (1884).

BEPIN BEHARI KUNDU v. DURGA CHURN BANDOPADHYA.

it can raise a presumption of law that the purpose for which the alienation was made was proper, and then indirectly through the medium of such a presumption, confer on the alienee a larger estate than that which it directly and without the aid of such a presumption, it is incapable of conferring. In *Varjivan Rangi* v. *Ghelji Gopal Das* (5) in which the widow had made a similar alienation with the consent of her daughter, Bai Bhakat; Sir Charles Sargent, in delivering the judgment of the Court, said:—"Nor can the mere concurrence of Bai Bhakat, albeit the nearest in succession, (having regard to the state of dependence in which all women are supposed by Hindu law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one." In *Vinayak* v. *Govind* (6), Jenkins, C. J., quoted this opinion with approval and adopted it as part of the reasoning in his judgment.

The passage cited by the learned vakil for the Appellant from the judgment of the Privy Council in the *Collector of Masulipatam* v *Cavaly Venata Narainapah* (10), in support of his contention does not touch the present case, because as the previous context shows their Lordships were there dealing with the case where the reversionary heirs are collaterals, that is male heirs entitled to succeed to an absolute estate of inheritance, subject to the estate of the widow. Similarly in the passage cited from the judgment of the Privy Council in *Rajlukhee Debea* v. *Gokool Chunder Chowdhury* (11), their Lordships were evidently referring to male reversioners.

(5) I. L. R. 5 Bom. 563 (1881).
(6) I. L. R. 25 Bom. 129 (1900).
(10) 8 M. I. A. 529 at p. 551 (1860).

As to the second branch of the contention that the consent of the daughters is, at any rate, some evidence of the propriety of the alienation, the Courts below having found that beyond the mere recitals in the *kobala* there is absolutely no reliable evidence of the existence of legal necessity, such evidence cannot be of any avail to the Defendants, unless, it by itself, be sufficient to establish legal necessity.

For the foregoing reasons I think this appeal ought to be dismissed with costs.

This judgment governs Appeals from Appellate Decrees Nos. 2280, 2281 and 2282 of 1906.

N. G. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 205 OF 1906.

RAMPINI, J.
SHARFUDDIN, J.
1908.
Heard, 17 and 25, March.
Judgment, 27, March.

BIBEE GOLAP KUMARI SAHEBA, Plaintiff, Appellant,
v.
MD. KADIRUDDIN and ors., Defendants, Respondents.

Court-fee on plaint—Reg. III of 1872, secs. 5, 8—Settlement—Suit instituted before Settlement Officer without Court-fee—Transfer to Civil Court—Court-fee on plaint if leviable.

No institution Court-fee need be paid when a suit which was instituted before a Settlement Officer under the provisions of Reg. III of 1872 without Court-fee was transferred to a Civil Court under sec. 5 of the Regulation.

(11) 13 Moo. I. A. 209 at p. 228 (1869).

BIBEE GOLAB KUMARI SAHEBA *v.* MD. KADIRUDDIN.

This was an appeal preferred on the 12th of June 1906, against the decree of P. Mirza, Esq., Subordinate Judge of Jamtara in Zillah Santhal Pargannahs, dated the 9th of March 1906.

The Appellants were the *mokurraridars* of Taluks Nila and Bheradeoli in Pargannah Kundabit in the Sub-division of Jamtara which had been notified for settlement under Reg. III of 1872. He instituted the present suit in the Court of the Settlement Officer of the Santhal Pargannahs for recovery of *khas* possession of certain properties lying within the said *mokurrari taluks.* The suit along other suits instituted by the Appellant was referred to the Court of the Subordinate Judge of Jamtara for determination and trial under sec. 5 of Reg. III of 1872. The Subordinate Judge registered the suit as title suit No. 9 of 1905 and then on the 24th October 1905 issued notice to the Plaintiff to pay proper Court-fees by the 22nd December 1905. On the 20th February 1906, notice was again issued on the Plaintiff calling on him to pay Court-fees on the value of the suit within 15 days, failing which, it was stated, the suit would be dismissed. The Court-fees not having been paid the suit was dismissed on 9th March 1906.

The Plaintiff appealed.

Babu Brojo Lal Chuckerbutty for the Appellant.

Babu Ram Churn Mitter for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal against an order of the Subordinate Judge of Jamtara, dismissing a certain suit for failure to pay Court-fees within the prescribed time. The suit had been instituted before the Settlement Officer. He had referred the suit to the Civil Court under the provisions of sec. 5 of the Settlement Regulation of 1872. The Subordinate Judge, relying on an order of his predecessor in title suit No. 3 of 1905, called on the Plaintiff to pay in the Court-fees leviable on the institution of the suit. The Plaintiff did not pay, so the suit was dismissed.

The Plaintiff now appeals. It is admitted that the suit was properly instituted before the Settlement Officer; and, under sec. 8 of the Regulation, no Court-fee was payable on the plaint. According to sec. 5, the Civil Court "may proceed to try and determine such suit under the same rules and in the same manner as if the suit had been originally instituted therein." It is contended that this does not mean that the Civil Court is to proceed to try the suit from the beginning as if it was instituted before it on the date on which it was transferred to it, but only that it is to proceed to try the suit as if it had been properly instituted before it, and so, as under sec. 8 of the regulation, the suit, when instituted before the Settlement Officer, was subject to no institution Court-fee, no institution Court-fee has to be paid, when it is transferred to the Civil Court, though, after its transfer, it is admitted Court-fees are payable.

The Government pleader admits the correctness of this argument. We also consider it to be right. We accordingly set aside the order of the Subordinate Judge, dated the 9th March 1906, dis-

BIBEE GOLAP KUMARI SAHEBA v. MD. KADIRUDDIN.

missing the suit and direct that he proceed to try it. This order governs Appeals Nos. 206, 207, 208 and 209 of 1908.

The applications under sec. 622 are disallowed.

Appeal allowed.

[CIVIL REVISIONAL JURISDICTION.]

RULE No. 1788 OF 1908.

CASPERSZ, J. SHARFUDDIN, J. 1908. 29, June.	In the matter of BABU NIRAJAN PROSAD MOHANTY, Muktear.

Legal Practitioners Act (XVIII of 1879), — Unprofessional conduct—Suspicion—Muktear—Renewal of license.

The renewal of the license of a legal practitioner cannot be refused on the mere suspicion that he was implicated in and privy to the sending of anonymous petitions making serious allegations against a Sub-divisional Officer and other Government officers.

This was a rule granted on the 23rd of May 1908, against an order of Mr. J. Platel, District Judge of Zillah Cuttack, dated the 2nd of May 1908, postponing the Petitioner's case to the 1st August 1908 and directing that his order, dated 27th January 1908, contained in a letter to the Sub-divisional Magistrate of Khurdah authorising the Petitioner to practise as a muktear pending the disposal of his application for renewal of his certificate be cancelled.

The facts of the case are as follows :—

The Petitioner, a muktear, practising in the Criminal Courts at Khurdah in the District of Cuttack, filed an application on the 2nd January 1908 to the District Judge for the renewal of his certificate, whereupon the District Judge directed the Petitioner to produce a certificate of character from the Sub-divisional Officer of Khurdah. Upon this the Petitioner applied to the Sub divisional Officer for the same and the officer passed the following order :—

"I certainly cannot grant to you character certificate just at present as your conduct is under enquiry."

On the 25th January 1908, Petitioner applied to the District Judge praying that his license might be renewed on the strength of the certificate of the second officer of Khurdah in whose Court the Petitioner ordinarily practised.

The order of the District Judge upon this petition was:—"The result of the enquiry which is being made by the Sub-divisional Officer should be sent to this Court without delay. Petitioner may practise in the meantime." Subsequently, on the 17th April, he was informed that his case would be taken up on the 29th idem. The case was adjourned to 2nd May 1908 when the District Judge passed the following order :

"Petitioner's pleader heard. The Sub-divisional Officer of Khurdah has refused to give Petitioner a certificate of character. Petitioner's pleader has failed to convince me that the certificate was wrongly withheld or that I should renew the license in the absence of a certificate of character. I shall, however, be willing to reconsider the matter on 1st August. In the meantime my letter No. 312, dated 27th January 1908, to Sub-divisional Officer Khurdah is cancelled."

IN THE MATTER OF BABU NIRAJAN PROSAD MOHANTI.

Against this order of the District Judge the Petitioner moved this Court and obtained the present rule.

Babu Provas Chandra Mitter for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

This is a rule calling on the District Judge of Cuttack to show cause why in effect he should not renew the license of the Petitioner who is a muktear ordinarily practising in the Criminal Courts at Khurdah.

No cause is shown, but we have perused the letter of the District Judge of Cuttack and that of the Sub-divisional Officer of Khurdah.

It appears that last year the applicant's license was renewed on a good character certificate furnished by the officer presiding in the second Court, and we find that, on the present occasion, the procedure adopted by the Petitioner was identical. It does not appear that there is any evidence of unprofessional conduct, or conduct such as would disentitle the Petitioner to have his license renewed. The Sub-divisional Officer merely says that he has suspicions that the Petitioner was implicated in, and privy to, the sending of anonymous petitions making serious allegations against the Tehsildar and the Sub-divisional Officer to their official superiors. A man cannot be deprived of his means of subsistence on mere suspicions; but we are glad to find that an affidavit has been filed that the Petitioner is not in any way connected with the anonymous petitions. There is nothing against his character, and, without inquiring further into the matter, we direct the District Judge of Cuttack to renew the Petitioner's certificate for the current year.

The rule, therefore, is made absolute.

We would add that issuing this rule we observed that inasmuch as the Petitioner's license to practise on the revenue side had been renewed for the current year, he should be permitted to practise on the criminal side pending the result of this rule. The Petitioner states, and his statement is borne out by an affidavit and a certified copy of the order of the Sub-divisional Magistrate, that the Petitioner's muktearnama was refused by the Sub-divisional Officer on the 8th June last. The learned vakil, however, does not desire to press this matter provided, of course, his client be permitted to practise without let or hindrance as he has been doing. If the order, we have now passed, is disregarded in any way by the Sub-divisional Officer, we shall be obliged to take very serious notice, but we are confident that the incident will now terminate.

S. C. S. *Rule made Absolute.*

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, AUGUST 10, 1908. [No. 39

Contents.

NOTES.

A FULL BENCH OF THE MADRAS HIGH COURT HAS placed interpretation upon sec. 476 of the Code of Criminal Procedure which seems to be more restricted than the interpretation which the Full Bench of the Calcutta High Court adopted in the case of *Begu Singh* v. *Emperor* (I L R 34 Cal. 551: s c 11 C W. N. 568) The majority of the Judges composing the Full Bench held in the case of *Rahimadulla Shahib* v. *Emperor*, a report of which appears at I. L R. 31 Mad. 140, that it was the intention of the Legislature in enacting sec. 476 that an order under the section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceedings. Their Lordships in an elaborate judgment reviewed the earlier enactments in the old Criminal Procedure Codes and the corresponding English Acts and came to the conclusion that when the Legislature enacted sec. 476 it intended that the sanction for prosecution under the section should be given either in the course of the proceedings or soon after. The chief reason for this view is stated to be that in the corresponding sections of the repealed Criminal Procedure Codes it was expressly laid down that the sanction for prosecution might be given at any time, while in secs. 195 and 476 of the new Criminal Procedure Code no such provision is made. Moreover sec. 476 is in close juxtaposition to sec. 480 which expressly provides for a procedure of an immediate and summary nature.

THE DISSENTING JUDGE, MR. JUSTICE MILLER, observed "I, of course, agree with the learned Judges of this Court who held in *re Subbaraya Vathyar*, 15 M. L. J. 489, that the section contemplates immediate action, that is to say, that the language of the section warrants and provides for immediate action, but I am unable to go further, and to hold that it either expressly or impliedly excludes what I may call action subsequent—action taken after the close of the proceedings in the course of which the offence was committed or brought to notice. The words 'when the Court is of opinion' are wide enough to embrace any point of time at which the opinion is formed, whether during, or after the close of the proceedings and there is nothing in the rest of the section to indicate that the opinion, must, in all cases, be formed as soon as the offence is committed."

MR. JUSTICE WALLIS DID NOT FIND THE WORDING of sec. 476 or other sections of the Code throwing any light upon the meaning of sec 476 or anything which conclusively warranted the restrictive construction. But on general grounds of justice he preferred to place upon the section the restrictive interpretation which the other learned judges put upon the section This decision of the Full Bench of the Madras High Court follows the judgment of the Calcutta, Full Bench in the case of *Begu Singh* v *Emperor* and is in disagreement with the decision of the Bombay High Court in the case of *In re Lachmidas Lalji*, I. L. R. 32 Bom. 184, which we recently noticed (12 C. W. N. clxxxi). When the several High Courts have differed as to the construction to be placed upon sec. 476 it is only proper that the Legislature should take an early opportunity of removing the conflict by amending the sections in accordance with the more reasonable view. The decision of the Madras High Court does not seem to have been brought to the notice of the learned judges of the Bombay High Court *In re Lachmidas Lalji*.

MR. ASQUITH WAS ENTERTAINED AT THE BANQUET by the Bar of England at the Inner Temple Hall on the 10th of July last. The Attorney-General presided and the leaders of the profession, irrespective of any political opinion, assembled to do honour to the distinguished guest. The occasion was a memorable one, as this is practically the second time that a

practising member of the English Bar has attained the highest position that a British citizen can aspire to. The Younger Pitt who also became the Prime Minister a century ago was also a practising member of the Bar. As another instance the name of Percival may be mentioned. These are, no doubt, isolated instances but it may safely be said that never before the dawn of the twentieth century did the members of the legal profession figure so largely in the British Cabinet. There are two qualifications that eminently fit the members of the Bar for responsible positions in the premier Legislature of the Empire. It need hardly be mentioned that a lawyer is never out of place amongst a body of men whose chief function is to frame laws. Then a lawyer's habit of daily engaging in controversies and doing his duties zealously without any rancour or ill-will towards his opponents makes him almost an ideal member in the country's Legislature.

WE WILL REPRODUCE HERE WHAT THE ATTORNEY-General, Sir William Robson, said regarding the matter. We invite particular attention to his remarks that "the Bar of England consists of men to an extent unequalled, in any other profession, who are keenly, intelligently and nobly interested in public affairs." The same may be said, though, certainly to a much less extent, of the members of the legal profession in India and this surely indicates a healthy sign of the times. The Attorney-General said :—

It must be confessed that we barristers, no matter what side we belong to, have to face a certain amount of humorous opprobrium when we go down to constituencies. But the opprobrium is not only humorous, if one may judge by results, it is mostly entirely harmless. That great section of the population which consists of persons who are not members of the Bar—a very important section in point of numbers and in some other respects—seems very steady in its confidence in us, and it seems to have that confidence to a very remarkable degree. Well, constituencies apparently persist in believing that the study and practice of the law is not necessarily a disqualification for those who have to take part in making the laws But in principle—and here I know I shall meet a responsive echo in the minds of those whom I address—we are not selected as barristers. We certainly do not offer ourselves as barristers. The Bar of England consists of men to an extent unequalled, I venture to think, in any other profession, who are keenly, intelligently, and nobly interested in public affairs. The ambition to take part in such affairs is widely spread among us—in fact, it is the belief, not always well founded, that our profession runs easily with public life that tempts many a youth to his destruction by joining the Bar. We get thereby a sort of preference among the budding statesmen of our public schools and universities. Mr. Asquith himself disclosed his gifts for statesmanship long before he held a brief or tried to get one. We cannot claim, therefore, that the Bar inspired him or that the Bar made him ; but, at all events, the Bar got him.

THOSE WHO AMONGST US TAKE TO PUBLIC LIFE WILL do well to cultivate the spirit of the Bar even in public controversies and emulate the example of Mr. Asquith who is, on this account, not only an object of admiration to his colleagues but also to his political opponents. The Attorney-General continuing said :—

Our lives are spent in controversy, and controversy is not an amiable pursuit ; but we at the Bar have learned, or some of us, perhaps, are only learning, how to pursue controversy without personal bitterness or resentment. And it is that characteristic of the Bar which, above all others, enables a man to understand and assimilate the Parliamentary spirit. It is that which has helped our guest to be what Mr. Balfour once called him—a great Parliamentary artist—for both at the Bar and in the House of Commons there never was a man who fought so hard and who yet expressed and provoked less personal resentment than the Prime Minister.

THE PRONOUNCEMENT MADE AT THE BANQUET BY SIR Edward Clarke is still more emphatic. He observed with true wisdom that in a democratic age like the present it is not only fit and proper that the democracy should largely send lawyers to represent them in the Legislature but it is to the best interests of the State that this should be so. Sir Edward in his usual felicitous style included amongst Cabinet Ministers who have a practical experience of the law, Mr John Burns, whom he prosecuted for being a political firebrand. He said :—

There never was a Cabinet with so many lawyers in it—and to us all, and, I trust, to the country outside, that is a comforting remembrance. There are four King's Counsel in the Cabinet to-day. One, our guest this evening, presides over its deliberations. Our dear friend, a friend of all of us, Bob Reid—is a strong and powerful Lord Chancellor ; Birrel—is creating universities for Ireland—Haldane—is reconstructing the British Army, and lest he should be appalled at the anomalous character of his task, another practising barrister is put in charge of the Navy. The finances of the country are in charge of a solicitor whose business address appears in this year's Law List—and another distinguished solicitor, the Chancellor of the Duchy, has gone to strengthen the House of Lords against any possible attack upon that body. And to complete the list of those who have practical experience in the administration of the law, there is another of his colleagues whom in the days of his hot youth Webster and I prosecuted at the Old Bailey. It is a delightful spectacle. It marks, indeed, an advance of democracy—democracy always chooses its leaders from among the lawyers—but it is a safe advance. A well-trained lawyer may sometimes call himself a Radical, but he is never a revolutionist. The intellectual conscience, which always supports the moral sense, and sometimes has to be a substitute for it—will not allow revolutionary movements, and the country is safe.

IN VIEW OF THE REFORMED LEGISLATURE IN INDIA, from which lawyers are sought to be discarded, the remarks of the present Prime Minister are likely to prove both interesting and instructive. Mr. Asquith said :—

It is natural, perhaps, that on an occasion like this one should be tempted to reflect upon the relations in our history between politics and the law. The 'gentlemen of the long robe,' and the '*nisi prius* mind,' have provided from time to time ample material for the cheap sarcasms of superficial and uninstructed politicians. Once, and I think only once, in our history they were able to put these prejudices into practice, and the disastrous experiment was tried of a House

of Commons from which all lawyers were excluded. What was the result? That notorious body is pilloried in our history as the *Parliamentum indoctum*, of which Lord Coke, not perhaps an altogether impartial Judge, declares that the whole of its legislation was not worth twopence. Gentlemen, I absolutely make this claim that there is no class or profession in our community which has done more—I will go further, and say that there is none which has done so much —to define, to develop, and to defend the liberties of England. Sir Thomas More, Lord Coke himself, Selden, Somers, Camden, Romilly—those are but a few of the names selected almost at random from a long and illustrious roll.

CRIMINAL CASES OF 1907.

(*Continued from* p. ccxi)

TRIAL BY JURY.—[*Questioning Jury*]. When there is a verdict on the general issue of guilty or not guilty, and the verdict is not ambiguous, as to the offence found proved or not, the Judge cannot question the jury as to the reasons for their verdict (*Emperor* v. *Siranadu*, 30 Mad. 469: *see* also *32 Cal. 759: 29 Mad. 91, 93, 96 2 C. L. J. 75n: 28 Bom. 412: 6 Bom. Law Rep. 258, 261: 15 Bom 452: 10 Cal 140: 9 Cal. 53: 21 W. R Cr. 1: 19 Bom. 735*). It is the Judge's duty to ask the jury as to their verdict where it is ambiguous, *e.g.*, *Kamdoshi*, (*7 C. W. N. 135*). If the finding is not exhaustive as to the facts in issue in the case, of *special verdicts* he may elicit a complete finding (*14 W. R. Cr. 59, 62*: see *25 W. R Cr. 36: 14 Cal, 164*). Where a case depends on inferences to be drawn from two or three facts the Judge may ask the jury to state a plain and concise finding on the facts (*15 Bom. 452*, per Candy, J., *contra* Jardine, J), so also to ascertain which of two objects charged they find proved (*21 Cal. 955, 973, 974*). [*Reference to High Court*]. The High Court is bound to give due weight to the opinions of the Judge and jury, but it can decide for itself the guilt or innocence of the accused (*Emperor* v. *Sri*, 11 C. W. N. 715: *see* also *29 Mad. 91: 29 Cal. 128: 22 Mad. 15: 7 C. W. N. 345, 347*). Under sec. 307, as now amended, the High Court is not bound to accept the verdict of the jury unless shown to be perverse or clearly and manifestly wrong (*29 Cal. 128*), but it was observed in *2 C. L. J. 77n, 78n* that the verdict is not to be interfered with except in a very clear case, and the fact that one High Court Judge agrees with it is ground for upholding it. As instances where the High Court gave particular effect to the verdict of the jury, see *32 Cal. 759* and *6 C. L. J. 253* [*Previous conviction*]. Where a reference is made under sec. 307 it is only after conviction by the High Court that the accused can be asked to plead to previous convictions (*Emperor* v. *Kandasami*, 30 Mad. 134).

PARDON.—[*Reasons*]. Where facts which led to the tender of pardon appeared on the record, the omission to record reasons therefor does not vitiate the proceeding (*D. L. R.* v. *Banu*, 5 C. L. J. 224). [***Withdrawal and commitment***]. If a pardon is tendered after the approver has had an opportunity as accused, of cross-examination of the prosecution witnesses, the withdrawal of pardon and commitment with the co-accused are not illegal (*Emperor* v. *Budhan*, 29 All. 24: *Queen-Empress* v. *Brij*, 20 All. 529).

RIGHT OF REPLY.—The counsel for the Appellant is entitled to reply on appeal under sec. 340 (*Promoda* v. *Emperor*, 11 C. W. N. xliii).

JUDGMENTS.—The judgment of an Appellate Court not containing the points for decision nor the reason therefor was set aside (*Rupa* v. *Keshab*, 5 C. L. J. 452: *Noai* v. *Emperor*, 11 C. W. N. cxxxv): also where it was partly based on the evidence and his own opinion in another case (*Ramanunda* v. *Mukunda*, 11 C. W. N. cli), and where it merely stated the number of witnesses but no facts bringing the case within the clauses of sec. 110 (*Alep* v. *King-Emperor*, 11 C. W. N. 413).

APPEALS.—[*Proper Appellate Court*]. It is the Sessions Court within the limits of whose jurisdiction the first class Magistrate ordinarily sits, whether the offence be committed within such limits or not, which is the proper Appellate Court (*Valia* v. *Emperor*, 30 Mad. 136). [*Re trial*]. Where on a complaint of kidnapping the Magistrate convicted the accused under sec. 342, P. C., *held* that the Judge had power, on finding that the evidence disclosed a more serious offence, to order re-trial or commitment for the proper offence (*Emperor* v. *Jare*, 11 C. W. N. c). Where the petitioners were tried under secs. 147 and 325 read with sec 149, P. C, and acquitted thereof but convicted under sec 323, the Appellate Court cannot after setting aside the sentence under the latter direct a re-trial on the former charges of which they were acquitted (*Dwarka* v. *Emperor*, 11 C. W. N. xci). The Appellate Court, when it reverses the finding and sentence, may under sec. 423 (1) (*b*), re-try the offender itself, if the offence is ordinarily triable by it (*Emperor* v. *Manikka*, 30 Mad. 228). There may be some difficulty in the Appellate Court holding the re trial by reason of sec. 556. Where a person is convicted under different sections of the law and sentenced under one the Appellate Court cannot, after setting aside the conviction and sentence under the particular section, remand the case for punishment under another of the sections, but must pass sentence itself. (*Mahbubali* v. *Naklesswar*, 11 C. W. N. ccliv). [***Alteration of finding***]. Where the finding of the Appellate Court disproves the common object charged, *viz*, taking possession of complainant's property, and finds another common object, the conviction is bad (*Noor Mahomed* v. *King-Emperor*, 11 C. W. N. clviii). Where the common object fails and the substantive charge is disbelieved, the Appellate Court must acquit and cannot find another common object not charged and uphold the conviction (*27 Cal. 990*, followed in *33 Cal. 295*). In the very recent case of ***Maniruddin* v. *Emperor***, 35 Cal. 384, where the common object alleged in the

charge was to dispossess the complainant, and the Appellate Court finding the question of possession not clear altered it to the intention of enforcing a right or supposed right, it was *held* that, as both common objects raised the same questions and the accused were not prejudiced, the conviction was legal. An Appellate Court can alter a conviction or acquittal of cheating into one of attempting to cheat [*Henry* v. *King-Emperor*, 11 C. W. N. xc (P. C.)], but not a conviction under sec. 3 of the Private Fisheries Act into one under sec. 447, I. P. C. (*Emarat* v. *Emperor*, 11 C. W. N. ccc). [*Enhancement of sentence*] The maintenance of a sentence passed for two offences on acquittal of one offence is an enhancement (*Paramasiva* v. *Emperor*, 30 Mad. 48). The reduction of a sentence of one month's imprisonment to five days' imprisonment with a fine and two weeks' imprisonment in default is not an enhancement (*Bhakthavatsalu* v. *Emperor*, 30 Mad. 103)

FURTHER INQUIRY.—[*Discretion*]. The power under sec. 437 should be sparingly used and with great caution (*Joygopal* v. *Emperor*, 11 C. W. N. 173). This rule was laid down in several cases before, *e g*, *9 All 52* adopting the *principle* of *4 All. 148* (which was, however, dissented from in *17 Cal. 485*): see also *Lakshminarasappa* v. *Mekala*, 31 Mad. 133, and the cases referred to therein. The Court must have and assign solid and sufficient reasons for doing so, otherwise the High Court will set aside the order for want of a proper exercise of discretion (*15 Cal. 608 (F. B.): 32 Cal. 1090: 8 C W. N. 456: 3 C. L. J 43*). In *31 Mad. 133* it was held that the superior Court should not order further inquiry on the evidence even if legally competent to do so. [*Order* suo motu] Sec. 437 does not prevent a Magistrate from ordering further inquiry *suo motu* (*Kamini* v. *Abdulla*, 11 C. W N. xi). [*Notice*]. Though not legally necessary, notice should be given to the accused before directing a further inquiry into a case *discharged under sec. 253*, and the omission to do so will render the order liable to be set aside (*Joygopal* v. *Emperor*, 11 C. W. N. 173: *see* also *15 Cal. 608 (F. B.): 10 Bom 131: 4 C. W. N. 100: 2 C W. N. 196: 32 Cal. 1090: 9 C. W. N. cclxxix: 2 C. L. J. 61n: 3 C. L. J. 43: 20 All. 339: 9 All. 52: 3 C. W. N 249: see 26 Mad. 41*) It has also been recently held that notice should be similarly given where the complaint has been *dismissed under sec. 203* (*Brij* v. *Gopal*, 11 C. W. N. 316: *Bhagwat* v. *Bishuni*, 11 C. W N. xxxv), but these rulings are contradictory to *29 Cal. 457* and *15 Cal 608* per C. J. and Prinsep, J. [*Dismissal or discharge*]. Where a summons is issued against some only of the accused named in the complaint, and the case referred to another Magistrate, who after acquitting them, refuses to proceed against the rest, *held* that the Judge had no power to direct further inquiry, as there was no dismissal of a complaint, nor an order of discharge (*Akhoy* v. *Debnath*, 11 C. W. N. ccxiii. *See* also *4 C. W. N. 242: 27 Cal. 658: Panchu* v. *Khosdel*, 12 C. W. N. 68: but contra *29 Cal. 857* and *32 Cal. 783*). [*Supplementary evidence*]. The Court has no power to order supplementary evidence to be taken and the record then returned to it (*Moni* v. *Iswar*, 6 C. L. J. 251).

REVISION:—[*Executive orders*]. An order by a District Magistrate under the rules framed under sec. 45 (3) of the Code is an executive one, and one not revisable (*Re Damma*, 29 All. 563). But the High Court can test the validity of an executive order on a prosecution of the accused for its disobedience (*Re Ambica*, 11 C. W. N. cclxvi). [*Orders of Presidency Magistrate*]. In some cases it has been held that the High Court has no power to order further inquiry under the Code but only under sec. 15 of the Charter Act (*Chargobala* v. *Barendra*, 27 Cal. 126, referring to *Opoorba* v. *Probod*, 1 C. W. N. 49: *Debi* v. *Jatmal*, 33 Cal 1282: *Kedar* v. *Khetra*, 6 C. L. J 705 and *Liladhar* v. *Lowji*, (unreported Cr. R 461 of 1907), and only on a question of jurisdiction but not of the propriety or impropriety of the order (*33 Cal. 1282: 6 C. L. J. 705*). These cases are in conflict with *Colville* v. *Kristo*, 26 Cal. 746, the opinion of Wilson, J., in the Full Bench in *15 Cal. 608, 617*, and *Emperor* v. *Varjivandas*, 27 Bom. 84. In *Lekhraj* v. *Debi*, 12 C. W. N. 678, the question of the High Court's jurisdiction under the Code was not considered, but it was held doubting *6 C. L. J. 705*, and referring to *R.* v. *Rys Charan Pal* (unreported) that independently of it the Court had jurisdiction under sec. 15, and could set aside an order of dismissal or discharge on the evidence. The question again arose in *Cr. R. 441 of 1908* (unreported), but was not decided, the case being disposed of on other grounds. Holmwood, J., was of opinion that the jurisdiction existed only under the Charter Act, but that it was not limited as laid down in *6 C. L. J. 705*. Such is the state of the authorities. But the case appears clear from secs. 435, 439 of the Code read with sec. 423. The following considerations show that jurisdiction can be deduced from these sections of the Code. (*i*) A Presidency Magistrate being an "*inferior Criminal Court*," within sec. 435, the High Court can call for the records of any case from such Court to test its correctness, legality or propriety. If then the High Court could not interfere under sec. 439 it would come to this, that the Court, after calling for the record in the case of a dismissal or discharge by a Presidency Magistrate and finding it to be wrong, could, nevertheless, do nothing else but send back the record. This position is absurd. Sec. 435 allows the record to be called for only for *the purpose of the order being revised.* (*ii*) The opening words of sec. 439 "in the case of *any* proceeding" clearly include the case of a dismissal or discharge by a Presidency Magistrate. (*iii*) The only matters excluded from revision are specified in sec. 435 (3), and (*iv*) It was not necessary to mention Presidency Magistrate in sec. 437 or

the High Court, because the latter had already sufficient powers for the purpose under sec. 439 read with sec. 423). The difficulty in the view expressed in *12 C. W. N. 678* as to the extent of the High Court's powers under sec. 15 of the Charter Act is that this section has been held to apply, where questions of jurisdiction or material irregularity are involved (*see* the Full Bench rulings in *Sukh* v. *Tara*, 33 Cal. 68 and *Khosh* v. *Nazir*, 33 Cal. 353), and not to orders wrong on the merits. The question whether the Code or the Charter applies must, therefore, ultimately go to a Full Bench.' [*Revisable orders*]. Sec 145 (*1*) is not the only provision in it which lays down what matters relate to the jurisdiction of the Magistrate. There are other provisions the contravention of which also affects his jurisdiction. An order passed only on the written statements of the parties without evidence, is without jurisdiction (*Kolha* v. *Muneswar*, 34 Cal. 840). This matter has already been dealt with under sec. 145 in this article. As to what are matters of jurisdiction, and when the High Court can interfere, *see* the Full Bench cases in *30 Cal. 155 : 33 Cal. 68 and 33 Cal. 353*. The Magistrate has a discretion under secs. 449, 450 of the Calcutta Municipal Act, the exercise of which is open to revision by the High Court (*Abdul* v. *Corporation*, 33 Cal. 287 : *Chuni* v. *Corporation*, 34 Cal. 341), but where a discretion is vested in the General Committee, the High Court cannot set aside an act done in the exercise of that discretion, if otherwise done in accordance with law. (*Shamul Dhone* v. *Corporation*, 34 Cal. 30) The High Court, but not the Sessions Judge, can interfere with an order under sec 476 (*Emperor* v. *Gopal*, 34 Cal. 42). This has always been the law in the Calcutta High Court (*16 Cal. 730 : 20 Cal 379 : Ibid 474 : 23 Cal. 532, 535 : Ibid 610, 618 : 9 C. W. N. 1030*) and also in Allahabad (*16 All. 80 : 23 All. 249 : 26 All 249*), and Bombay (*26 Bom. 785*), though the reasoning in *32 Bom 184, 193* is somewhat in favour of the Madras Full Bench in *26 Mad. 98*. In Madras, notwithstanding *19 Mad. 18*, the Full Bench case in *21 Mad. 124* established the jurisdiction of the High Court under the Code of 1882. It has, however, been ruled by a Full Bench of that Court that under the Code of 1898 the power does not exist (*26 Mad. 98*). But its authority has been weakened by *29 Mad. 100* and *Ibid 331*. It proceeds on the basis that the addition to cl. (*2*) of sec. 476 of the words "*as if upon complaint*" converts an *order* under sec. 476 into a "*complaint*." But this view is incorrect. The words only mean that on receipt of an order under sec. 476 the Magistrate is to *adopt the same procedure that he would on receiving a complaint* recorded under sec. 200. The wording of cl. (*2*) is not very happy, because as it stands the Magistrate on receiving an order under the first clause, if it were to proceed *as on complaint recorded under sec. 200*, could act under secs. 202, 203. What is meant is that the Magistrate must proceed with the trial at once. Of course the High Court cannot on appeal set aside a *complaint* by a public servant (*13 Mad. 144*, following *13 Bom. 109*). The High Court can interfere on the evidence with an order of commitment passed under sec. 436 (*Muthiah* v. *Emperor*, 30 Mad. 224 : *Pirthi* v. *Sampatia*, 7 C. W. N. 327). [*Stay of proceedings*] The High Court no doubt has power to stay proceedings (see the cases *infra*). Criminal proceedings for perjury or forgery should not as a rule go on during the pendency of civil litigation in respect of the same (*16 Bom 729*), though this is not an invariable rule (*18 Bom. 581 : 26 Mad. 190, 191*): see *23 Cal. 610* and *26 Bom. 785 : 8 C. W. N. 797 : Ibid 801*). The High Court should not stay proceedings pending a civil suit except on good grounds. (*31 Cal. 858*, followed in *9 C. W. N. cclxii*). Proceedings were stayed in *10 C. W. N. cliv* : *Ibid ccxi : 5 C. L. J. 233*. A defendant in a civil suit ought not to be allowed to prejudice the trial by a criminal prosecution on the same facts (*30 Mad. 226*, distinguishing *3 Mad. 400, 18 Bom. 581*, and *23 Cal. 610*). Where a prosecution would defeat, if not delay, the civil suit, the High Court will grant a stay of the former and revoke a sanction (*Jadu Lal* v. *Lowis*, 34 Cal. 848, explaining *16 Bom. 729, 18 Bom 581, 26 Mad. 190*, and *B. L. R. Sup. Vol. 426*). [*Practice*]. A party may raise a point at the hearing though not mentioned in the rule if the Judges granting a rule have directed that it will be considered at the hearing (*Chakoo* v. *Emperor*, 11 C. W. N. 467, 468). A Munsif must show cause by Counsel and not like a District Magistrate (*Jogendra* v. *Syama*, 6 C L. J. 713). An accused will be heard as to why a further inquiry should not be directed against him, though no rule has issued upon him (*Brij* v. *Gopal*, 11 C. W. N. 316).

(*To be continued.*)

E. H. Monnier.

CURRENT INDIAN CASES.

Rahimadulla v. Emperor, I. L. R 31 Mad. 140 (F. B.). *Criminal Procedure Code, sec. 476.*

"It was the intention of the Legislature that an order under sec., 476, Cr. P. C., should be made either at the close of the proceeding or so shortly thereafter that it may reasonably be said that the order is part of the proceeding."

Singam Setti v. Draupadi, I. L. R. 31 Mad. 131. *Hindu Law—Reversioner—Sale.*

A Hindu widow is not bound to mortgage any portion of her husband's estate if that would be more prejudicial to her than a sale, by reducing her income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security. A

suit brought by the reversioner to set aside an alienation by a Hindu widow where the plaint contained no offer to pay the money, when it should have contained such offer, should be dismissed.

DAKSHINA *v.* THE MUNICIPAL COUNCIL OF TRICHINOPALY, I. L. R. 31 Mad. 157. *Civil Procedure Code, sec. 102.*

"A decision dismissing a suit under sec. 102, C. P. C., for default of appearance of the Plaintiff or dismissing an appeal under sec. 556 for default of appearance by the Appellant is not a decree within the meaning of the definition in sec. 2, C. P. C."

KANEMAR *v.* KRISHNA, I. L. R. 31 Mad. 161. *Hindu Law.*

Where in the course of a transaction entered into by a Hindu father for the benefit of the joint family, he received money to be paid to others but this he appropriated in circumstances which constitute a breach of civil duty but not a criminal act, *held* that the family property would be liable for the debt.

VADAPALLI *v.* DROUAM RAJA, I. L. R. 31 Mad. 162. *Landlord and tenant—Holding over—Transfer of Property Act, sec. 116—Civil Procedure Code, secs. 281, 283—Limitation Act, Sch II, Art. 139.*

The lessor can, by his assent, convert a tenant by sufferance into a tenant in the true sense of the terms; he cannot, by his mere assent, convert the representatives of a tenant by sufferance, who are mere trespassers into tenants and without their own consent and sec. 116 of the Transfer of Property Act does not enable him by his mere assent to convert the representatives of a tenant by sufference into such tenants.

In a suit by a landlord to recover possession from a tenant for a term of years, time begins to run under Art. 139 of Sch. II of the Limitation Act from expiry of the term.

An order under sec. 281, C. P. C., is not conclusive as against the judgment-debtor unless he is a party to the proceedings in which the order is passed.

RAMANUJA *v.* KRISHNASAWMI, I. L. R. 31 Mad. 169. *Water, retention of—Damage.*

"The retaining of water on one part of a man's land in order that it might not flow on to another part does not appear to us to be an act done in the natural and usual course of the enjoyment of property which would protect the man who does it from being liable in damages if he injures his neighbour's land." *Per* WHITE, C. J. and MILLER, J.

RAMA ODAYAN *v.* SUBRAMANIA AIYAR, I. L. R. 31 Mad. 171. *Injunction—Likelihood of damage.*

An injunction was granted restraining the Defendant from interference with a channel without proof on the Plaintiff's part of actual damage when such interference caused a stoppage of the entire water supply.

KRISHNA *v.* SARASVATULA, I. L. R. 31 Mad. 177. *Civil Procedure Code, sec. 244.*

A purchaser who obtains his title at Court auction and does not derive it by purchase from the decree-holder is not the representative of the decree-holder within the meaning of sec. 244, C. P. C.

PONNAYEE *v.* PERIYA MOOKHAN, I. L. R. 31 Mad. 185. *Criminal Procedure Code, sec. 488—Maintenance.*

Where a woman was refused maintenance by the lower Court in a proceeding under sec. 488, Cr. P. C., on the ground that she had been guilty of adultery with a low-caste man which led to her expulsion from caste and thus it was impossible for her husband to keep her with him,

Held, that the lower Court was not wrong in refusing to award her maintenance.

Review.

THE CODE OF CIVIL PROCEDURE, being Act V of 1908. *By K. Rama Chandra Iyer, B. A, B. L, High Court Vakil, Madras. S Murthy & Co, 305, Thumbu Chetty Street, Madras. 1908. Price Re. 1.*

This is a very handy reprint of the New Civil Procedure Code The printing and the general get up are satisfactory and the price, for a cloth bound edition, moderate. The special feature of the work consists in an index of the Act portion and a general index for the Code including the schedules and an appendix reproducing the Letters Patent of the Madras High Court, the High Courts Act, Madras Civil Courts Act and Madras City Civil Courts Act, besides the report of the Simla Special Committee which so far no reprint of the Code appears to have omitted.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ. CRIMINAL REVISION No. 660 OF 1908. SAMSUL HUQ AND ANR., Petitioners *v.* SHEIKH HAFIZ ZAFFARUDDIN, Opposite party. 16th July 1908.

Criminal Procedure Code (Act V of 1898), secs. 133, 135—Obstruction to a path way—Procedure, of the Magistrate, illegality of.

Sheikh Hafiz Zaffaruddin put in a petition before the Sub-divisional Officer under sec. 133, Cr. P. C, alleging that the Petitioners had obstructed a path way by erecting bamboo fences. The Sub-divisional Officer went to the spot and after making some inquiries of the persons who were called in, asked the Petititoners to remove the fence within 3 hours. It appears from the petition filed in the High Court that the Magistrate did not record any evidence nor drew up any formal proceeding under sec. 133, Cr. P. C. The Petitioners moved the Sessions Judge who declined to interfere. They then obtained the the present rule. It appears that the obstruction was however removed before the rule came up for hearing.

Their Lordships observed :—

We understand that the obstruction has been removed and therefore even if this rule were made absolute it would be impossible to restore the state of things which existed before the order was passed. At the same time, however, we feel bound to say that the procedure adopted by the Magistrate before he made his order final was not one of which we can approve. He was bound under the provisions of sec. 135 and the following sections to have heard the evidence which the present Petitioners desired to offer when they appeared to show cause against the order being made absolute and no finding on the question whether the path was a public path or not could be arrived at until the Petitioners had had an opportunity of adducing such evidence: Though therefore we think that the rule must be discharged, yet at the same time we hold that the finding of the Magistrate to the effect that the road is a public road cannot be held to be a correct finding in law or to have effect, as that finding was arrived at without following the proper procedure and without allowing the present Petitioners to produce their evidence.

Babu Kshetra Mohun Sen for the Petitioners.

Babu Monmatha Nath Mukherjee for *Babu Hari Bhusan Mukherjee* for the Opposite Party.

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. APPEAL FROM APPELLATE DECREE No. 1474 OF 1907. TUAZUNNESA AND ORS., Plaintiffs, Appellants *v.* SHUHRULLAH MUNSHI AND ORS, Defendants, Respondents. 20th July 1908.

Transfer by guardian, validity of—Benefit of minor—Mahomedan guardian—Lawful debt.

The Plaintiff sued for 14 annas of a certain property in the possession of Defendant No. 1. The latter claimed it under a sale to him by Defendant No. 2, who was the widow of a certain Mahomedan of the name of Rajab Ali. The Plaintiffs were sons of Rajab Ali by Defendant No. 2. The Defendants Nos. 3 to 5 were the children of Rajab Ali by another wife. In the lower Court the conveyance of the Defendant No. 2 was held to be valid and the Plaintiffs recovered the shares of Defendants Nos. 3 to 5 In this transfer she did not purport to convey as guardian of her children and she did not state that the conveyance was for their benefit; but it appeared that the sale was in the first place for the payment of lawful debts of Rajab Ali and in the second place for the benefit of her children.

Held—That the transfer by Defendant No. 2 to Defendant No. 1 was valid.

Munshi Mahomed Hossain v. *Based Sheikh* (11 C. W. N 71) and *Ram Charan Sanyal* v. *Anukul Chandra Acharya* (11 C. W. N 160) followed.

Babu Girija Prosonno Roy Chowdhury (for *Moulvi Syed Shamsul Huda*) for the Appellants.

Moulvi Serajul Islam for the Respendents.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before MITRA and BELL, JJ. In the matter of application under sec 15 of the Charter Act. MOHUNT KRISHEN DYAL, Plaintiff, Petitioner *v.* MAHATMA SUMANGABA AND OTHERS, Defendants, Opposite Party. 23rd July 1908.

Civil Procedure Code (Act XIV of 1882), sec. 25—District Judge's power to re-transfer case.

This was an application in connection with a suit pending in the Court of the first Subordinate Judge of Gaya (title suit No. 261 of 1907). It was originally instituted in the Court of the second Subbordinate Judge but was transferred to the file of the District Judge by an order made by him on the 9th August 1907. The District Judge who had made the order of transfer to his own file was himself transferred shortly after to another district. Before leaving the station he re-transferred the case to the file of the first Subordinate Judge. It was apprehended however that the decision in *Ram Charitter Roy* v. *Bidhata Roy*, 10 C. W. N. 902, threw doubt on the validity of the last transfer. On this application their Lordships observed:

"Sec. 25 of the Civil Procedure Code is so worded as to give rise to a doubt as to the power of a District Judge to retransfer a case to a Subordinate Judge, after he had transferred it to his own file. The Petitioner however has no objection to the case being tried by the first Subordinate Judge. We therefore direct that the case be taken to be still in the file of the District Judge, his order of retransfer being without jurisdiction and we direct that it be transferred from the file of the District Judge to that of the first Subordinate Judge. We direct the latter officer to try the case."

Babu Atul Chandra Dutt for the Petitioner.

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 2049 OF 1906. SHEONANDAN SINGH AND OTHERS, Plaintiffs, Appellants *v.* JEONANANDAN DUSADH AND ANOTHER, Defendants, Respondents. Heard, 28th July 1908. Judgment, 30th July 1908.

Register of chowkidar's entry of situation and boundaries of chakran land, if admissible in evidence—Evidence Act (I of 1872), secs. 32 (2), 35—"In course of business," meaning of.

The appeal arose out of a suit brought by the Plaintiff zemindar to recover possession of 1½ bighas of land which the Defendant claimed as his chowkidari chakran land: The question at issue was, was the entry of the situation and boundaries of the chakran land made in the register an entry in a public register made by a public servant in the discharge of his official duty within the meaning of sec. 35 of the Evidence Act or was it an entry made in the ordinary course of business within the meaning of sec 32 (2) of the Evidence Act.

Reg. XX of 1817 does not impose any duty on the Darogah of keeping a register of chowkidari chakran lands, but the Daroga is permitted to make such entries.

Held—That sec. 35 of the Evidence Act not being sufficient to cover the entries owing to the absence of evidence at this distance of time of the authority under which they were made, sec. 32 (2) of the Act might be brought in to supplement the defect.

The entries were all in the same ink and the same handwriting, it was contended that they were presumably made at one and the same time and the entries in such a record made for a special purpose could not be said to be in course of business which must be continuing.

Held—The phrase "in course of business" was apparently used to indicate the current routine of business which was usually followed by the person whose declaration it was sought to introduce. The phrase does not apply to any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but to business or professional employment in which the declarant was ordinarily or habitually engaged.

Mugniwa v. Bharurappa (I. L. R. 23 Bom. 63 at p. 70) approved.

The entries were therefore admissible in evidence.

Babu Sarat Chandra Bysack for the Appellants.

Mr. J. W. Chippendale for the Respondents.

A. T M. *Appeal dismissed.*

High Court Notice.

NOTIFICATION.

The following Rule made by the High Court of Judicature at Fort William in Bengal is published for general information.

It is ordered that the following Rule be inserted after Rule VII, Chapter XV, Part IV, page 96 of "The Rules of the High Court, Appellate Side," published in Part I, pages 1523 to 1583 of the *Calcutta Gazette* of the 19th November 1902:—

VIIA. Copies of judgments convicting Government officers of criminal offences as well as copies of judgments of acquittal and orders of discharge will be supplied free of charge on the application of the Head of the Department concerned." *Calcutta Gazette, August 5th, 190-, Part I, page 1402.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 493 OF 1907.

FLETCHER, J.

1908.

Heard,

10, April.

3 & 10, June.

Judgment,

11, June.

RAMDEO and another

v.

GONESHNARAIN and another.

*Limitation—Suit—Leave to withdraw—*Ultra vires*—Fresh suit—Code of Civil Procedure (Act XIV of 1882), secs. 373 and 374—Limitation Act (XV of 1877), sec. 14.*

An order giving leave to withdraw a suit and file a fresh suit on the same cause of action, on the ground that leave under cl. 12 of the Charter to institute it was granted by the Registrar, was held to be ultra vires, *and the order was regarded as one only directing the plaint to be returned to the Plaintiff:*

ROBERT WATSON & CO. *v.* THE COLLECTOR OF RAJSHAHI (1) *followed.*

Sec. 373 of the Code of Civil Procedure does not apply except to cases where the suit is properly pending in a Court in which the leave was granted.

A plaint was filed well within the period of limitation. But, the leave to institute it under cl. 12 of the Charter was obtained from the Registrar. Under the practice laid down by the Court, it was by leave, withdrawn and, on the same cause, a fresh suit, with proper leave, was then and there instituted but on a date when, under the usual circumstances, the suit would be barred by limitation,*

Held—*That the leave to withdraw was not granted under sec. 373 of the Code of Civil Procedure; that, therefore, sec. 374 of the Code could not operate as a bar to the fresh suit and that, under sec. 14 of the Limitation Act (XV of 1877), it was not barred by limitation.*

(1) 13 M. I. A. 160 (1869).

* See, 11 C. W. N. (*notes*) cxli for the form of the order.

Suit to recover Rs. 6,801-1-6 due on account stated in writing and signed on the 15th December 1902. The plaint was first filed on the 11th December 1905, with leave under cl. 12 of the Charter obtained before the Registrar. The leave granted by the Registrar having been held to be bad in law, the Plaintiff, in accordance with the practice* laid down, on the 8th May 1907, applied on summons to the Defendants for and obtained leave to withdraw the suit and to file a fresh suit on the same cause of action: on the same day, the plaint was presented again and admitted with proper leave from the Court.

There were two Defendants, the latter being an infant and a guardian *ad litem* was duly assigned to him. The adult Defendant filed his written statement denying adjustment and submitting that the suit should be dismissed with costs. The infant Defendant left the matter to the Court.

Subsequently, the suit was settled and it was agreed that the Defendants should pay the Plaintiff's claim and costs by instalments of Rs. 500 a year. A petition for consent-decree was drawn up, and signed by the adult Defendant and his attorney as also the guardian *ad litem* of the infant Defendant.

On the 10th April 1908, an application was made for a consent-decree in terms of the prayer of the petition. On the Court requiring the Plaintiffs to

* See, 11 C. W. N. (*notes*) cxli for the form of the order.

RAMDEO v. GONESHNARAIN.

prove the case as against the infant Defendant, they did so. But, although the point was not raised by any of the Defendants, his Lordship Fletcher, J., was doubtful that the fresh suit had become barred under sec. 374 of the Code of Civil Procedure and therefore refused the application for consent-decree, and ordered the Plaintiffs to proceed with their case in the usual way.

The suit again came on for hearing on the 3rd of June 1908.

Mr. Hyam (with *Mr. R. C. Bonnerjee*) for the Plaintiffs submitted that the suit was not barred. He cited, *Subbarau Nayudu* v. *Yagana Pantulu* (2), *Laliteshwar Singh* v. *Rameshwar Singh* (3), *Pirjade* v. *Pirjade* (4), *Robert Watson & Co.* v. *The Collector of Rajshahi* (1).

On 10th June 1908, *Mr. B. C. Mitter* followed for the Plaintiffs:—I submit that the order of the 8th May 1908 was not an order under sec. 373, which contemplated cases where the Court had jurisdiction to entertain them: *Robert Watson & Co.* v. *The Collector of Rajshahi* (1).

The Code of Civil Procedure is not intended to be and is not exhaustive. *Hukum Chand Baid* v. *Kamalanand Sing* (5).

The decision of the case of *Laliteshwar Singh* v *Rameshwar Singh* (3) left the Plaintiffs no alternative but to follow the form prescribed by the Court, as appears in 11 C. W. N. (notes) cxli.

The word "Court" means a Court having jurisdiction and competent to make the order: *Durga Charan Mazumdar* v. *Umatara Gupta* (6). The question of jurisdiction or limitation is not a question of non-suit. See, Chitty on Pleadings [1844], Vol. 1, pp. 219—220.

[THE COURT.—My difficulty is that you stand or fall by the order of 8th May 1907, which was purported to be made under sec. 373 of the Code. How can I help you?]

It cannot be an order under that section under which the Court had power to exercise its judicial discretion, *e.g.*, regarding costs. My claim was not adjudicated upon and that is why I have brought this second suit. I rely on, *Subbarau Nayudu* v. *Yagana Pantulu* (2), *Tribeni Sahu* v. *Bhagwat Bux Rai* (7), *Gurdeo Singh* v. *Chandrikah Singh* (8), *Chandra Madhab Chakerbutty* v. *Bissesswari Debea* (9). I say sec. 14 of the Limitation Act does apply to my case. Besides, a Court ought to relieve parties against the injustice occasioned by its own acts: *Lakhan Chandra Sen* v. *Madhu Sudhan Sen* (10), *Rodger* v. *The Comptoir D'Escompte de Paris* (11), *Pulteney* v. *Warren* (12).

Mr. H. N. Sen for the infant Defendant.

Mr. S. Khoda Bux for the adult Defendant.

Cur. adv. vult.

(1) 13 M. I A. 160 (1869).
(2) I. L. R. 19 Mad. 90 (1895).
(3) 11 C. W. N. 649 : s. c. I. L. R. 34 Cal. 619 (1907).
(4) I. L. R. 6 Bom. 681 at p. 683 (1882).
(5) 3 C. L. J. 67 (1904).
(2) I. L. R. 19 Mad. 90 (1895).
(6) I L. R. 16 Cal. 465 (1889).
(7) 11 C. W. N. 1033 : s. c. 6 C. L. J. 298 (1907).
(8) 5 C. L. J. 611 (1907).
(9) 6 W. R. (Civ.) 184 (1866).
(10) 12 C. W. N. 326 (1907).
(11) L R. 3 P. C. 465, per Lord Cairns at p. 475 (1871).
(12) 6 Ves. Jun. 73, per Lord Chancellor [Eldon] at p. 92 (1801).

RAMDEO v. GONESHNARAIN.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This suit was originally instituted on the 11th December 1905, leave being taken from the Registrar under cl. 12 of the Charter.

I ought to say the suit was then within time by four days, for the purpose of computing the period of limitation. Subsequently, following the practice laid down under a new ruling relating to cases where leave to sue was granted by the Registrar under cl. 12 of the Charter, the plaint was returned to the Plaintiffs, leave having been given to them to withdraw the suit, and file a fresh suit on the same cause of action. Now, for the purpose of considering the question of limitation, it is material to consider whether the leave to withdraw the suit and institute a fresh suit on the same cause of action was granted under sec. 373, Civil Procedure Code, because, if it is so, it is admitted, that under sec. 374 of the Code, the present suit is barred by limitation.

Now, sec. 373 of the Civil Procedure Code provides:—

"If at any time after the institution of the suit, the Court is satisfied on the application of the Plaintiff (a), that the suit must fail by reason of some formal defect or (b) there are sufficient grounds for permitting him to withdraw from the suit, or, to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

It has been decided in the case of *Robert Watson & Co. v. Collector of Rajshahi* (1) that there is no general jurisdiction in this Court to permit a suit to be withdrawn and a fresh suit to be instituted on the same cause of action.

Now, is the order made in this suit giving leave to the Plaintiff to withdraw the suit and to institute a fresh suit *ultra vires*, or not? In my opinion sec. 373 does not apply except to cases where the suit is properly proceeding in the Court in which the leave was granted. It follows, therefore, that the order giving leave to withdraw the suit is *ultra vires* and the order can only be regarded as one directing the plaint to be returned to the Plaintiff.

In these circumstances, I am of opinion that the present suit comes within time, having regard to the provisions of sec. 14 of the Limitation Act.

Mr. Mitter.—Then the case will be put on the list to-morrow for hearing.

THE COURT.—Yes.*

Mr. Kali Mohan Rakshit, Attorney for the Plaintiffs.

Messrs. Manuel and Agarwalla, Attorneys for the 1st Defendant.

Mr. Anil Nath Bose, guardian *ad litem* for the infant Defendant.

P. R. C.

(1) 13 M. I. A., 160 (1869).

* *Note.*—The consent-decree was subsequently made in terms of the prayer of the petition.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 2095 OF 1906.*

MITRA, J.
1908.
Heard,
18, July.
Judgment,
27, July.

BRETT, J.
COXE, J.
1908.
2, July.

PROSANNO KUMAR BOSE, Plaintiff, Appellant,
v.
SARAT SHOSI GHOSH and ors., Defendants, Respondents.

*Hindu Law—Dayabhaga—*Stridhana—*Succession to* pittridatta ayautuka—*Son of married daughter, preferential heir*—Kanya, *meaning of.*

Sons succeed in preference to married daughters to the pittridatta ayautuka stridhana *of their mother.*

The word kanya *in paragraph 16, sec. 2, Chap. 4 of the Dayabhaga means "unmarried daughter."*

This was an appeal preferred on the 21st of November 1906, against the decree of Babu Ananda Nath Majumdar, Subordinate Judge, 1st Court of Zillah Mymensingh, dated the 16th of August 1906, reversing that of Babu Syama Charan Ukil, Munsif, 2nd Court at Tangail, dated the 27th of March 1906.

The Appellants in this and three other analogous appeals* were brothers. They instituted four suits out of which these four appeals arose against the Defendants Nos. 1 to 3, their married sisters for a declaration that the ⅓rd share of kharija taluk No. 5480 Raj Chandra Sarma, Mehal Chhatshata, which had been given to their mother, Sarada Moyi Basu after her marriage by their maternal grandfather, Brojo Nath Guha, passed on her death to them and not to the Defendants who had been wrongly registered as proprietors thereof in the Collectorate.

Before the Munsif, the suits were heard *ex parte* and decreed in favour of the Plaintiffs. On appeal the said decrees were reversed by the Subordinate Judge. The Plaintiffs thereupon preferred these second appeals. The appeal was first heard by a Division Bench consisting of Brett and Coxe, JJ., who differed in opinion. The dissentient judgments were as follows:—

BRETT, J.—The Appellants in these four appeals are the four sons and the Respondents are the three married daughters of Sarada Moyi Basu. On the 15th June 1853, Sarada Moyi received a gift from her father of taluk No. 5480 Raj Chandra Sarma. This was after her marriage. On the 7th October 1903 she died leaving four sons and three daughters her surviving. Three of the sons other than the Appellant in appeal No. 2095 of 1906 applied to the Collector to be registered as heirs of the taluk by right of inheritance from their mother. They were opposed by the 3 daughters and on the 24th August 1904 the applications of the sons were refused and order was passed to register the 3 daughters as proprietors of the taluk by right of inheritance from Sarada Moyi Basu. The four brothers then filed 4 suits on the 5th July 1905 and following days, praying for declaration of their title each to ¼ share in the taluk and for recovery of possession.

* Appeals from Appellate Decrees Nos. 2411 to 2413 of 1906 were analogous and were heard and decided along with this appeal.

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

In the Court of 1st instance the suits were heard *ex parte* in the absence of the Defendants and were decreed, the Munsif holding that the taluk was *ayautuka stridhan* of the mother and that the Plaintiffs as sons were preferential heirs to the married daughters.

On appeal the lower Appellate Court has set aside the judgment and decree of the Munsif in all the cases and has dismissed all the suits.

The Plaintiffs, the four sons, have appealed to this Court in four appeals. These have been heard together and will all be governed by this judgment.

Admittedly the taluk which is the subject of the present litigation is the *pittridatta ayautuka stridhan* of Sarada Moyi Basu, and the question which we have to decide is whether the sons or the married daughters are the preferential heirs.

The learned Subordinate Judge has gone with great care and detail through the various authorities and has come to the conclusion that the balance of authority is strongly in favour of the married daughters. In this appeal it has been argued by the learned Counsel for the Appellants that the learned Subordinate Judge has erred in law in the view which he has taken of those authorities and that in fact they support the contrary view that the sons are the preferential heirs.

The determination of the matter in dispute depends on the construction which should be placed on the passage in paragraph 16, sec. 2, Chap. IV of the edition of the Dayabhaga of Jimutavahana (as translated by Colebrooke). In that passage Jimutavahana has adopted the law as laid down by Manu in sloka 198, Chap. IX. The passage, which is given in the vernacular in the judgment of the Subordinate Judge, runs as follows :—"As for a passage of Manu.—The wealth of a woman which has been in any manner given to her by her father let the Brahmini damsel take; or let it belong to her offspring." Since the text specifies given by her father the meaning must be that property which was given to her by her father even at any time other than her nuptials, shall belong exclusively to the daughter, and the term Brahmini is merely illustrative, indicating that a daughter of the same tribe inherits." The words used which are translated as the "Brahmini damsel" are "*Brahmini kanya*" and the whole contest has centred round the point whether "*kanya*" should be translated to mean generically any daughter, and so to include married or widowed daughters, or should be confined to the unmarried daughters alone. If the first meaning be accepted the Defendants must succeed in these suits; if the second be preferred the Plaintiffs must succeed.

Now it is suggested by the learned Counsel for the Appellants that the first and obvious way to ascertain the meaning of the word "*kanya*" in the passage is to search through Chap. IV of the Dayabhaga and see where the word "*kanya*" occurs and what is the meaning which has been given to it. In sec. 1, the word is used twice as meaning a bride at the time of marriage, which may be taken to imply a maiden daughter. In sec. 2, irrespective of the passage in dispute, the term "*kanya*" wherever it occurs means maiden or unmarried

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

daughter. In sec. 3 "*kanya*" is used in the same sense except in verses 32 and 33. These are the passages on which the Subordinate Judge relies to expose, as he says, the fallacy of the hypothesis that the word "*kanya*" is used by Jimutavahana in the restricted sense of unmarried daughter. It is unfortunate that the two passages on which the Subordinate Judge relies are held by some commentators to be of doubtful authenticity, and by others have been pronounced to be interpolations, and that in a case* on the Original Side of this Court, lately heard by a Special Division Bench of which one of us was a member, it was held that the two passages were forgeries. The final decision on that point will no doubt rest with their Lordships of the Privy Council, but meanwhile it is apparent that the result of the search through Chap. IV of the Dayabhaga goes strongly to support the argument that the word "*kanya*" is used in that work to mean an unmarried daughter.

An argument based on the use of the word "*kanya*" in modern conversation and literature seems to us to be dangerous. In the course of 300 years words in all languages change and modify their original meaning.

The other method of ascertaining the meaning of the word *kanya* as used in passage is to look first to the context and then to enquire and ascertain how the passage has been interpreted by other authors and commentators. The decision of this case depends as I have already noticed on the meaning to be given to the word "*kanya*" in that passage.

Now in dealing with the question by the light of opinions expressed by authors and commentators we are met with a difficulty which the Subordinate Judge has either not recognized or ignored that these high authorities in the works which they have produced and in the different editions of their works have contradicted themselves and have displayed a wavering of opinion which cannot but have the effect of weakening confidence in them. In fact the point appears to be one of considerable doubt and difficulty and in dealing with it we have endeavoured to give to the various authorities careful and impartial study and consideration. Dealing with the question first on principle we have it that the property in suit having been given to Sarada Moyi Basu after her marriage comes under the head of *ayautuka stridhan*. In the ordinary line of inheritance to *ayautuka stridhan* the sons succeed as preferential heirs to the married or widowed daughters. In the cases before us the property can only go to the married daughters if the Hindu law makes a distinction between *ayautuka stridhan* which is "*pittridatta*" or given by the father and ordinary *ayautuka stridhan*. The case for the Defendants is that the texts on which they rely lay down a special line of succession to *pittridatta ayautuka stridhan*. Apparently it is not suggested that the exception is governed by either the principle of spiritual benefit or natural affection. The learned Subordinate Judge has however suggested that it is governed by a "natural desire to make a sort of equitable distribution of the effects of the parents amongst children, male and female," and "to a very laudable desire on the part of the

* Suit No. 615 of 1904.

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

to provide for helpless and indigent relations.". It does not however appear to follow of necessity that married daughters should be more indigent and helpless than sons.

Dealing next with the authorities we have first to take Chap. IV, sec. 2, of the Dayabhaga in which the passage occurs. The chapter first lays down the general rule of succession with regard to the separate property of a woman and provides that it devolves in the first instance in equal shares on her sons and unmarried daughters and in support of this view quotes passages from Sancha, Lichita and Devala. It then goes on to lay down the order of succession of other heirs and in paragraph 11 when noting that the son's son is preferred to the daughter's son it explains that the reason of it is that the married daughter is debarred from the inheritance by the son. In paragraphs 13 to 15 the nature of *ayautuka stridhan*, or property received by a woman at her nuptials, is explained and it is pointed out that the authorities, *e.g.*, Narada, Catyayana, and Yajnavalka which give the preference to all unmarried daughters over sons are referring to property of that class only. Then follows the paragraph 16 in which the passage occurs on which the decision of this case mainly depends. It deals with property given to a woman by her father "in any manner even at any time besides that of the nuptials," and provides that it shall be taken by the Brahmini damsel, or let it belong to her offspring.

"Her offspring" is generally accepted as meaning the offspring of the deceased. The next two passages in the paragraph offer a possible explanation of the use of the word "Brahmini." The concluding passage runs, "such is the meaning of the passage for else according to the preceding interpretation all the texts which declare the equal right of the son and daughter to the mother's property in certain cases would be incongruous." The texts here referred to are those dealt with in the preceding paragraphs of the section and which lay down the general rule that the sons and unmarried daughters equally divide the property of the mother, and the passage seems to lay down that the paragraph provides in respect of *ayautuka stridhan* received from a father an exception to that rule, and nothing more.

The succeeding paragraphs 17 to 24 seem clearly to go back to paragraph 13 and to deal with the text referred to in that paragraph. They explain that the term "her issue" in the text of Narada refers to the issue of the mother and not of the daughters. Sec. 13, however, distinctly provides that the texts relate only to the (*yautuka*) wealth given at the nuptials because these passages contradict the text of Devala cited in paragraph 6. That text runs, "a woman's property is common to her sons and unmarried daughters when she is dead."

Paragraphs 22 and 23 go on to lay down the line of succession to the property of a woman received at her nuptials, and the passages following explain how the order of succession is modified by the form adopted at the time of marriage.

For the Appellants it is argued that paragraph 22 resumes the discussion of

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

the succession to *yautuka stridhan* from paragraph 13 and that the intervening paragraph 16 alone deals with the succession to *pittridatta ayautuka stridhan* and provides in the case of such property the exception to the general rule of succession that the unmarried daughters succeed in preference to the sons and not jointly with them. This view is supported by the order of succession to *pittridatta ayautuka stridhan* which is given in the synopsis of Srikrishna at the end of the Chap. IV.

For the Respondents it is argued that the word "*kanya*" in paragraph 16 is used generically to include all daughters, that therefore all daughters whether unmarried, married or widowed, are preferred to sons, and that is the view which Srikrishna himself adopted in his Dayakrama Sangraha. Further it is argued that the discussion in the subsequent paragraphs of the words, "her issue" would be unnecessary if the expression "Brahmini *kanya*" did not cover married as well as unmarried daughters of the deceased. This contention does not however, seem to be sustainable for the discussion in paragraphs 17 to 21 seems clearly to refer to the meaning of the words "her issue" as used in the text of Narada in paragraph 13.

It is not easy to determine the exact meaning of the text of the Dayabhaga but the synopsis in which Srikrishna gives the order of succession shows clearly enough that he then interpreted it to mean that the unmarried daughters alone were preferred to sons in the succession to property given to a woman by her father not at her nuptials.

The next authority we come to is the Dayakrama Sangraha of Srikrishna. This is described in the preface as containing a good compendium of the law of Inheritance according to Jimutavahana's text as expounded in his commentary, on the Dayabhaga. Chap. II deals with the order of succession to the peculiar property of a woman. Sec. 1 deals with the succession to the property of a maiden, sec. 2 defines the peculiar property of a married woman, sec. 3 deals with the succession to the separate property of a woman when received at her nuptials, and sec. 4 with the separate property not received at her nuptials. Then comes sec. 5 which is important for the purposes of this case and which deals with the succession to the separate property of a woman when given to her by her father. Paragraphs 1, 2 and 3 deal with the order of succession. It has been pointed out to us that in the original the text is not divided into paragraphs and that the paragraphs 1 and 2 and the first half of paragraph 3 down to "received at nuptials" form one paragraph. These passages as well as the remaining part of paragraph 3 and paragraph 4 have been interpreted by the Subordinate Judge to mean that the order of succession to *ayautuka stridhan* is the same as that of *yautuka stridhan* given by the father, and is first the maiden daughter, then the married daughters who have or are likely to have male issue, then the barren and widowed daughters and on these failing the sons and the rest. This construction is supported by the learned pleader for the Respondent who argues that the latter portion of paragraph 3 and paragraph 4 merely confirms the preceding paragraphs.

The meaning and effect of the four

PROSANNO KUMAR BOSE v. SARAT-SHOSI GHOSH.

paragraphs have been considered by a Bench of this Court in the case of *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1). In that judgment the learned Judges express the opinion that the first paragraph of sec. 5 should be taken to apply to the separate property of a woman given to her by her father both at her nuptials and at any time other than her nuptials, that is to say, to both *yautuka* and *ayautuka stridhan*, that paragraphs 2 and 3 should be taken to lay down the rule of succession in the case of *yautuka stridhan* and paragraph 4 the right of succession applicable to *ayautuka stridhan*. They take the words "as in the case of property received at nuptials" in the 3rd paragraph to mean that it refers to such property only. The learned Judges also point out that if this view be accepted there will be no difference between the line of succession as laid down by Srikrishna in his synopsis to Chap. 4 of the Dayabhaga and in the section of his Dayakrama Sangraha with which we have been dealing. The learned pleader for the Respondents contends that it is impossible to reconcile the views expressed in the two works and that the line of succession given in the Dayakrama Sangraha should be accepted as correct.

One thing is however clear that if the two opinions be held to be irreconcilable the authority of the learned commentator is considerably weakened.

The next authority is the Dayatattwa by Raghunandan. Chap. X deals with the succession to woman's property. The first paragraph lays down the general rule that a woman's property is common to her sons and maiden daughters when she is dead, and the succeeding paragraphs up to paragraph 10 deal with the succession on failure of sons and married daughters. Paragraph 12 deals with property received by a woman at the time of her marriage and prefers the married daughters to the sons. Paragraph 16 deals with *ayautuka stridhan* received from the father and quotes the passage from Manu relied on in the Dayabhaga, Chap. IV, sec. 2, paragraph 16. Paragraph 17 provides that on default of these the son succeeds quoting in support the authority of Manu. The question then arises whether this applies to *ayautuka stridhan* or whether it follows in natural order of sequence, paragraph 13 which deals with *yautuka stridhan*. The Subordinate Judge has accepted the former alternative, but here as in the other authorities the succession to *ayautuka stridhan* is introduced seemingly in parenthesis and it seems open to doubt whether paragraph 17 really refers to it or to *yautuka*. Paragraph 18 points out that similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property. This description may refer to "property given by the parents" as mentioned in paragraph 11 or to nuptial presents as mentioned in paragraph 13.

Mr. Macnaghten in his principles and precedents of Hindu law published in 1829 in Vol. I, pp. 39 and 40 follows, in the case of *ayautuka stridhan* received from the father, the line of succession given by Srikrishna in his synopsis at the end of Chap. IV of the Dayabhaga.

Sir Thomas Strange in his elements of

(1) 10 C. W. N. 510 : s. c. I. L. R. 33 Cal. 315 (1905).

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

Hindu Law, Vol. I, p. 247, notices the intricacy with which the succession to woman's property is regulated and in the Appendix, Vol. II, p. 403, extracts the order of succession as given in the synopsis of Srikrishna to Chap. IV of the Dayabhaga and states that it is the settled order of succession to the separate property of a woman.

Neither of these learned authors could claim to be, as those previously mentioned, expounders of the text of the Hindu law, but both had large experience in the Courts of law and presumably were well aware of the authorities that were accepted in them.

The next authority is the Vyavastha Darpana of Shama Churn Sircar. In his first edition published in 1859 he adopts the exposition of the law of succession to the property of a woman received from her father at any time other than her nuptials given by Srikrishna in his synopsis attached to Chap. IV of the Dayabhaga in preference to that given in the Dayakrama Sangraha, because being consonant with the Dayabhaga it is respected above the Dayakrama Sangraha. He also accepts the view that in the passage in Chap. IV, sec. 2, paragraph 16 of the Dayabhaga "*kanya*" means "maiden daughter."

In the second edition of the Vayavastha Darpana published apparently in 1867 (see pp. 718-719) the learned author accepts the order of succession to the property of a woman given to her by her father at any time other than at her nuptials, given in Srikrishna's commentary on the Dayabhaga. In a remark which follows the portion of the text dealing with this subject, the author notices that in the Dayákrama Sangarha Srikrishna lays down that 'succession to the property given by a father to his daughter, whether at the time of her marriage or at any other time, is regulated according to the principles applicable to the property received at nuptials and he expresses the opinion that this view is supported by the note of Jimutávahana in the Dayabhaga on the passage in Manu.' But he goes on to say "the order of succession as given in the commentary on the Dayabhaga seems to be more consistent with reason for, in the succession to this kind of *stridhan*, why should the son who confers the greatest benefit on the mother be postponed even to the widowed and barren daughters (who confer no spiritual benefit on her), in the same way as in the succession to the *yautuka* property which descends to the daughters in preference to the son solely on account of certain texts of the sages and especially the text of Manu, Chap. III, v. 49. The text and note indicate the opinion of the learned author that, in the line of succession, sons should be preferred to daughters other than unmarried daughters.

In the edition of his work published in 1883 after his death a different order of succession is adopted and all daughters married and widowed are preferred to the sons.

Here, again, we have a learned commentator expressing diametrically different views at different times a circumstance which goes to weaken confidence in him as an authority.

Among later commentators we find in the work on Hindu Law of Marriage

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

and Stridhan by Dr. (now Sir) Gooroo Das Banerjee, that the learned author in the first edition remarks that the order given by Srikrishna's commentary on the Dayabhaga is "generally" accepted as correct, while in the later edition, p. 408, he qualifies it by saying it is accepted as correct by some authorities. The learned author points to the difference between the authorities on the point and expresses no certain opinion himself.

Jogendro Smarta Siromoni in his commentary on Hindu Law published in 1885 at page 398 deals with *pittridatta stridhan*. He points out first that there is a special rule with regard to this class of property, that it goes in the first instance to the unmarried daughter alone. He notices that in the Dayakrama Sangraha Srikrishna has laid down that the course of succession to *pittridatta* is similar to that in the case of *yautaka* but he goes on to say that in Srikrishna's commentary on the Dayabhaga he has expressed a different opinion. He however notices that property given by the father before or after marriage must be regarded as *ayautuka* and the course of succession to such property must be the same as in respect of any other *ayautuka*, except so far as the operation of the general rules is qualified by special texts, and he adds that there is no direct authority for saying that all daughters succeed to the *pittridatta* before the sons. The learned Subordinate Judge in dealing with this authority fails to notice that the opinion above expressed is clearly in favour of the view that the sons succeed to *pittridatta ayautuka stridhan*, after the unmarried daughters. In commenting on the judgment of Mr. Justice Mitter in the case of *Judoo Nath Sircar* v. *Bussunt Coomar* (2) the learned author remarks that the conflict between Srikrishna in the Dayakrama Sangraha and his master in the Dayabhaga cannot be reconciled except by showing that the text of the Dayabhaga is capable of being interpreted in the manner Srikrishna has done.

Babu Golap Chandra Sarkar Sastri in his work on Hindu law notices the conflict between the Dayakrama Sangraha and Srikrishna's Synopsis to Chap. IV of the Dayabhaga in respect of the line of succession to *ayautuka stridhan* which is given by a father at any time other than the nuptials and notices that the question is beset with considerable difficulty arising from apparent contradiction.

Mayne in his work on Hindu Law and Usage, 7th Ed., p. 900, sec. 673, accepts the view that all the daughters are preferential heirs to the sons.

Taking next the decisions of the Courts we find that in the case of *Gopal Chandra Pal* v. *Ram Chandra Pramanik* (3) this Court refused to follow the Dayakrama Sangraha in respect to the order in which a brother or a husband were entitled to succeed to moveable property received by a woman from her father after her marriage, and relied in preference on the text of the Dayabhaga as being the paramount authority in the Bengal School.

In the case of *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1) to which reference has already been

(1) 10 C. W. N. 510: s. c I. L. R. 33 Cal. 315 (1905).
(2) 19 W. R. 264 (1873).
(3) I. L. R. 28 Cal. 312 (1901).

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

made a similar view was accepted in respect of the mother's right to succeed to *anwadheya stridhan* of a childless woman in preference to her husband. The learned Judges in dealing with paragraph 16, sec. 2, Chap. IV of the Dayabhaga express the opinion that subject to the one variation made in that passage "*yautuka* given by a father is inherited as other *yautuka*, and *ayautuka* given by the father is inherited as other *ayautuka*:" and they attempt to reconcile the paragraphs 1 to 4 of. sec. 5 of the Dayakrama Sangraha with this view in the manner already noticed in this judgment.

In the case of *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhury* (2) the exact words of the Dayakrama Sangraha have not been accepted and in preference an attempt has been made to reconcile them with the text of the Dayabhaga.

The result of a careful examination of the commentators and authorities on Hindu law and of the cases which have come before the Courts in which the question of the succession to the *pittridatta ayautuka stridhan* of a woman has been considered, does not at all go to support the opinion expressed in rather over confident terms by the Subordinate Judge in the lower Appellate Court that the balance of authority is heavily in favour of the married daughters being preferred to the sons.

If we rely on the Dayabhaga itself, and the earliest interpretation put on it by Srikrishna in his synopsis, we must hold that the sons should be preferred in the line of succession to the married daughters. If we take the words of the text of the Dayabhaga we find that it is only in two exceptional passages, and those of doubtful authenticity, that the word "*kanya*" is used by itself in the Dayabhaga to mean a daughter in the generic sense. When the author intends to convey that meaning the word "*duhita*" is used. "*Kanya*" is used to mean "a bride at the time of bridal" and "an unmarried damsel" and in fact the original meaning of the word appears to have been "a girl up to 10 years of age." According to the ordinary rule unmarried daughters and sons succeed jointly to the separate property of their mother, and the question is whether in the passage of the Dayabhaga under consideration it was intended to give the unmarried daughter preference to the sons, or to give all the daughters preference to them. Certainly the use of the word "*kanya*" seems to go far to support the former conclusion.

To support the contention that the word "*kanya*" is used in the generic sense to include all daughters, the learned pleader for the Respondent has relied on the passages in the Daykaruma Sangraha to which we have referred and has argued that the learned Judges in the case of *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1) have failed to reconcile the discrepancy between these passages and the synopsis in the Dayabhaga which it is contended are irreconcilable.

The texts of the ancient authors do not however yield readily to those methods of construction which we are able to adopt in dealing with books of

(2) 19 W. R. 264 (1873).

(1) 10 C. W. N. 510: s. c. I. L. R. 3 Cal. 315 (1905).

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

recent date. The style is often involved. No rules of punctuation are observed and matters are introduced in parenthesis both in passages and in sections of the works without any apparent system or rule. One of the learned Judges who was a party to the decision under consideration is a Sanskrit scholar, who was able to seek elucidation of difficulties by reference to the original texts. Under these circumstances it seems to me that we should hesitate before differing from the view expressed in that judgment. The Dayakrama Sangraha is supposed to have been written by Srikrishna after his synopsis to the Dayabhaga, but as to this there is no certainty. At all events there is nothing in the Dayakrama to explain why the learned author had modified his previous opinion, and therefore there is every reason to attempt to reconcile the two expressions of opinion if it be possible. If that can be done in the manner adopted by the learned Judges in the case under notice all further difficulties will disappear.

If such reconciliation be impossible then it seems that the credit to be attached to Srikrishua as an authority is much weakened.

The meaning of the text of the Dayatattwa of Raghunandan is far from being clear owing to the introduction 'in parenthesis' of the reference to *ayautuka stridhan* given by the father.

Macnaghten and Strange both accept Srikrishna's Synopsis at the end of Chap. IV of the Dayabhaga as laying down the correct law.

Shama Churn Sircar in his Vyavastha Darpana wavers in opinion and it is remarkable that in the first and second editions which were published during his lifetime and in which he follows Srikrishna's Synopsis and accepts the meaning of "*kanya*" to be unmarried daughter, he gives reasons for his conclusions, while in the third edition, which was published after his death, no reasons whatever for his change of opinion (if in fact the opinion expressed in that edition be his), are mentioned.

Jogendro Smarta Siromoni refuses to accept the view that all daughters should be preferred to sons. The other learned authors invite attention to the difficulty which has arisen in interpreting the passage in the Dayabhaga owing to subsequent contradiction but do not assist us to elucidate it.

The decisions of the Courts to which we have referred indicate that where there is a difference between the Dayakrama Sangraha and the Dayabhaga the former has been rejected and the Dayabhaga followed.

Taking the passage of the Dayabhaga as it stands and giving due effect to the use of the word "*kanya*" and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pittridatta ayautuka stridhan* the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan* and to make an exception in the case of such property received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1) that the synopsis of Srikrishna to Chap. IV of the Dayabhaga and the paragraphs in the Dayakrama Sangraha are capable of reconciliation.

I would, therefore, set aside the judgment and decree of the lower Appellate Court and decree the appeal and restore the judgment and decree of the Court of first instance with costs.

As, however, my learned brother differs in opinion from me the case must be referred to the Hon'ble the Chief Justice for orders under sec. 575 of the Code of Civil Procedure.

COXE, J.—In this case the sole point in issue is whether sons succeed in preference to married daughters to property given to a woman by her father at a time other than the time of nuptials; and the decision of this question turns exclusively, or almost so, on the further question whether the word "*kanya*" in paragraph 16, sec. 2, Chap. 4 of the Dayabhaga refers exclusively to unmarried daughters or includes all daughters.

It will be convenient to deal with the authorities in order and the first that must necessarily be considered is the Dayabhaga itself. The Dayabhaga deals first with the succession to woman's property generally, and lays down that the property of a woman goes on her death, first, to her son and unmarried daughter, and then to the married daughters. The author then deals with the *yautuka* property, which he apparently regards as exceptional and lays down that it goes on, the mother's death to the daughters. Then comes the text on which this controversy hinges (iv, ii, 16). The author quotes a text of Manu which runs, "The wealth of a woman which has been in any manner given to her by her father, let the 'Brahmini' damsel (*kanya*) take, or let it belong to her offspring." And as I have said, the controversy arising in this case turns principally on the question whether the word "*kanya*" is intended to refer only to the unmarried or to all daughters.

There is no dispute that the term means "daughter." It is not suggested that any girl who was not a daughter could by any possibility succeed. But it is strenuously argued that the word ordinarily means a maiden daughter only, and is only used to signify daughters in general, when used in conjunction with the word *putra* (son). Particular reference is made to the use of the word in the text of Devala, quoted in paragraph 6 of the same section of the Dayabhaga, which runs, "A woman's property is common to her sons and '*kanya*,' when she is dead, but if she leave no issue, her husband shall take it, etc." It is very curious that if the word "*kanya*" here refers only to unmarried daughters, there is no direct reference to unmarried daughters at all, though admittedly they succeed before the husband. But it is not disputed that the word "*kanya*" in this passage means unmarried daughters only.

At the same time it cannot be denied that the word is occasionally used to signify daughters generally, and the sense in which it is used in this passage must in my opinion be gathered from the con-

(1) 10 C. W. N. 510: s. c. I. L. R. 33 Cal. 315 (1905).

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

text. It has been argued that the paragraphs succeeding paragraph 13 deal with the question whether in the text of Manu quoted above, the words, "her offspring" refer to the daughter's offspring or the offspring of the deceased mother. And it has been argued that the fact that this point has been thought worthy of serious discussion shows conclusively that the word "daughter" must include married daughters, for obviously an unmarried daughter could not, in the eye of the law, have any offspring at all; and therefore, if only unmarried daughters were referred to there could be no controversy or discussion as to what was meant by the words "her offspring." To this argument there could, in my opinion, be no answer, if the paragraphs really referred to the text of Manu before quoted. But if I understand the paragraphs aright they refer to a text of Narada quoted in paragraph 13, and not to the text of Manu at all. Still the fact remains that the author of the Dayabhaga deals with the succession to *yautuka* property in paragraphs 13, 14 and 15. He then deals with this special subject of the succession to *pittridatta* property. He then devotes paragraphs 17 to 21 to a possible misconception that might arise with regard to the succession to *yautuka* property laid down in paragraph 13. And then he goes on dealing with the succession to *yautuka* property generally. Taking the whole arrangement of the section, with the parenthetical reference to the succession to *pittridatta* property in paragraph 16 embedded in the general discussion of the succession to *yautuka* property, it seems to me that the author of the Dayabhaga regarded *pittridatta* property as coming under the rules relating to *yautuka* property, so far as daughters were concerned.

Ayautuka property goes first to the son and unmarried daughter, then to the other daughters. *Yautuka* goes first to the daughters and then the sons. If really there were a third and entirely distinct order of succession to *pittridatta* property, it seems reasonable to suppose that in a work that is certainly not inattentive to detail, it would have been stated distinctly what it was.

It has been argued on behalf of the Appellants that if he intended that daughters as a class succeeded to *pittridatta* property, the author of the Dayabhaga would certainly have laid down their order of succession within the class. To me the fact that he has omitted to do so, and has merely stated the fact of the daughter's succession in a parenthesis embedded in the middle of the rules governing the devolution of *yautuka* property, in which the order of succession of daughters *inter se* is set out, seems to indicate that he did not regard the succession of the "*kanya*" to *pittridatta* property as any exception to the rule governing the succession to *yautuka* property. It must be remembered that the word "*kanya*" was not his own. He was quoting from the Code of Manu, which was in verse, and presumably subject to the laws of metre and style. He did not feel himself bound to assign any specific meaning at all to the word "*Brahmini*," and it may well be that he did not feel himself bound to attach a restricted meaning to the word "*kanya*." With reference to the words "or let it belong to her offspring" in the text under considera-

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

tion it may be asked why a word signifying both male and female offspring should be used if the text means that on failure of daughters the property goes to the sons. It is clear however from the context that the word "offspring" cannot refer to all the children but only to the children other than the "*kanya*." If therefore "*kanya*" means all the daughters the word "offspring" must refer to the sons. If on the contrary the word "*kanya*" means unmarried daughter only the text prescribes that in the absence of an unmarried daughter sons and married daughters inherit together, which is not suggested by anybody. This consideration seems to me to support in some measure the view that the word "*kanya*" refers to all the daughters. I do not however lay any stress on this beyond saying that in my opinion the use of the word "offspring" is not inconsistent with the view that the term "*kanya*" refers to all the daughters.

Next comes the strongest authority, on the side of the Appellants, namely, the summary by Srikrishna, at the end of Chap. IV. of the Dayabhaga, of the rules of succession prescribed in that chapter. This clearly lays down that in the case of *pittridatta* property, not given at the time of marriage, the maiden daughter succeeds first, then the son, and then the other daughters.

It is argued, however, by the Respondents that this authority has been destroyed by the fact that Srikrishna in his later work, "The Dayakrama Sangraha" (Chap. II, sec. 5) has laid down that the daughters succeed before the sons. It will be necessary to set out the first three paragraphs of the section in full. They run as follows.—

"In regard to the wealth given by a father to a woman, at the time of the wedding, or antecedent or subsequent to it, a maiden daughter inherits in the first place.

2. "After her a married daughter who has, and one who is likely to have, male issue inherit together.

3. "Next the succession devolves on the barren and widowed daughters, and in default of all daughters the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares, 'The wealth of a woman which has in any manner been given to her by her father, let the Brahmini damsel take or let it belong to "her offspring."'

It was held in *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1), that though the first paragraph referred to both *yautuka* and *ayautuka pittridatta* property, the second and third could refer to *yautuka pittridatta* property only. This view was based principally on the words "as in the case of property received at nuptials," and on the fact that, if the second and third paragraphs referred to *ayautuka* as well as *yautuka pittridatta* property, it would be impossible to reconcile the Dayakrama Sangraha with the same author's synopsis of the Dayabhaga. It has been argued, however, before us that a consideration of the original text renders this view untenable. We are informed that the first two paragraphs and the third paragraph as far as the words "widowed daughters" form one sentence, prescribing

(1) 10 C. W. N. 510 : s. c. I. L. R. 33 Cal. 315 (1905).

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

that the maiden daughter is first entitled to succeed, then the married daughter, and then the widowed daughter, and ending with the word "entitled" which applies equally to all the preceding nominatives. An entirely new sentence then begins with the words "In default of all the daughters." If this is so, and the fact has not been disputed before us, then although I have the greatest diffidence in dissenting from the view of the learned Judges in the case cited above, I find myself unable to understand how any distinction can be drawn between the first and the two following paragraphs in their relation to all kinds of *pittridatta* property. And it appears to me that the succeeding sentence—"In default of all daughters the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares:—The wealth of a woman which has in any manner been given her by her father let the Brahmini damsel take," implies that in the view of Srikrishna at the time he wrote the Dayakrama Sangraha, the term "brahmini damsel" was in effect synonymous with "all daughters." In paragraph 4, it is laid down that whatever is given by the father "belongs first to the damsel and after her it goes to her offspring, her son." This paragraph is to my mind conclusive that Srikrishna at the time he wrote the Dayakrama Sangraha regarded the term "*kanya*" as including married daughters since otherwise he could not have referred to their sons.

Next comes the Dayatattwa of Raghunandan. Chap. X of this work begins by dealing with succession to *stridhan* generally. Then in paragraphs 12 to 15 the author deals with succession of *yautuka*. Paragraph 16 deals with the text of Manu that *pittridatta* property goes to the Brahmini damsel. Paragraphs 17 and 18 run as follows:—

"17. On default of these the son succeeds; since Manu says 'on default of daughters the inheritance goes to sons.'"

"18. Similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property."

Then paragraph 19 begins, "On failure of sons and the others, a woman's nuptial presents go to the husband."

It is argued on behalf of the Appellant that paragraph 16 is a parenthesis and that, at the end of it, the author resumes the consideration of the succession to *yautuka* property. In this view, the words "on default of these" at the beginning of paragraph 17 mean "on default of the daughters mentioned in paragraph 13." On the other hand it is argued on behalf of the Respondents that the words mean "On default of the Brahmini damsels mentioned in the preceding paragraph." It seems to me that both views are tenable and that it would be unsafe to build any firm conclusion on this passage. I may say however that the repetition of the words "nuptial presents" in paragraph 19 tends in a small measure to show that the parenthesis about the *pittridatta* ends, and the discussion of *yautuka* property is resumed at that point.

The authority next quoted is Jagannath's or Colebrook's Digest. It is difficult to base any conclusion on this work as it quotes both the text of Devala, to the effect that the son and maiden

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

daughter together, and that of Katyayana, to the effect that the daughters succeed, and draws no clear distinction between *yautuka* and *ayautuka* property. But in quoting the text of Manu (paragraph ccccxcv) the author construes it as laying down that the property of a childless wife shall go to the daughter of a Brahman co wife, or to the issue of that daughter. So that it is clear that the author did not regard the term "*kanya*" as necessarily confined to an unmarried girl.

Subsequent commentators may be briefly referred to, although the case must be decided on the view that is taken of the earlier authorities. Macnaghten is wholly in favour of the Appellant. Strange is claimed as being in his favour, but all that appears in that work is a reprint of Srikrishna's Synopsis at the end of Chap IV of the Dayabhaga. Jogendra Nath Bhuttacharjya is in favour of the Appellant's contention, but his views are in my opinion weakened by the distinction which he draws between the first and subsequent paragraphs of sec. 5 of the Dayakrama Sangraha. Golap Chander Sarkar seems to have been unable to make up his mind on the point, and a still more remarkable instance of this indecision may be found in the work of Shama Churn Sircar. In the first edition of the work of that learned author he seems to have been wholly in favour of the view urged by the Appellant. In the second (sec. 464) he admitted that the Dayabhaga furnished full authority for the contrary view, but thought that reason required the postponement of the married daughters to the sons. But in the last edition of his work, published some months after his death, he went wholly round to the view for which the Respondents now contend. On the other hand Mayne is wholly opposed to the view taken by the Appellants."

I attach a good deal of importance to the comments in the second edition of Shama Churn Sircar's Vyavastha Darpan and those in Mr. Justice Banerjee's work on *stridhan*. The first author gives the succession as laid down in Srikrishna's Synopsis at the end of Chap: IV of the Dayabhaga. That was the order of succesion which he thought was right. He defends it as based on reason. But he admits, and, as it seems to me, reluctantly admits that Srikrishna in the Dayakrama Sangraha lays down that succession to all *pittridatta* property is regulated according to the principles applicable to the *yautuka* property, and then he goes on to say: "The above is not the solitary opinion of Srikrishna alone but also of Jimutavahan as is evident from the following note." The note is a quotation of the paragraph 16 which has already been set out in full. Now if the word "*kanya*" must necessarily mean an unmarried daughter, I cannot understand how Shama Churn Sircar can have felt himself forbed to admit that paragraph 16 was opposed to the view which he was defending. For if the word "*kanya*," as we are now told, would necessarily convey to all Sanskrit scholars the signification "unmarried daughter," it is clear that the commentator must have seen at once that the Dayabhaga was not opposed to the synopsis and did not support the view that the order of succession to all *pittri-*

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

datta property was the same as that of succession to *yautuka*. And the fact that this evidently did not answer to him indicates strongly to my mind that the restriction of the meaning of the word "*kanya*" to unmarried daughters is untenable.

The same considerations apply though in a less degree to Mr. Justice Banerjee's observations in page 408 of his work on marriage and *stridhan* (second edition). Though he does not express any very decided opinion he seems to accept the order laid down in Srikrishna's Synopsis. But he observes that according to the Dayakrama Sangraha the order of succession was the same as for *yautuka* and that this "seems to be in accordance with the opinion of Jimutavahana and Raghunandan." And clearly if the word "*kanya*" had conveyed to the learned commentator's mind the meaning of "unmarried daughter" only he could have had no reason whatever for saying that it was the opinion of Jimutvahana, that the order of succession for all *pittridatta* property was the same as that for *yautuka*.

We have been referred to two cases *Judoo Nath Sircar* v. *Bussunt Coomar* (2) and *Gopal Chandra Pal* v. *Ram Chandra* (3). But all that was held in the first of these cases was that the words "sons and the rest" in the Dayakrama Sangraha did not include collateral heirs and this finding does not seem to me to have any bearing on the present case. The second case also has no real application to this case.

I think that the Appellants have failed to show that the Subordinate Judge is wrong. The only clear authorities on the point are, the two diametrically opposed statements of Srikrishna If either of these is to be preferred, it should, I think, be the latest, namely, the Dayakrama Sangraha. Otherwise the decision of the case must turn on the question whether the word "*kanya*" in the Dayabhaga includes married daughters. The Subordinate Judge is of opinion that it does include them. The arrangement of that portion of the Dayabhaga indicates that the author intended to include them. The interpretation of Manu's text given in Jagannath's Digest, and in the Dayakrama Sangraha, indicate that the term was understood as including married daughters. Among the later commentators Babu Gooroo Das Banerjee and Shama Charan Sircar, in the second edition of his work, while accepting the order of succession laid down in the synopsis, were at the same time of opinion that that order was opposed to the Dayabhaga, a view which necessarily implies that they thought that the term "*kanya*" included married daughters. Against these authorities there are the clear opinions of Macnaghten and Jogendra Nath Bhuttacharjee which in their turn are opposed to that of Mayne. I find it impossible to hold on these authorities that the term "*kanya*" could not have been intended to include married daughters. I think that it does include them, and if this view is correct, these appeals must necessarily fail.

Accordingly I would dismiss these appeals but I agree that they should be referred to another Judge or Judges under sec. 575, C. P. C.

(2) 19 W. R. 264 (1873).
(3) I. L. R. 28 Cal. 311 (1901).

PROSANNO KUMAR BOSE *v.* SARAT SHOSI GHOSH.

[Owing to this difference of opinion, the case was referred to a third Judge, Mitra, J.].

Messrs. B. Chuckerbutty, B. K. Lahiri and *Babu Mohini Mohun Chuckerbutty* for the Appellant.

Dr. Priya Nath Sen and *Babu Rajendra Chandra Guha* for *Babu Akhilbandhu Guha* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MITRA, J.—The decision of the question of Hindu law raised in these appeals depends on the interpretation of Chap. IV, sec. 2, paragraph 16 of the Dayabhaga of Jimutavahana, the paramount authority in the Bengal School. Other authorities may be followed, if there be any ambiguity in Jimutavahana's text. Srikrishna and Raghunandana undoubtedly deserve the greatest respect, but their opinions must yield to the authority of their great master, Jimutavahana, himself.

Chap. IV, sec. 2, paragraph 16 of the Dayabhaga of Jimutavahana is as follows in Colebrooke's translation :—"As for a passage in Manu, "The wealth of a woman which has been any manner given to her by her father, let the Brahmini damsel take ; or let it belong to her offspring," since the text specifies "given by her father," the meaning must be, that property which was given to her by her father, even at any other time besides that of the nuptials, shall belong exclusively to her daughter, etc." The text of Manu referred to in the paragraph is this in original :—

स्त्रियास्तु यद्भवेद्वित्तं पित्रादत्तं कथञ्चन ॥
ब्राह्मणी तद्धरेत् कन्या तदपत्यस्य वा भवेत् ॥

Chap. IX, V 193.—The word "damsel" in the translation by Colebrooke represents the word "कन्या" in the original text. In Jimutavahana's commentary on it in paragraph 16, he also uses the word "कन्यायाः" In the next sentence in that paragraph he uses the words "सपत्नी दुहिता ब्राह्मणी कन्या" In this last sentence, the word "दुहिता" is evidently used in contradistinction to the word "कन्या" ।

The question then arises.—In what sense has the word "कन्या" been used by Manu and Jimutavahana. The arguments before me, as well as those before my learned colleagues, Brett and Coxe, JJ., related principally to the meaning of the word "कन्या" and the sense in which it was used by Jimutavahana. Does it mean an unmarried daughter, or daughters generally ?

The word "कन्या" primarily means a maiden daughter, a virgin "कुमारी" (kumari). That is the interpretation of the word given by the celebrated lexicographers, Amar Singha and Hem Chandra. In the Medini also, the first synonyms of "कन्या" is "कुमारी" (maiden daughter). The same meaning is given in the Sabdakalpadruma by Rajah Sir Radha Kanta Deb Bahadur, and all the later lexicographers. Professor H. H. Wilson in his dictionary also gives the same meaning : "A maid, a virgin, a girl of nine or ten years of age." Later writers have occasionally used the word to mean "a woman" "नारी", from the particular to the general. But that is not the meaning of the word as used in the Smritis. To illustrate the primary meaning "virgin" of the word, the

PROSANNO KUMAR BOSE v. SARAT SHOSI GHOSH.

learned author of the Saudakalpadruma has cited a significant passage from the Vanaparba in the Mahabharata showing the root and inflexion of the word and its meaning *kumari*,—"कुमारी." He gives the secondary meaning "woman" (नारी) following the earlier lexicographers. Sir Greaves Haughton in his dictionary confines the meaning to a "maid, a virgin, a young woman." In fact there can be no doubt as to the meaning of the word as used in earlier Sanskrit literature and law. The genus (woman) for the species (virgin) is of later use.

I have not been able to find the word used in its wider sense anywhere in Manu. The word "दुहितृ" means daughter, married, unmarried or widow. All female children are daughters "दुहितृ". The word included in its significance, "कन्या", and the lexicographers, I have referred to, are unanimous in this respect. Amar Singha, Hem Chandra as well as the Medini also give the wider meaning of the word *kanya*, but they do not give the synonym to be *duhitri*; they give the word woman (नारी). When Jimutavahana uses the words "सपत्नी दुहिता आत्मजो कन्या" in paragraph 16, he must have used the word "दुहितृ" in its appropriate sense of daughter and the word "कन्या" as included in the genus "दुहितृ." The word "कन्या" occurs also in paragraphs 6 and 7 of the same chapter and section. In paragraph 6 the text of Devala is cited: "सामान्यं पुत्रकन्यानां . भर्तार्या स्त्रीधनं स्त्रियाम्" and in paragraph 7 the word is interpreted to mean, as it must, "कुमारी". In both the paragraphs, Colebrooke's translation of the words is "unmarried daughter." I am not disposed to come to the conclusion that the same word was used by Manu and Jimutavahana in an unusual sense in Chap. IX, v. 198 and paragraph 16, respectively. Such use would be inconsistent with its use in other parts of their great works.

Of the commentators on Manu's text, Kulluka carries the greatest weight. He seems to be of opinion that unmarried daughter first succeeds and, on her default, the sons of the deceased. He lays down distinctly that in the presence of both an unmarried daughter and sons, the former should be preferred, and the sons follow the maiden daughter. This seems to be also the opinion of Manu's commentators, Raghavananda, Nandan and Ram Chandra, but Sarvajna Narayan may appear to be of a different opinion. The latter says "कन्येति दुहितृ मात्रपरम्" *i.e.*, the word *kanya* is used for daughters generally. But Survajna Narayan's authority has never been recognised in Bengal as superior to Kulluka's and the sentence itself is very vague.

The commentators of Dayabhaga, Srinatha, Ram Chandra, Moheswara Achyutananda, Raghunandana and Srikrishna, interpreted the word "कन्या" in the text as having its ordinary meaning "unmarried daughter." Srikrishna is abundantly clear in his commentary as has been pointed out by Brett and Coxe, JJ. Srikrishna and Raghunandana subsequently laid down in their respective treatises a different rule of succession, as if the word "कन्या" might mean daughters generally. In a conflict of authorities, however, Jimutavahana must be preferred. The later opinions of Srikrishna and Raghunandana which are not based on the text of the Dayabhaga ought not to be followed by the Courts in Bengal.

Macnaghten (Principle of Hindu Law, pp. 39 40), Strange (Vol. I, p. 251 and Vol. II, p 403), Shyma Churn (Vyavastha Darpana, p. 806, 1st Edition; pp. 717-8, 2nd Edition) and Elberling have followed Srikrishna's commentary on the Dayabhaga and not his individual opinion as given in the Dayakrama Sangraha. The order of succession—maiden, daughter, son and other daughters—was accepted by all Anglo-Indian text writers until a cloud was thrown in the third edition of Shyama Churn's Vyavastha Darpana published after his death. Sir Gooroo Das Banerjee in his learned work on the Hindu Law of Marriage and Stridhan (p. 401, 2nd Edition) seems to be of opinion that Srikrishna did not follow Jimutavahana as regards succession to *pittri-datta stridhan*. Raghunandan in his Dayatattwa did not also follow the Dayabhaga.

I am of opinion that we should follow the Dayabhaga and not Srikrishna and Raghunandan, when it is evident that the latter have not followed their master in giving preference to daughters generally. I am confirmed in my view by what Rampini and Mookerjee, JJ., have said in *Ram Gopal Bhattacharjee* v. *Narayan Chunder Bandapadhya* (1). I agree, therefore, with Brett, J.

The result is that the appeals will be decreed with costs in all the Courts.

Appeals allowed.

(1) 10 C. W. N. 510: s. c. I. L. R. 33 Cal. 315 (see p. 325) (1905).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 277 OF 1906.

MITRA, J.
CASPERSZ, J.
1908.
31, January.

RAM MONI DASI, Petitioner, Appellant,
v.
RAM GOPAL SHAHA, Opposite Party, Respondent.

Will, document whether—Construction—Operation after death—Revocability.

A document which contains directions regarding the executant's property after his death, which in certain circumstances may be revoked is a Will.

Instruments not drawn by professional men should be liberally construed.

The document in question in this case would be ineffective as an instrument of transfer of immoveable properties owing to the properties not being specified in it, but could be given effect to if it were a Will:

Held—*That the document was a Will.*

This was an appeal preferred against the decision of A. C. Sen, Esq., District Judge of Rajshahi, dated the 10th April 1906.

The District Judge rejected the Petitioner's application for letters of administration with the Will annexed made on the basis of a document which she contended was the Will of her deceased husband. He was of opinion that the document was not a Will.

The document was as follows:—

"In favour of Sriman Sreemanto Shaha, son of late Ram Kumar Shaha, by caste Shori, occupation cultivator and shop-keeping, inhabitant of Balakandi, at present of Orjunpore, station Natore, District Rajshahi.

RAM MONI DASI v. RAM GOPAL SHAHA.

"This *ekrarnama* (deed of agreement) is executed as follows:—

"I have kept you, in my house, in order to marry to you Sreemutty Radhika Sundari Dasya, the daughter born of my loins, and in order to create your right, title and interest in the 8 annas share of my moveable and immoveable properties. Being in my house, you have been all along maintaining me and my wife Sreemutty Rammoni Dasya, by giving food and clothing from your earnings, and you also agree and promise to maintain (us) in future by giving food and clothing and to perform our sradh and funeral ceremonies, upon our death. Being satisfied with your conduct, I do hereby promise by executing this *niampotro* and *ekrar* that all my moveable and immoveable properties which at present belong to me and whatever other properties may belong to me in future shall all remain in my possession and shall be mine, so long as I shall remain alive, and I shall be competent to alienate the same according to my will and pleasure. Upon my death, my said wife Rammoni Dasya shall, in the first instance, receive a moiety share of all moveable and immoveable properties and you shall also maintain the said Rammoni Dasya with food and raiment during the term of her natural life and then perform her funeral and *sradh* ceremonies upon her death. After the death of the said Rammoni Dasya, you will get the aforesaid half share and you will be able to enjoy and possess the same, with full powers of alienation by way of sale, gift and otherwise, that is to say, upon the death of myself and of my wife Rammoni Dasya, you will have right, title and interest in the 8 annas share of all my moveable and immoveable properties.

"In the month of Assarh 1313 next I shall marry my said daughter to you at my own expense.

"If I do not marry my daughter to you or if I expel you from my house, then I shall pay to you Rs. 300 (three hundred) on account of compensation for loss. After my death, my heirs also shall remain bound according to the conditions of this *ekrar* (agreement), to marry my said daughter to you. In case of default you will be able to realise the said 300 rupees from the properties left by me I and my heirs and legal representatives shall be bound by all the stipulations mentioned in this *ekrar*. To this effect I *bonâ fide* execute this deed of *ekrar* of my free will and accord in sound state of body and in possession of my senses."

Against the decision of the District Judge the present appeal was preferred.

Babus Golap Chandra Sarkar and *Mohini Mohan Chuckerbutty* for the Appellant.

Babu Sarat Chandra Roy Chowdhury for the Respondent.

THE JUDGMENT OF THE COURT was as follows:—

The Indian law defines a Will to mean "the legal declaration of the intentions of a testator with respect to his property which he desires to be carried into effect after his death." (See sec. 3 of the Indian Succession Act) sec. 49 would indicate that such an instrument is revocable. We have to examine whether the instrument propounded in this case, the alleged Will, dated the 2nd February

RAM MONI DASI v. RAM GOPAL SHAHA.

1905, corresponding with 20th March 1311, gives directions as to the disposition of property subsequent to the death of the testator, and whether it is revocable in its character or not.

The testator bequeathed a half share of his moveable and immoveable properties without specifying them in the document itself to his widow Rammoni and imposed a burden on Srimanta Saha to maintain the widow during her lifetime. The document then directed that, after the death of the widow, her half share would go to Srimanta. The dispositions were to take effect after the death of the testator. They were also revocable according to the subsequent clause, inasmuch as the daughter of the executant might or might not be married to Srimanta. It is true that the document is of an ambiguous character, but it certainly contains directions regarding the executant's property after his death which, in certain circumstances, may be revoked.

It has been held over and over again in this Court and by the Judicial Committee that instruments not drawn by professional men should be construed liberally. One fact is clear that no property is specifically mentioned in the document, specially the immoveable property. It would not be effective as an instrument of transfer of immoveable property. Effect could be given to it only if it were a Will.

We cannot, therefore, agree with the learned District Judge that the instrument is not a Will and probate cannot be granted of it. We remand the case to the lower Court to deal with it according to law. Costs will abide the result. We assess the hearing fee at two gold mohurs.

N. C. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 242 OF 1908.

RAMPINI, J. & SHARFUDDIN, J.

1908. Heard, 29, April. Judgment, 4, May

DASARATH MOHAPTRA and another, Petitioners,

v.

RAGHU SAHU, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 147—Common object—No express finding as to common object, does not vitiate conviction, when accused not prejudiced.

In a trial of the accused for an offence under sec. 147, I. P. C, the common object stated in the charge was to "enforce a right or supposed right" but as there was no contest in either of the lower Courts as to the common object, those Courts did not discuss the question of the common object and come to any express finding on the point but it was clear that both the Courts impliedly found that the common object was as stated in the charge,

Held—*That, as the accused were in no way misled or prejudiced in their defence, their conviction was not bad in law.*

SABIR v. QUEEN-EMPRESS (1) and PORESH NATH SIRCAR v. EMPEROR (2) *explained and distinguished.*

This was a rule granted on the 3rd March 1908, against an order of Babu B. Chaudhury, Deputy Magistrate of Balasore, dated, 3rd February 1908, convicting the Petitioners of an offence under sec. 147, I. P. C., and sentencing each to undergo rigorous imprisonment for a month and to pay a fine of Rs. 20 which order was, on appeal, affirmed by Mr. B.

(1) I. L. R. 22 Cal. 276 (1894).

(2) I. L. R. 33 Cal. 295 (1905).

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, AUGUST 17, 1908. [No. 40

Contents.

NOTES.

WE REPRODUCE IN ANOTHER COLUMN AN INTERESTING article in an American contemporary about the administration of justice as it prevailed in the Bombay Presidency about a century ago. The East India Company and their officers used to regard His Majesty's judges and the independent discharge of their duties in those days with considerable jealousy and disfavour. The traditions of the Indian executive may be said to have to a certain extent come down to us from the days of the East India Company and we cannot say that the traditional jealousy between the executive and judiciary is quite extinct. Should the scheme for the separation of the executive and judicial functions now before the Government of India be made farreaching enough so as to make each move independently in its own plane and thus obviate all causes of friction, then we may hope to see amongst the executive and judicial officers a better understanding of the respective functions of these two important limbs of the State.

WE PUBLISH BELOW A LETTER FROM A PLEADER drawing the attention of the Hon'ble Judges of the Calcutta High Court to the manner in which the suggestions of the High Court that the Civil Court Amins should in course of time be replaced by pleader commissioners are being given effect to by Civil Courts in certain districts. We agree with our correspondent that it is time that some rules should be framed regarding the issue of such commissions to pleaders and fixing the scale of remuneration of pleader commissioners. Our correspondent puts the case for pleader commissioners clearly and his suggestions seem to us to be very reasonable.

THE MUKTEARS PRACTISING UNDER THE JURISDICTION of the Calcutta High Court, has submitted to us a draft memorial to the Hon'ble Judges which contains some very reasonable prayers. A recent Allahabad ruling (I. L. R. 30 All. 66) which we noticed in these columns, and also the fact that the new Code of Civil Procedure makes no reference to this class of legal practitioners has evidently alarmed them. With regard to the former, we may say, that it has no application in Bengal. It has been the invariable practice in all the mofussil magisterial Courts in Bengal, Behar, Orissa and Assam to allow the muktears to appear and plead in criminal cases as a matter of course. The High Court has never contemplated and the magisterial Courts have never required the muktears to take special permission to appear in each case. No occasion has arisen for a change in the practice.

THERE WAS ONCE A PROPOSAL FOR THE ABOLITION of this class of legal practitioners But it was the Hon'ble Judges of the Calcutta High Court who opposed the proposal on the ground that the result would be to do away with the "poor man's counsel." Consequently the proposal was dropped and gradually the qualification and standard of examination of the mukteears have been raised. Now-a-days no one who has not passed the Entrance Examination of the Calcutta University is entitled to offer himself for the Mukteearship examination. Further, to qualify themselves as mukteears they have to pass an examination in Hindu and Mahomedan law and also in Criminal and Civil law and the Revenue law of the Province The standard and the nature of the examination is almost the same as that of the Pleadership examination. The mukteears of to-day are regarded as fairly educated men and we see no reason why their privileges should be curtailed instead of being enlarged. We regard the prayer in their petition that they should be allowed to offer themselves for Pleadership examinations after five years' practice as very reasonable.

IT IS TRUE THAT SEC. 37, CL. (*b*) OF THE CODE OF Civil Procedure of 1882, which is now in force, specifically mentions that parties may put in appearance, &c., through mukteears holding special powers of attorney. The new Code of 1908 makes no specific mention

of muktears by name in the corresponding provision, *viz.*, Order III, Rule 2, but provides that any person holding powers of attorney can act on behalf of the parties. It is explained in the statement of objects and reasons of the new Code that this widening of the provision includes the muktears as a matter of course and it is, therefore, unnecessary to repeat the provision of the old Code in the new one. Further, it should be remembered that the powers and privileges enjoyed by muktears are not defined by any section of the Civil Procedure Code but are conferred on them by certain rules made by the High Court in accordance with sec. 11 of the Legal Practitioners Act.

UNDER SEC. 11 OF THE LEGAL PRACTITIONERS ACT "the High Court may, from time to time, make rules directing what shall be deemed to be the functions, powers and duties of muktears practising in the Subordinate Courts . . . . . ." The Calcutta High Court in accordance with this section has laid down the functions, powers and duties of muktears to be chiefly the following:—"To present a plaint, to produce documents for his client, to tender a written statement, to apply for and receive processes, to file interrogatories and affidavits, to file notices for service, to apply for records being sent for, to apply for adjournment, to apply for summonses to witnesses, to apply for execution, to apply for leave to bid, to apply for commission to examine witnesses, to apply for an injunction, to apply for an order of reference to arbitration and certain other matters relating to arbitration, to file a memorandum of appeal or a cross-objection duly signed by a pleader, to deposit rent under the Bengal Tenancy Act, to apply for probate or letters of administration if unopposed, to apply for a certificate of guardianship or a certificate to collect debts if unopposed." Since it is a long established practice that the muktears may appear and plead in the Mofussil magisterial Courts in these Provinces without any special permission, we think, formal recognition should be given to it in the rules.

CRIMINAL CASES OF 1907.

(*Continued from* p. *ccxiv.*)

SECTION 476.—[*Court*]: The word "Court" in sec. 476 does not include a successor [*Begu* v. *Emperor*, 34 Cal. 551 (F. B) approving of *Re Krishna*, 9 C. W. N. 859, and distinguishing *33 Cal. 193; 11 C. W. N. 119* and *2 C. L. J. 65n*, followed in *Kartik* v. *Emperor*, 35 Cal. 114 and *Kanto* v. *Gobardhan*, 35 Cal. 133, but dissented from in *Re Lakshmidas*, 32 Bom. 184] The case of *Runga* v. *Emperor*, 29 Mad. 331, is also opposed to the Full Bench ruling. The Bombay case in *32 Bom. 184* is based on the erroneous reasoning that an order under sec. 476 (1) is now a "complaint" under cl. (2). [*Discretion*]. The summary power under the section is exercisable only at, or immediately after, the conclusion of the trial (*Begu* v. *Emperor*, supra). It is not in every case which a Magistrate considers false that he should direct a prosecution under sec. 476. Where the Magistrate and the Judge came to different conclusions on the evidence, which was of a doubtful character, the order under sec. 476 was set aside (*Emperor* v. *Gopal*, 34 Cal 42).

CONTEMPT OF COURT.—An order of a Munsif under sec. 476 for contempt of Court and defamation contained in a petition presented to him for transfer is illegal. Sec. 476 does not cover a case under sec. 500, P. C., and the offender should be tried for contempt then and there (*Jogendra* v. *Syama*, 6 C. L. J. 713).

MAINTENANCE —[*Who is liable*]. The husband and not the father of an illegitimate girl of 7 is liable for her maintenance (*Bhojan* v. *Swarna*, 11 C. W. N. c). [*Living in adultery*]. A single act of adultery is not "living in adultery" which expression implies a course of conduct. [*Patala* v. *Patala*, 30 Mad. 332: *see* also *Kallu* v. *Kaunsilia*, 26 All 326: *Gantapalli* v. *Gantapalli*, 20 Mad. 370, 373 (F. B.)]. The Full Bench ruling in *20 Mad. 370* defines "*adultery*" within the meaning of sec 488, Cr. P. C., as distinguished from the definition in sec 497 of the Penal Code.

BAIL.—No bail is necessary from a person called upon to show cause under sec 107, when proceedings are merely contemplated and not actually instituted, but only personal recognizance where there is a likelihood of his absenting himself (*Mewa* v *Emperor*, 11 C. W. N. 415).

WITHDRAWAL OF CASE —Where a public prosecutor puts in a petition for the withdrawal of a case against an accused, and it is granted, the latter is a competent witness, though no formal order of discharge has been recorded (*D. L. R* v *Banu Singh*, 5 C. L J. 224). But this view is hardly consistent with *Banu Singh* v. *King-Emperor*, 33 Cal. 1353, 1360. The withdrawal is legal though the proper order in such a case should have been of acquittal and not one of discharge (*Queen-Empress* v. *Hussein*, 25 Bom. 422: see *33 Cal. 1353, 1358*). When a person jointly accused with others of a non-bailable offence has accepted a pardon it is not necessary that he should be detained in custody, but he may be admitted to bail (*D. L. R.* v. *Banu Sing*, 5 C. L. J. 224, 228).

DISPOSAL OF PROPERTY.—[*Property produced before the Court*]. An order directing the delivery of property to the applicant *merely* on a complaint of unlawful detention by another is illegal (*Nur Mahomed* v. *Jafar*, 5 C. L. J. 229: *Sreedam* v. *O'Grady*, 6 C. L. J. 707). [*When no offence committed*]. The Magistrate has jurisdiction, though no offence has been committed in respect of the property produced before it or in its custody (*Rusul* v. *Ahmed*, 34 Cal. 347). The ruling in *30 Cal. 690* contra is wrong, as was.

pointed out by the Author in his article in *8 C. W. N. xliii*, published shortly after the decision, where the law on the point has been fully discussed. [*Confiscation*]. The words "*which has been used for the commission of any offence*" do not include a printing press (*Abinash v. Emperor*, 34 Cal. 986). This decision is right in its conclusion, and was followed by the Punjab Chief Court, though its reasoning is open to question, as was pointed out by counsel in the latter case, one ground on which it is based, *viz.*, that as sedition is not an offence till there is publication, there is no publication till the seditious matter reaches the public, is wrong. The giving of a seditious article to compositors to set up in type, is sufficient publication: see *Heckford v. Galstin*, 2 Hyde's Report 275.

DISPOSSESSION.—[*By show of force*]. In *Chhakoo v. Emperor*, 11 C. W. N. 467, the Court expressed an opinion that dispossession by a show of force without the use of actual force was within sec. 522, though it was admitted the rulings *contra* in *25 Cal. 434* and *27 Cal. 174* were binding.

TRANSFER.—[*Grounds of*]. The High Court will transfer a case when the Magistrate has pre-judged the guilt of the accused in a counter case (*Rangasami v. Emperor*, 30 Mad. 233: *see* also *13 C. L R. 275*, and *2 Shome's Rep. 35*), but he is not incompetent simply because he has tried a counter case: he ought in such a case to keep an open mind (*1 C. W. N. 426*, distinguishing *13 C. L. R. 275*). A transfer will be allowed where the complaint relates to facts which formed the defence in another case already tried by the same Magistrate (*4 C. W. N. 824*), or where the Magistrate has obtained extra-judicial information (*Radha v Nazima*, 11 C. W. N. cclxii: see *10 C. W. N. xvi*), or has appointed a party to a sec. 107 proceeding a special constable, though the order is in abeyance (*Bibee v. Umatul*, 11 C. W. N. 121: *Gopinath v. Emperor*, 10 C. W. N. 82), or where on application under sec. 526 (8) the Magistrate has proceeded to examine more witnesses and then adjourned the case, and after the receipt of a telegram from a vakil intimating the issue of a rule examined other witnesses and adjourned the case (*Wahed v. Basaraddi*, 11 C. W. N. 507). The Magistrate is bound to act on a telegram from a High Court practitioner informing him of the issue of a rule (*2 C. W. N. 498 : 5 C. W. N. 110 : 11 C. W. N. 507* : contra *19 Mad. 375*). [*Clause (8)*]. The application under clause (8) can be legally put off to the last moment, that is to the day fixed for the hearing of the case, though the accused had ample time to move the High Court, before (*Tarapati v. Emperor* ccxxxi: *see* also *29 Cal. 211 : 8 C. W. N. 77*).

[*By District Magistrate*]. Where the Sessions Judge has directed further inquiry under sec. 203, when the complaint was dismissed under that section, the District Magistrate cannot transfer it from the file of the Magistrate who then has seizin of the case (*Brij v. Gopal*, 11 C. W. N. 316).

PROCEEDING IN A WRONG PLACE.—Sec. 531 applies where a Magistrate tries an accused for an offence committed outside his jurisdiction, and is not limited to cases where the offence is committed within his jurisdiction but is tried outside of it (*Empress v. Doraswamy*, 30 Mad. 94 : see *13 B. L. R. Ap. 4 : 5 Mad. 23, 25 : 17 Mad. 402 : 26 Mad. 460* and *16 Bom. 200*).

SECTION 537.—The issue of a second summons on the same information on which a previous summons disclosing no offence was issued, is an irregularity cured by sec. 537 (*Emperor v. Jeevanji*, 31 Bom. 611), and so also the omission to record the reasons for transfer under sec. 528 (*Prakas v. Emperor*, 34 Cal. 918), or for granting pardon under sec. 337 (*D. L. R. v. Banu Sing*, 5 C. L. J. 224), unless in each case the accused has been prejudiced by the irregularity.

II. PENAL CODE.

CONVICTION UNDER DIFFERENT ACTS.—Facts forming the basis of a conviction and sentence under one section of an Act cannot form the basis of conviction and *separate* sentence under another. Where an Act is a general and a special one, the sentence should ordinarily be under the latter (*Kuloda v. Emperor*, 11 C. W. N. 100, referring to *Chandi v. Abdur*, 22 Cal. 131, 138, 139). The conviction may be under either (*Weir 3rd Ed. 12 : 8 W. R. Cr. 55*), but sentences under both are illegal (*5 N. W. P. 49*). Sec. 26 of Act X of 1897 lays down the same rule. Sec. 5 of the Penal Code saves special and local laws, and the question raised in 11 C. W. N. 100 whether a special law repeals a general law does not arise in connection with this Code.

CONSTRUCTIVE OFFENCES.—Sec. 149 refers to an assembly of five or more, and sec. 34 applies without such limitation (*Nibaran v. King-Emperor*, 11 C. W. N. 1085, 1090).

FORFEITURE.—Sec. 62 is to be applied only in rare cases, *i.e.*, to crimes of an atrocious character or offences committed under aggravating circumstances (*Emperor v. Amrit*, 29 All. 25 : *Queen v. Mahomed*, 12 W. R. Cr. 17).

INSANITY.—Where the accused cut his wife's throat without any rational motive, and was captured without attempt to escape, and before the offence had suffered from failure of reasoning powers and had entertained delusions as to dangers threatening his wife, it was *held* that the facts proved unsoundness of mind rendering him incapable of knowing the nature of his act (*Dil Gazi v. Emperor*, 34 Cal. 686 : cf. *Shibo v. Emperor*, 10 C. W. N. 275 : *Queen-Empress v. Lakshman*, 10 Bom. 512 : *Queen-Empress v. Venkatasami*, 12 Mad. 459 : *Queen-Empress v. Razai*, 22 Cal. 817 : *Queen-Empress v. Kadir*, 23 Cal. 604). The usual medical tests of insanity are laid down in Taylor, 4th Ed., p. 572, *et seq.* The law as to insanity in India may be thus summarized.

(i) *The legal test of insanity is that prescribed in*

sec 84, I. P. C. and not the medical tests (10 Bom. 512 : 12 Mad. 159 : 23 Cal. 604).

(ii) *The legal test of criminality is whether the accused knew the nature of the act* (10 Bom. 312 : 12 Mad. 459 : 14 Bom. 564 : 22 Cal. 817 : 23 Cal. 604 : 28 Cal. 613 : 29 Cal 413).

(iii) *In the case of insane delusions the accused is in the same position as to legal responsibility as if the acts were real* (28 Cal. 613, following McNaghten's case 10 Cl. and F. 20)..

(iv) *The onus of proving legal insanity is on the accused* (*Queen Empress* v. *Kadir*, 23 Cal. 604, 607, and sec. 105, Evidence Act)

Insanity may in extreme cases affect the will or emotions and thereby also the cognitive faculties, and sec. 84 applies in such cases (*23 Cal 604 : 10 C. W. N. 725*). Diseases may sometimes produce an incapacity of knowledge of the nature of the act so as to render sec. 84 also applicable (*29 Cal. 413 : 14 Bom. 564*).

PRIVATE DEFENCE.—[*Sec. 99—"not strictly justifiable"*]. Sec. 99 does not apply where the act of the public officer, *e.g*, search without a written authority under sec. 165 (3), is *wholly* illegal. It contemplates acts against which there is no right of private defence (*Iddu* v. *Emperor*, 6 C L J. 753). So where the Police attempted to execute a warrant issued under sec. 96, Cr. P. C, instead of sec. 100 of the Code, and was resisted, it was held that the section did not apply (*Bisu Haldar* v. *Emperor*, 11 C. W. N. 836). The following rulings belong to this class of cases: *Bolai* v. *Emperor*, 35 Cal. 361 and *13 Bom. 168 : 29 All, 272 : 24 Cal. 320 : 1 C. W. N. 174*.

SEDITION.—The definition of "*sawraj*" was explained in *Beni* v *Emperor*, 34 Cal. 991, but it has given rise to a great deal of criticism in some of the recent sedition cases in Bombay and Madras The question is not really what the etymological meaning of the word is but what meaning was attached to it by the persons who used it. Here the case was decided mainly on the former consideration.

UNLAWFUL ASSEMBLY AND RIOTING.—[*Joint possession*] Where two parties were entitled to joint possession but one was out of possession, and 30 or 40 servants of his went armed with *lathis* and took possession without having to use the criminal force, *held* that the conviction under sec. 143 was right (*Bepin* v. *Pranakul*, 11 C W. N. 176 : *see* also *Emperor* v. *Gopalrao*, 10 Bom. Law Rep. 285). [*Rights of market proprietors*]. Market proprietors have a right to prohibit the sale of particular kinds of goods by non-permanent stall-holders, but if they forcibly compel them to give up the sale of some article hustling them and throwing their goods away they are guilty of rioting (*Raj* v. *Emperor*, 11 C. W. N. 28). [*Wantonly provoking riot*]. Persons taking part in a religious procession and gratuitously disobeying police orders as to the conduct of the prosecution, with the result that a riot was only prevented by armed police being brought on the scene, are liable under sec. 153 for "*wantonly*" giving provocation (*Emperor* v. *Husain*, 29 All. 569). [*Rioting not for landlord's benefit*]. A riot between tenants, the landlords not being intended to, or deriving nor having derived any benefit, does not come within sec. 153 (*Mahipat* v. *Emperor*, 11 C. W. N. cclxviii)

(*To be continued.*)

E H. MONNIER.

CURRENT INDIAN CASES

AJUDHIA v. KUNJAR, I. L. R 30 All. 123. *Instalment bond—Default—Limitation Act, Sch. II, Art. 75*

Limitation does not run from the first default where a bond payable by instalments contained a provision that in default of the payment of one instalment it would be in the power of the creditor to sue for the whole amount.

BAIJNATH v. PAITU, I. L R. 30 All. 125 *Sale—Non payment of purchase money*

Non payment of purchase money does not necessarily prevent the passing of the ownership of the purchased property.

TEJPAL v. GIRIDHARI LAL, I. L. R. 30 All. 130. *Pre-emption.*

A right of pre emption is not a right of re-purchase, but is simply a right entitling the pre-emptor to be substituted for the vendee as purchaser and to stand in his shoes in respect of all the rights and obligations arising from the sale under which he derived his title. A person who chooses to pre-empt must, therefore, take upon him the burden of the obligations subject to which the sale was made as well as the benefits accruing thereform.

GANGA DEI v. BADAM, I. L. R. 30 All. 134 *Trees, right to.*

The property in timber on a tenant's holding vests in the landlord. The tenant has no right to cut and remove it.

A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy.

SHEORAM TIWARI v. THAKUR PRASAD, I. L. R. 30 All. 136. *Disposal of a case on Sunday.*

A proceeding in a Court is not vitiated by the fact that it was taken on a Sunday; it may be irregular but such irregularity is cured by the consent of the parties.

MAHADEO PRASAD *v.* BINDESWARI, I. L R. 30 All. 131. *Act VIII of 1890—Guardian and Wards Act —Arbitration.*

There is nothing in the Guardian and Wards Act to authorise a District Court to refer the question of the appointment or declaration of a guardian to arbitration.

FEROZI BEGUM *v.* ABDUL, I. L. R. 30 All. 143 *Civil Procedure Code, sec. 549*

An order rejecting an appeal under sec. 549, C. P. C., is not appealable either as an order or as a decree.

KISHAN LAL *v.* UMRAO SINGH, I. L R 30 All. 146 *Transfer of Property Act, sec. 99.*

After the confirmation of sale it cannot be impeached on the ground that it was in violation of the Transfer of Property Act, sec. 99.

BAHADUR SINGH *v* NEZI PURAN, I. L. R. 30 All. 151. *Arbitration—Award—Appeal.*

If a decree based upon an award is not in excess of the award no appeal lies. There is no difference between a case in which a reference is made through the intervention of the Court and a reference without such intervention

---

FAHMIDA *v.* JAFRI, I. L. R. 30 All. 153. *Mahomedan Law—Bequest.*

A legacy in excess of one-third of the estate according to the *Shia* law is not valid to any extent unless the consent of all the heir, given after and not before the death of the testator, has been obtained.

BABU SINGH *v.* BEHARI LAL, I. L. R. 30 All. 156. *Mitakshara—Hindu Law—Son's liability for father's debt.*

"It is not necessary in order to establish a son's liability for his father's debt that it should be shewn that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay a personal debt of their father, if the debt be proved, and the sons cannot show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge."

NARPAT *v.* RAM SARAN, I. L. R. 30 All. 162. *Usufructuary mortgage.*

A usufructuary mortgagee failing to get possession is competent to sue for and obtain a decree for sale of the mortgaged property.

BOMBAY IN THE DAYS OF GEORGE IV.*

By PERCY A. ATHERTON.

To the reader the story of the conflict of the King's Court with the East India Company, and the struggle of the King's Judges to curb the headstrong officials of the company, seems well nigh inconceivable. Respect for the authority of the state, and respect for its judiciary, have come to be today so much a part of daily life as to pass unnoticed. Yet this life of Sir Edward West, this defence of the right of an English Judge to administer justice, under strange conditions and in the face of great difficulties, throws an interesting light on the strength and vigor of Anglo-Saxon institutions.

Born in 1782, Edward West had the sturdy training of Harrow, and the opportunities of University College, Oxford, a typical English education of the best sort. In 1814, at the comparatively youthful age of 32, he was called to the Bar of the Inner Temple. In the meantime he had been elected a Fellow of his college, and had done notable work in economics. Eight years later, after a moderate success at the Bar, he was appointed recorder of Bombay and knighted as Sir Edward West.

India, at the end of the eighteenth century, was governed by the East India Company, and administration of justice was at a very low ebb. Mere boys with little training or experience were sent by the company to India to sit in the Provincial Courts, and matters had reached such a state that King's Courts were created in 1799 to curb the East India Company's growing power, and to give to the native some degree of protection to life and property—both endangered by the aggressiveness of the company. As may well be seen the position of a King's Judge, sent out from England by the Crown, was anything but enviable. The East India Company looked on him with distrust and disfavour; and the natives had not yet learned that a Judge could act with uprightness and independence. The company regarded the Sovereignty of India as its own private property, and resented all interference with it by the British Parliament as an unwarranted invasion of its rights. Under such conditions it was impossible for a Judge, who did his duty as he saw it, not to come into collision with the traditions of the company. He faced a European colony hostile to him, he lacked the moral support of an independent public opinion, and further, he had to apply Anglo-Saxon theories of justice to native India conditions

Nevertheless, Edward West, married on the eve of his sailing for India, did not hesitate for a moment. His entire work in India was crowded into six brief years, first as "Recorder of Bombay," then as "Chief Justice of the Supreme Court of Judicature"—the successor of the Recorder's Court; yet, even then, he served longer than the average of the early English Judges of India. In the first quarter of a century of the King's Court not one King's Judge lived to return to England, and the average length of their service was a little over three years.

Throughout his six years' service as a Judge West seems to have been in constant conflict with the East India Company. He had scarce arrived in India when the new Supreme Court of Judicature was substituted for the old Recorder's Court, and he became its Chief Justice. That he proposed to reform the Bench and Bar was evident from the outset. Within a month after he was sworn in as Chief Justice he dismissed the Master in Equity and the Clerk of Court, both for irregularities of professional conduct. He next suspended from practice for overcharges made to clients, five of the six barristers practising in his Court. He insisted that the English residents must perform their jury duty, and he reformed the administration of the jails. These reforms, all of them of vital necessity to the proper administration of justice, created violent opposition from successive governors of the company.

---

* Memoir of Sir Edward West, A King's Judge under the Company, by F. Dawtrey Drewitt, M.A., M.D. Longmans, Green & Co., London, 1907

In 1825 West, in an elaborate charge to the grand Jury, then sitting, urged an investigation of the treatment of native prisoners by the lower Courts, which were run entirely by the Company; and an investigation into the unnecessary severity, and even illegality of many sentences pronounced by the company's judges and police magistrates. Unfortunately the Grand Jury declined to act, great as was the need of reform in the company's treatment of the natives; and West's charge to the Grand Jury seems only to have aroused the increased enmity and hostility of the company and its officers. At the same time there was great unrest and ill feeling in the Colony as is shown by the following paragraph: "The new year (1826) found Bombay society in a quarrelsome mood. Mr. Norton, the loud-voiced Advocate-General to the Bombay government, had been challenged by a Mr. Browne, but had refused to go out with him. Martin West (Sir E. West's nephew), had been insulted by Mr. Norris, a member of the Bombay government, and had been obliged to demand an apology. Mr. Graham, an attorney, had libelled and had challenged Mr. E win, a barrister, and on the challenge being declined had horsewhipped him. Mr. Warden had circulated a defamatory paper aspersing the character of Mr. Graham, and trials for assault and libel occupied the attention of the Supreme Court." Truly a most unhappy picture of life in the small English Colony at Bombay!

In this stormy atmosphere it occurred to those who were smarting under West's recent charge to the Grand Jury, and who looked upon an independent King's Court as a nuisance, that the Chief Justice might, with advantage, be provoked into a duel Accordingly the Company's governor, Ephinstone, openly insulted the Chief Justice at a dinner, and upon the Chief Justice's asking an explanation, the governor promptly sent him a challenge. This West, in a very manly way, declined, pointing out a disgrace, that would thereby be brought upon his Court, but the entire episode made West's work more trying and more difficult

Through all these troublesome times West was constantly endeavouring to improve the condition of the natives, and to soften the harshness of their treatment by the company. One difficult problem he worked out was a set of "Rules" regulating the service of Mahometans, Hindoos and Parsees upon juries. The difficulty of this in connection with the "Caste" system may well be imagined.

This was the last work he did. In August, 1828, he was suddenly seized with a malady not recognized by his physicians, from which, after an illness of a few days, he died. An added touch of sadness was the death of Lady West two weeks later, in giving birth to a son who did not survive.

The striking feature of this brief and tragic story of West's life and work lies in the almost superhuman difficulties overcome by the King's Judges in India. Sir Edward West, in the face of these difficulties, upheld the best traditions of the English Judiciary. He was a fearless, high-minded Judge —an honor to the profession of the law, a friend to the people of India.—*The Green Bag.*

Correspondence.

[To the Editor "Calcutta Weekly Notes."]

Sir,—Permit me to bring to the notice of the Hon'ble High Court through the medium of your much esteemed journal the following in regard to the applicability of Act II of 1899 (B. C.), with the hope that you may be pleased to express your own views in the matter.

1. Act II of 1899 provides for the abolition of Civil Court Amins. The aim and object of this Act seem to have been mainly honesty and competency in work though they might be secured at a much higher cost. With this object in view the Bengal Government agreeing with the High Court directed that in future commissions for local investigations involving knowledge of survey should be issued to pleaders who have passed the survey test prescribed by Resolution No. 2049, J. D., dated 9th October 1907 (*Vide* Circular Orders of the High Court [Civil] Para. 132, Vol. I, p. 45) and that no Civil Court Amins would be appointed in future, so that the pleaders would ultimately occupy their places.

2. With the introduction of the survey examination ("prescribed survey test") for pleaders, the number of qualified pleaders has much increased and occasional employments are being given to them in various districts after giving salaried Amins work sufficient to keep them engaged throughout the year where they exist. But besides the pleaders another class of men has been imported into this service from outside, some of whom have not even the adequate survey knowledge, who are being employed for this kind of work in various districts perhaps without the knowledge of the Hon'ble High Court. Such employment of men who are worse qualified and more wanting in a sense of responsibility than even the Civil Court Amins is rather deteriorating the service than improving it, thus frustrating the objects of the Legislature. So far as my information goes, such outside element is being introduced almost in every district though an adequate number of qualified pleader commissioners is available now in such districts.

3. It is but natural that pleaders who go out on commission gradually lose their practice and ultimately they have to depend on commission business for earning a living. The practice of giving occasional employments to pleader commissioners is thoroughly detrimental to their interests, for, as experience shows, a pleader once he takes to this kind of work, is no longer engaged by suitors. He is, therefore, bound to make his choice of either commission work or professional work. The Hon'ble High Court for a number of years recommended the systematic employment of qualified pleader Commissioners in as many cases as possible. In para. 5 of the resolution on the administration of Justice, dated 1st August 1904, the High Court observed: "Those (qualified pleaders) who have performed their work satisfactorily should be given as much work as they are willing to undertake." Again the Hon'ble Court observed that "as vacancies occur in the staff of Amins and qualified pleaders are available in large number, it is to be expected that this class of work will be transferred in increasing ratio in each succeeding year from the hand of the former class to those of the latter." The above rule of the High Court is followed more in the breach than in its observance. Again no rule has yet been framed by the Hon'ble High Court as to the remuneration of the qualified pleaders. It is a fact that qualified pleaders Commissioners are employed at a much higher cost. No uniform scale of fees exists in this respect. At the same time it is idle to expect that ordinary suitors or the illiterate class of people would resort to the more expensive though more reliable agency, so long as they can get their work done cheaper and that quite regardless of consequences. It is therefore only fit and proper that the Hon'ble High Court should fix the remuneration of Commissioners at its earliest convenience and discourage illegal employment of irresponsible outside amins, if a qualified and competent staff of pleader Commissioners is to be maintained in each district.

The professional prospect of pleaders who have taken to this kind of work is gone for good and it would be doing them a grievous injury if the Hon'ble High Court after calling them into existence should now leave them at the mercy of the Mofussil Courts.

Pleader.

Notes of Cases.

PRIVY COUNCIL.—Appeal from Hong Kong. *Chan Hang Kik and others* v. *The King*. 3rd July 1908.

Upon this petition for special leave to appeal, LORD ROBERTSON in delivering their Lordships' judgment said :—"Their Lordships will humbly advise His Majesty that special leave ought to be granted. Notice will be given to the Justices, with leave to them to make such observations as they think fit, and to appear by counsel. The present security must stand."

PRIVY COUNCIL.—Appeal from N.-W. Provinces. *Musst. Parbuti* v. *Chaudri Naunihal Singh*. 17th July 1908.

This was an application by two daughters of Musst. Parbuti for substitution of their names as Appellants in the place of their deceased mother.

No counsel appeared on either side.

Their Lordships made the order for substituting the names of the daughters in place of the Appellant who had died.

Mr. Douglas Grant, Solicitor for the Applicants.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CIVIL APPELLATE JURISDICTION. Before DOSS, J. APPEAL FROM APPELLATE DECREE No. 1853 OF 1906. BEHARY LAL PAN, Appellant *v.* FAKIR CHANDRA ROY AND OTHERS, Respondents. Heard, 29th July 1908. Judgment, 3rd August 1908.

Bengal Tenancy Act (VIII of 1885), sec. 171—Interest voidable on sale—Co-sharer, not entered in zemindar's sherista if judgment-debtor—Contribution, suit for—Specification of separate liabilities if indispensable—Amount paid in satisfaction of rent decree.

The appeal arose out of a suit for contribution for payments made by the Plaintiff in satisfaction of a rent decree against Defendants Nos. 2 to 5 and for declaration of a mortgage lien for the sum paid and for possession under the provisions of sec. 171 of the Bengal Tenancy Act. The case of the Plaintiff was that Defendants Nos. 2 to 5 were the owners of an occupancy-holding, the share of Defendants Nos. 2 and 3 being ⅘th and that of Defendants Nos. 4 and 5 being ⅕th, that on the 30th Baisack 1308 (*i.e.*, 13th May 1901) Defendants Nos. 4 and 5 conveyed under two *kobalas* their ⅕th share to the Plaintiff, but that his name had not been recorded in the sherista of their superior landlord; that on the 1st April 1904 the latter obtained a decree for rent for the years 1306 to 1309 against Defendants Nos. 2 to 5; that on the 20th April 1904, the Defendant No. 1 purchased the holding in execution of a decree upon a mortgage, dated the 1st May 1893, which had been executed by Defendants Nos. 2 and 3 in favour of his father; that the holding had been proclaimed for sale on the 4th December 1904 in execution of the rent decree, and that on that date he deposited the amount of that decree, in full satisfaction thereof. He therefore asked for a decree for contribution by the Defendants Nos. 1, 2 and 3 of a ⅘th share of the amount paid by him, and he also asked for the reliefs provided for by sec 171 of the Bengal Tenancy Act.

Defendant No. 1 alone contested the suit and his principal objections were (1) that the suit could not proceed without a specification in the plaint of the separate liabilities of each of the Defendants, (2) that Defendants Nos. 2 and 3 were the owners of the entire holding and that Defendants Nos. 4 and 5 had no shares therein; (3) that the Plaintiff who purchased from Defendants Nos. 4 and 5 had consequently purchased nothing and in satisfying the rent decree he had made a voluntary payment, and (4) that in any event the Plaintiff was not entitled to the benefit of sec. 171 of the Bengal Tenancy Act.

The Munsif found that Defendants Nos. 4 and 5 were in fact the owners of a ⅕th share in the holding, that the Plaintiff had purchased that share and that consequently the payment made by him in satisfaction of the decree was not a voluntary payment; but he was of opinion that the Plaintiff's claim for contribution should fail as he had not set forth in his plaint the respective liabilities of the Defendants. He nevertheless proceeded to give a decree to the Plaintiff declaring under sec. 171 of the Bengal Tenancy Act that the sum claimed by him was a mortgage on the holding and directing that he should be put in possession thereof and that he should continue in possession until his claim was satisfied.

On appeal by Defendant No. 1, the Subordinate Judge dismissed, the suit on the sole ground that the Plaintiff, having regard to the nature of his interest in the holding, was not entitled to claim the benefit of the provisions of sec. 171 of the Bengal Tenancy Act.

The Plaintiff appealed to the High Court and contended that he was entitled to the benefit of the provisions of sec. 171 of the Bengal Tenancy Act.

Held—That it is in the case of persons having in the tenure or holding any interest voidable on the sale and not in the case of the judgment debtor or any one or more of the judgment-debtors if there are several of them, that the legislature intended to confer the relief provided for by sec. 171 of the Bengal Tenancy Act.

The Plaintiff who was a co-sharer of the judgment-debtors though his name had not been recorded in the sherista of the superior landlord was a judgment-debtor within the meaning of sec. 171 of the Bengal Tenancy Act.

The words "any person having in a tenure or holding an interest which would be voidable upon the sale" mean "any person who has in a tenure or holding an encumbrance as defined in sec. 161 of the Bengal Tenancy Act.

Jotindra Mohan Tagore v. *Durga Dabi* (10 C. W. N. 439) followed.

The rule which requires that in a suit for contribution the Plaintiff should in his plaint specify the separate liabilities of the several Defendants was never intended to apply to a case where from the very nature of the dispute between the parties such separate liabilities cannot be defined without an adjudication by the Court

The amount paid by the Plaintiff in satisfaction of the rent decree of the superior landlord being not a charge on the holding, Defendant No. 1 could not be held liable for any portion of the amount claimed by the Plaintiff. Defendants Nos. 2 and 3 were personally liable to contribute the sum.

Gopi Nath Bagdi v. *Ishur Chunder Bagdi* (I. L. R. 22 Cal. 800) referred to.

Babus Boidya Nath Dutt and *Jnanendra Nath Sarkar* for the Appellant.

Babus Amarendra Nath Bose and *Biraj Mohun Mojumdar* for the Respondents.

A. T. M. *Appeal allowed: Case remanded.*

Civil Appellate Jurisdiction. Before Holmwood and Sharfuddin, JJ. Appeal from Appellate Decree No. 1919 of 1906. MUKTAKESHI DASI, Appellant *v.* PULIN BEHARY SINGH and ors., Respondents. Heard, 29th July 1908. Judgment, 4th August 1908.

Mortgage by occupancy raiyat—Death of mortgagor without heirs—Landlord, if liable.

An occupancy raiyat B mortgaged his holding to the Plaintiff in Assar 1309. He subsequently died leaving one brother who also died without having an heir and the landlord took over the holding. The Plaintiff sued the landlord Defendant No. 2 and two other persons, Defendant No. 1 and his wife Defendant No. 3 who, he alleged, were in occupation of the land. It was not contended that they were in any way the heirs of B but Defendant No. 1 who appeared said that Defendant No. 3 got the land as a gift from B. The Munsif in the first Court disbelieved the story of gift and found there was cause of action against Defendant No. 1 as he was in possession. He also found that the vesting of a jote in the landlord on failure of the heirs of a deceased tenant cannot destroy a subsisting mortgage lien. He accordingly gave the Plaintiff a mortgage decree.

In appeal the learned Subordinate Judge found that Defendants Nos. 1 and 3 had no subsisting interest in the land. As regards the vesting of the holding in the landlord Defendant No. 2 he held that under sec. 26 of the Bengal Tenancy Act there is no saving clause respecting the right of third persons as sub-lessees or mortgagees and that the landlord Defendant No. 2 therefore did not take the holding subject to Plaintiff's mortgage.

As regards the question of transferability, he held that it did not arise in his view of the case though he decided in fact against the custom as regards the jote in suit.

Held—That in construing words like "or otherwise" it was held that the matters reserved must be *ejusdem generis*

Badan Chunder Das v. *Rajeswari Debya* (2 C. L. J. 570) followed.

The terms transfer, succession or otherwise in sec. 22 of Bengal Tenancy Act do not embrace the case of vesting by death of the tenant without heirs under sec. 26.

The landlord did not represent the mortgagor tenant in any way and there was not and never was any privity of contract between him and the mortgagee. The tenant's interest after death wholly ceased and became extinct and with it the security of the mortgage.

Babus Nalini Ranjan Chatterjee and *Rajendra Chandra Chuckerbutty* for the Appellant.

Babu Sajani Kanta Sinha for the Respondents.

A. T. M. *Appeal dismissed.*

DASARATH MOHAPTRA *v.* RAGHU SAHU.

C. Sen, District Magistrate of Balasore, on 27th February 1908.

Mr. Monnier and *Babu Bidhubhusan Ganguly* for the Petitioners.

Babu Dasarathi Sanyal for the Opposite Party.

The JUDGMENT OF THE COURT was as follows :—

This is a rule to show cause why the conviction of, and sentences passed on, the accused should not be set aside. The accused have been convicted under sec. 147, I. P. C., of rioting and sentenced to undergo rigorous imprisonment for a month and to pay a fine of Rs. 20. They have been found to have attacked the complainant and others, while cutting their paddy. The accused's party were about 30 in number. The complainant was beaten and wounded and taken to the thanah in a dhuli.

The main question debated in the lower Courts was as to the possession of the land. Both the Courts below found that the complainant had been in possession of the land since 1905. His predecessor in interest, that is, his father-in-law, had obtained a decree in the Civil Court, had been put in possession of the land by Civil Court and an under-raiyat named Shibo Jana, who had been in actual possession till then, had gone out and the complainant's father-in-law and the complainant had been ever since in direct possession and cultivation. The accused had therefore no possible right to interfere with the complainant, when cutting the paddy. They have been rightly convicted of an offence under sec. 147. I. P. C.

The learned Counsel for the Petitioner impugns the conviction on technical grounds, the principal of which is that there is no finding in the judgments of the lower Courts, as to the common object of the unlawful assembly. He relies on the rulings in the cases of *Sabir* v. *Queen-Empress* (1), and *Poresh Nath Sircar* v. *Emperor* (2), as authorities for holding that this is essential. The charge in this case was, however, properly drawn. The common object was therein stated to be, to enforce a right or supposed right. Now there was no contest in either of the lower Courts as to the common object. Nobody ever contended that the common object of the assembly, if any, was not to enforce a right or supposed right. The lower Courts have therefore not discussed this question, and have come to no express finding, couched in so many words, on this point, but it is clear that they both impliedly have found that the common object of the unlawful assembly was as stated in the charge.

In the case of *Sabir* v. *Queen-Empress* (1), it is only said that "there should be a clear" (not an express) "finding as to the common object," and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly and it was not apparent which of them had been accepted by the Judge and the jury. In the case of *Poresh Nath Sircar* v *Emperor* (2), according to Mr. Justice Mookerjee, the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge

(1) I. L. R. 22 Cal. 276 (1894).
(2) I. L. R. 33 Cal. 295 (1905).

completely negatived the common object, set out in the charge, which it is pointed out was not stated with due precision. The accused were therefore held to have been prejudiced. The facts of the present case are very different. As has been already explained, there is no defect in the charge. It was never contended that the common object of the assembly was or could be other than that set out in the charge. No plea on the point was raised in either of the lower Courts, and from the judgments of both Courts it is clear that they found the common object of the assembly to be the same as stated in the charge. The accused have in no way been misled or prejudiced. We discharge the rule. The Petitioners must be remanded to jail to undergo the remainder of their sentences.

B. C. *Rule discharged.*

PRIVY COUNCIL.

[APPEAL FROM MADRAS.]

LORD ROBERTSON.	SANKARALINGA
LORD ATKINSON.	NADAN and ors.,
LORD COLLINS.	*v.*
SIR ANDREW SCOBLE.	RAJA RAJESWARA
SIR ARTHUR WILSON.	DORAI *alias*
1908.,	MUTTURAMLINGA
1, July.	DORAI and ors.

Worship, right to exclusive—Temple of Shiva in Southern India—Right of Shanars or Nadars to worship—Custom—Trustee surrendering decree on appeal—Power of Court to join beneficiaries as co-Plaintiffs—Compromise, unlawful—Civil Procedure Code (Act XIV of 1882), secs. 375, 437—Breach of trust—Introducing new worshippers contrary to usage.

Where it was proved that men of the "Shanar" or "Nadar" caste were by custom not allowed to worship in a temple dedicated to Shiva in which the customary ceremonies of Hindu worship were carried on,

Held—*That arguments directed against the soundness of the doctrine as to the exclusion of the Nadars and showing inconsistencies in the treatment of the Nadars by the worshippers at the temple in other respects were of no avail and could not be entertained.*

Where the heriditary trustee of the temple, after a decree had been made in his favour as representing the worshippers at the temple and pending an appeal by the Shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and it was alleged and not disproved that he did so for a corrupt motive,

Held—*That the Appellate Court very properly reinforced the cause of the worshippers of the temple by joining certain new Plaintiffs.*

The principles applicable to the case of a trustee who betrays his trust by surrendering a decree were well stated and applied by the High Court:

In all cases where the Court sees that the trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it never makes a decree in the absence of those parties who are alone interested in the contest;

CLEGG *v.* ROWLAND (1) *followed.*

It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so he is guilty

(1) L. R. 3 Eq. 368, 373 (1866).

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

ATTORNEY GENERAL v. PEARSON (3) *followed.*

This was an appeal from a decree of the High Court of Judicature at Madras, dated the 14th February 1901, which affirmed a decree of the Court of the Subordinate Judge of Madura (East), dated the 20th July 1899.

The principal question involved in the present appeal was whether the Appellants and other persons of the caste to which they belonged, were prohibited from entering into and worshipping at the Hindu temple of Meenatchi Sundareswara, situate in the town of Kamudi.

The facts leading up to the present litigation shortly stated are as follows:—Rajah M. Bhaskara Sethupathi, the zemindar of Ramnad, was the hereditary trustee of many Hindu temples in his estates, including the temple in suit. The Appellants were members of the Nadar or Shanar caste, and on the 14th May 1897 some of them entered the said temple where they made an offering, and marched in procession round the ramparts, as they contended they were entitled to do. One of the officials of the said temple, Narayanasami Gurukkal, charged the Appellants with wilful sacrilege, and insult to the idols of the temple. After criminal proceedings which failed, the said Rajah on the 5th July 1898 instituted the present suit in the Court of the Subordinate Judge of Madura (East), against the Appellants and seven other persons belonging to the same caste. The plaint alleged that the said Rajah was the hereditary trustee of the said temple; that various acts of sacrilege had been committed by the Defendants on the 14th May 1897; that the Defendants were of low caste and were "prohibited from entering the said temple both according to the shastras and custom;" and prayed for a declaration that "neither the Defendants nor other Shanars are entitled to enter into any part of the said temple;" for a perpetual injunction restraining them from so doing; and for the payment of damages.

On behalf of the Plaintiff, application was made under sec. 30, Civil Procedure Code, to the said Court to issue a proclamation and advertisement announcing the institution of the suit, so as to enable Shanars other than the Defendants to apply to be made parties to the suit. This procedure was adopted, but no application made.

On behalf of the Appellants, Sivalinga Nadan and Ponnambala Nadan, and one other of the Defendants, a written-statement in defence was filed. It denied the right of the Plaintiff to sue; and that a suit of the present nature could be maintained in a Civil Court. It asserted that the provisions of sec. 30 of the Code of Civil Procedure had not been followed so as to make the decision binding on all Shanars. It denied the acts of sacrilege alleged, and claimed an equal right to use the said temple with other Hindus not being Brahmins, who as such were accorded special privileges.

On the pleadings the Subordinate Judge

(3) 3 Meridale 353; 17 Revised Reports 101 (1817).

fixed several issues of which the following only are material:

5. Whether there are shastras prohibiting the Defendants from entering and worshipping in the plaint temple?

6. Whether there is any custom in the place by which the Defendants cannot use the plaint temple? If so, is it valid and binding upon them?

7. Whether the Defendants have the use of the plaint temple equally with the other classes who use it? And whether the Defendants belong to a class inferior to the other classes that worship there?

After recording evidence both oral and documentary the Subordinate Judge delivered his judgment on the 20th July 1899, and on the matters now material he came to the following conclusions:— That the Nadars were not a distinct and separate community from the Shanars, whose hereditary occupation was the cultivation of the palmyra tree and cocoanut palm, and the extraction and manufacture of their juice. That persons belonging to that class were prohibited from entering the plaint temple by the rules of worship therein observed. That a custom was proved excluding Shanars from entering the said temple, That the acts of sacrilege alleged to have been done by the Appellants on the 14th May 1897, were not done by them, and that the Plaintiff's case was in this respect false. That the Civil Courts could take cognisance of the present suit. That in consequence of the entry into the temple, purification was necessary, and that the Defendants ought to pay Rs. 500 for this purpose. In accordance with the above findings, a decree was made declaring that the Defendants and other Shanars at Kamudi were not entitled to enter the said temple, restraining them by perpetual injunction from so doing, and directing them to pay the sum of Rs. 500 for the expenses of purifying the temple. Each party was ordered to pay their own costs.

Against the said decree the Appellants appealed to the High Court of Judicature at Madras. Simultaneously they preferred another appeal to the District Court on the same grounds, owing to a doubt as to which was the right Court to appeal to. The latter appeal was transferred to its own file by the High Court on the 2nd March 1900.

Prior to the hearing of the said appeal a compromise was come to between the original Plaintiff, the trustee of the temple, and the Appellants recognising the rights of their caste to worship in the said temple. On the 2nd May 1901, the Appellants applied to the said High Court for a decree to be made in accordance therewith.

On the 14th May 1901, Narayanasami Gurakkal applied to be made a Respondent in the said appeal in order to oppose the said compromise; on the 29th May 1901, Vallasawmy Thever made a similar application; and on the 18th July 1901, Raja Rajeswara Dorai, son of the Plaintiff, made an application of a similar nature. On the 18th September 1901, the said High Court made an order directing that the said three persons should be brought on the record as co-Plaintiffs. The following extract from the order is material.

"In support of the present petitions affidavits have been put in alleging, *inter*

SANKARALINGA NADAN *v.* RAJA RAJESWARA DORAI.

alia, that the Plaintiff has been influenced by corrupt motives, and by false representations, to enter into a compromise.

"With regard to these allegations, we may say at once that they are made in such terms as to be quite worthless.

"Apart, however, from these special allegations, we think that a recital of the admitted facts of the litigation are sufficient to justify us in making the Petitioners parties."

After reciting the facts the order proceeds as follows:—

"The compromise recites that the Plaintiff on full and further enquiry is satisfied that, as a matter of fact, the Defendants and their caste people have enjoyed the right of access to, and of worshipping in, the temple of Ramnad Zemindari, including the plaint temple at Kamudi, in the same manner and to the same extent as the Vellala Chetti and other Sudra sects of the Hindu community * * * and whereas Plaintiff is advised and instructed that according to the Hindu shastras the people of Defendants' caste are entitled to the said right of access and worship with respect to all Hindu temples, and whereas Plaintiff has ascertained that the sentiments of the general body of the Hindu community are in favour of the Defendants' caste people exercising their said right of access and worship in respect of all Hindu temples * * *.

"The Plaintiff then agrees to allow the Defendants and their caste people the same rights as other Sudra servants of the Hindu community in the plaint temple, and he gives up the damages awarded to him. Considering the evidence on the record as to the manner in which the claims of the Shanars are viewed by the non-Shanar castes it is not easy to reconcile this *volte face* with *bonâ fides* on the part of the Plaintiff.

"But even if personally honest in his change of conviction, there is no reason to suppose that there has been any similar change of conviction on the part of those for whom the Plaintiff as trustee brought the suit particularly as he now himself objects to the compromise. Three of the beneficiaries, now come forward and ask to be made parties in order that they may show cause against the compromise being recorded and a decree being passed in its terms in lieu of the existing decree.

"The first Petitioner is an hereditary officiating priest of the temple, the second is a large landholder of the locality, the third is the son of the Plaintiff. All are worshippers in the temple, and interested in its being kept free from defilement, and the Plaintiff's son claims a special interest as being entitled to succeed the Plaintiff as hereditary trustee. The Petitioners are clearly all beneficiaries, who are interested in the trust property regarding which the suit was filed.' Sec. 437, Civil Procedure Code, provides that 'in all suits concerning property vested in a trustee, when the contention is between the persons beneficially interested in such property and a third person, the trustee shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them, or any of them, to be made such parties.' The last clause is taken from 15 and 16 Vic., C. 86, S. 42, Rule 9 and the bene-

ficiaries are made parties in England when the trustee is either wholly uninterested or is adverse to their interest [*Clegg* v. *Rowland* (1), *Payne* v. *Parker* (2)]. In the former case Vice-Chancellor Malins said 'In all cases where the Court sees trustees are wholly uninterested in the matter and there are parties who are materially interested in the question, it will never make a decree in the absence of those parties who are alone interested in the contest, but will have them brought before the Court in order that those who are interested in resisting the demand, may resist it at the proper time, which is the hearing of the cause.' We think that the principle is applicable to the present case and that we ought not to refuse to allow the Petitioners to come in as parties in order that they may be at liberty to show, if they can, that the Court ought not to pass a decree in accordance with the compromise, which, as they allege, is injurious to their interests, and which certainly gives up all that Plaintiff has hitherto contended for on their behalf."

The making of a decree in accordance with the said compromise was also opposed by the original Plaintiff, and on the 25th September 1901 the said High Court made an order refusing to act on the said compromise on the ground that it was a breach of trust on the part of the trustee of the temple, and as such unlawful under the provision of sec. 375 of the Code of Civil Procedure. The material portion of the order is as follows:—

"It has been judicially established before the Subordinate Judge that the Defendants 'belong to a class which under custom and the shastras are prohibited from entering the plaint temple and that their having done so caused defilement which necessitated the purificatory ceremonies.'

"That finding is binding on the Plaintiff as well as on the Defendants, and he cannot take upon himself to say 'I have made further enquiries. I am satisfied that the finding of the Court is wrong. I shall, therefore, allow the Shanars to enter the temple.'

"To do this would be to ignore and alter the fundamental character and usage of the temple as ascertained by judicial authority. It is not in the power of the trustees to do this. This principle was laid down by Lord Chancellor Eldon in the case of the *Attorney-General* v. *Pearson* (3) in these words:—Where an institution exists for the purpose of religious worship, and it cannot be discovered from the deed declaring the trust what form or species of religious worship was intended, the Court can find no other means of deciding the question than through the medium of an enquiry into what has been the usage of the congregation in respect to it; and, if the usage turns out upon enquiry to be such as can be supported, I take it to be the duty of the Court to administer the trust in such a manner as best to establish the usage considering it as a matter of implied contract between the members of that congregation. But if, on the other hand, it turns out that the institution was established for the ex-

(1) L. R. 3 Eq. 368, 373 (1866).
(2) 1 Ch. App. 327 (1866).

(3) 3 Meridale 353; 17 Revised Reports 101 (1817).

press purpose of such form of religious worship, or the teaching of such particular doctrine, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members: We have changed our opinions and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you conform to the alteration which has taken place in our opinions.'

"These words, no doubt, were used with reference to the regulation of religious trusts in England by the Court of Chancery, but we apprehend that, *mutatis mutandis*, the Court will be guided by the same principles in this country. Where an institution exists for the purpose of religious worship but the exact form of worship, or the class for whose benefit it was established, cannot be discovered from the instrument creating the trust, (or where, as in the present case there is no such instrument), the Court can find no other means of deciding those questions than through the medium of an enquiry into what has been the usage of the worshippers in respect thereto, and, if the usage is a lawful one, it is the duty of the Court to support that usage on the suit, legally instituted, of any person interested. It is not in the power of individuals having the management of the institution to alter the purpose for which it was founded, or to say to the other worshippers 'We have changed our opinions, and you who resort to this place for the purpose of worshipping in the customary manner, shall no longer enjoy the benefit intended for you unless you conform to the alteration which has taken place in our opinions, even to the extent of submitting to the presence of other worshippers who are prohibited by custom and the shastras from entering into the temple.' It is not in the power of any trustee to say this to the other worshippers in a temple. On the contrary, it is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is in our opinion, guilty of a breach of trust and, still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it.

"The Defendants, however, contend that as the decree of the Subordinate Judge in this case, is under appeal, the appeal opens up the whole question as to whether the Shanars are or are not prohibited from entering into, and worshipping in, the temple, and there is no binding decision as to what the usage is, and therefore no breach of trust on the 1st Plaintiff's part making the agreement to admit the Shanars to the temple.

"This contention, it seems to us, rests on a fallacy, and is invalid. The appeal, no doubt, opens up the whole question for the decision of the Appellate Court, but, pending that decision, the decree of the Subordinate Judge does not cease to be binding on the parties. Pending

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

that decision they are just as much bound by the decree as if there was no appeal. In view, then, of the finding of the Subordinate Judge that the Shanars are prohibited by custom and by the shastras from entering the plaint temple we must hold that the proposed compromise by the 1st Plaintiff involves a breach of trust on his part, and is therefore not a lawful compromise within the meaning of sec. 375 of the Code of Civil Procedure."

The High Court (Benson and Boddam, JJ.) delivered judgment on the case on the 14th February 1902.

After setting out the facts and the issues in contest between the parties the Judges proceed as follows :—

"A great deal of evidence was taken on the latter part of the 7th issue, but it is relevant, if at all, only with reference to the appreciation of the evidence on the essential question in issue, which is whether the Shanars, as a caste, are by custom prohibited from entering the plaint temple, or are entitled to enter and worship in it as other non-Brahmanical castes do.

"On this question there is a great mass of direct oral evidence on both sides. The Plaintiffs examined on this point no less than 38 witnesses, of whom 24 reside in Kamudi or its immediate neighbourhood; while Defendants examined 24 witnesses, of whom 17 are residents."

Afterdiscussing the Plaintiff's evidence the learned Judges observe as follows :—

"The evidence of the witnesses we have quoted is entitled to belief because it is given by men who from their age and long acquaintance with the plaint temple, are likely to know the custom in regard to it, and who by reason of their official and social positions, are not likely to give false evidence. Most of them are Brahmins, who being in a position of acknowledged superiority to both the contending parties, are less likely than others to be swayed by personal bias or self-interest. The Defendants have called a considerable number of witnesses to contradict the Plaintiff's evidence as to custom, and there are some Brahmins among them, but it may be said generally that the Defendants' witnesses are men of much lower standing and respectability, and are, to a large extent, in the pay or under the control of the Nadars, or are under pecuniary obligations to them, or are servants in temples under their control. It is a remarkable fact that though there are hundreds of respectable and well to-do Nadars living in Kamudi, not one of them has gone to the witness-box and stated that he was in the habit of entering into the temple or had attempted to prove that he ever entered it on any particular occasion. Surely if it was an immemorial right recently interfered with, all the chief Shanars would have been able and willing to swear to their acts of worship, and as to how and when and by whom they had been interfered with, instead of relying, as they have done, on vague general statements by men of little or no status or credibility. There can be no doubt that the evidence adduced by the Plaintiffs as to the custom of the plaint temple is far superior in weight and credibility to that adduced by the Defendants, and is, in fact, sufficient to establish the contention of the

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

Plaintiffs that the Shanars are, by custom, prohibited from entering the plaint temple. That being our conclusion on the main question directly in issue, it is sufficient to refer very briefly to the other collateral questions on which evidence was adduced, so far as they have a bearing on the main direct issue.

"A great deal of evidence has been adduced with regard to the right of the Shanars to enter Hindu temples, other than the plaint temple whether in other parts of the Madura District, or in other districts of the Presidency. There is some evidence on Defendants' side, that Nadars have been allowed to enter certain Hindu temples in Tanjore and Coimbatore Districts, and at Chidambaram in the South Arcot District, and also at Palani in the Madura District, but there is an overwhelming preponderance of evidence on the Plaintiff's side against the existence of any such right in the temples generally in the Madura District.

"A great mass of evidence on both sides was adduced with reference to the latter part of the 7th issue as to whether the Defendants belong to a class inferior to the other classes that worship there; but, as already remarked, this question is relevant only in so far as it leads to an inference with regard to the alleged prohibition against the Shanars entering the plaint temple. The evidence is, as might be expected, conflicting, but there can be no doubt whatever as to its general result. There is no sort of proof, nothing, we may say, that even suggests a probability, that the Shanars are, as the Defendants contend, descendants from the Kshatriya or Warrior caste of Hindus, or from the Pandiya, Chola or Chera race of Kings, and the futile attempt of the Shanars to establish the connection has brought well deserved ridicule on their pretensions. Nor is there any distinction to be drawn between the Nadars and the Shanars. Shanar is the general name of the caste, just as "Vellala" and "Maravar" designate castes. "Nadar" is a mere title, more or less honorific, assumed by certain members or families of the caste, just as Brahmins are called Aiyars, Aiyangars and Rows. All "Nadars" are Shanars by caste, unless, indeed, they have abandoned caste as many of them have by becoming Christians. The Shanars, as a class, have, from time immemorial, been devoted to the cultivation of the palmyra palm and to the collection of its juice and the manufacture of liquor from it. Their own local traditions connect them with the toddy drawers of Ceylon, whence the Tiyans, or toddy drawers of the West Coast are also supposed to have immigrated. There are no grounds whatever for regarding them as of Aryan origin. Their worship was a form of demonology, and their position in general social estimation appears to have been just above that of Pallas, Pariahs and Chucklies (who are on all hands regarded as unclean and prohibited from the use of the Hindu temples), and below that of Vellalas, Maravars and other cultivating castes usually classed as Sudras, and admittedly free to worship in the Hindu temples. In process of time many of the Shanars took to cultivation, trade and money-lending, and to-day there is a numerous and prosperous body of Shanars who have no immediate concern

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

with the immemorial calling of their caste. In many villages they own much of the land and monopolise the bulk of the trade and wealth. With the increase of wealth they have, not unnaturally, sought for social recognition and to be treated on a footing of equality in religious matters.

"In a few individual cases in Tanjore and other districts away from Madura they appear to have, to some extent, succeeded, but the general attempt of the caste to force itself to an equality with the better castes in social and religious matters, has been fiercely resisted in the Southern districts and specially in Madura, where serious rioting and loss of life have resulted. The general result of the oral evidence as to the position of the Shanars in the social scale, as above stated, is abundantly borne out by all the best authorities who have written on the subject. Extracts from these are given in para. 59 of the Subordinate Judge's judgment. The reference to the Abbe Dubois' work is inaccurate, but the other extracts are to much the same effect. We refer to a few of them. In the official report on the Census of 1871 (Ex. L), it is stated: 'The Shanar people, in whatever district they may be found, are clearly a non-Aryan people. In Tinnevelly and Canara they are chiefly devil-worshippers. In Malabar they have hardly any religion at all, beyond the worship of some local deities. They are chiefly classed as Sivaites 68·3 per cent., but 24·4 per cent. are nominally Vishnuaites. They have their own gurus or priests in the Sivaite sects, but Brahmins officiate for the Vishnuvaites', and again 'It has been ascertained that many of the Shanars of Tinnevelly returned themselves as Kshatriyas, a position in the caste system, which they have no claim to.'

"In Baierlein's "Land of Tamilians" published in 1875 (Ex. M) it is stated: 'It was amongst this simple race of palmyra farmers, the Shanars, some of whom also cultivate the land, that Christianity has celebrated her most important victories in India. Living at the southern extremity of India and possessing only a barren country, they were not much affected either by the Brahmin immigrations or by the Mahomedan sway. The Brahmins suffered them to drag their idol cars, but did not permit them to enter the temples. In this way they retained their own Gods and their own worship. Their Gods were demons, with an influence for evil only.'

"In Garrett's "Classical Dictionary of India," 1871, (Ex. K) the Shanars are described as 'a low caste very numerous in Tinnevelly, whose hereditary occupation is that of cultivating and climbing the palmyra plam, the juice of which they boil into a coarse sugar. This is one of those occupations which are restricted by Hindu usage to members of a particular caste. The majority of the Shanars confine themselves to the hard and weary labour appointed to their race; but a considerable number have become cultivators of the soil, as landowners or farmers, or are engaged in trade. They may in general be described as belonging to the highest division of the lower classes or the lowest of the middle classes; poor, but not paupers; rude and unlettered, but by many degrees removed from a savage state. Demonolatry

SANKARALINGA NAPAN v. RAJA RAJESWARA DORAI.

or devil-worship, is the only term by which the religion of the Shanars can be accurately described.'

"In Sir W. W. Hunter's "Gazetteer of India". (Ex. U), 1867, we read: 'The Shanars are a low caste, living solely by the cultivation of the palmyra palm. They claim (perhaps with justice) to be the original lords of the soil. Christian Missions have been specially successful among them. Devil-worship is common, especially among the Shanars. Tinnevelly has been less influenced by pure Hinduism than other districts. Some Brahmins have even taken up the local devil-worship.'

"In the Manual of the Tanjore District (Ex. Q) compiled by the order of Government in 1883, we read: 'Shanars, Fishermen, Oddars, Kuravars and Tombars, all held in about the same degree of exclusion, none of them being allowed to enter the houses of caste people, temples or choultries.'

"Again Dr. Caldwell in his "Dravidian Grammar," p. 77, says: 'In Northern India the Sudra is a low caste man; in Southern India he ranks next to the Brahmin, and the place which he occupies in the social scale is immeasurably superior, not only to that of the Pariahs and agricultural slaves, but also to that of the unenslaved low castes, such as the fisherman and the cultivators of the cocoanut and the palmyra palms.'

"These and the other extracts from various writers which has been filed as evidence in the case, give no support to the pretensions of the Shanars. On the contrary they go a considerable way to suggest that the Shanars are not likely to have a right by immemorial custom to worship in Sivavite temples, but are rather likely, from their low original occupation and social estimation, and the demonological character of their worship, to be excluded from such temples. The Shanars admittedly have a temple of their own in Kamudi dedicated to Subrahmania Badrakali, and there are many other such temples elsewhere.

"Another matter from which an inference as to the custom of the temple may well be drawn is that referred to in the 5th issue which runs as follows:—

"Whether there are shastras prohibiting the Defendants from entering and worshipping in the plaint temple?

"The Subordinate Judge has examined this question at length, and his conclusion is that, according to the Agama shastras which are received as authoritative by worshippers of Shiva in the Madura District, entry into a temple, where the ritual prescribed by these shastras is observed, is prohibited to all those whose profession is the manufacture of intoxicating liquor and the climbing of pamyra and cocoanut trees. No argument was addressed to us to show that this finding is incorrect and we see no reason to think that it is so. It might, of course, be that the local custom differed from the rule laid down by the shastras, but, in the absence of evidence, the inference to which the shastras would lead is that Shanars are prohibited, owing to their hereditary caste occupation, from entering the Sivite temples, and we have already seen that this is also the conclusion to be drawn from all the other evidence in the case. No doubt many of the Shanars have abandoned that occupation and have won for

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

themselves by education, industry and frugality, respectable positions as traders and merchants and even as vakils and clerks; and it is natural to feel sympathy for their efforts to obtain social recognition and to rise to what is regarded as a higher form of religious worship; but such sympathy will not be increased by unreasonable and unfounded pretensions, and in the effort to rise, the Shanars must not invade the established rights of other castes. They have temples of their own, and are numerous enough and strong enough in wealth and education, to rise along their own lines, and without appropriating the institutions or infringing the rights of others, and in so doing they will have the sympathy of all right-minded men, and, if necessary, the protection of the Courts.

"The only other question is as to the remedy to which the Plaintiffs are entitled in the present case. There can be no doubt but that the Defendants did enter the temple notwithstanding the protests of the temple authorities on the 14th May 1897, and that, as purificatory ceremonies were thereby rendered necessary the Plaintiffs are entitled to damages. We do not think that the sum of Rs. 500 awarded by the Subordinate Judge is excessive. Plaintiffs are also entitled to the declaration and injunction given by the Subordinate Judge in order to prevent a recurrence of the trespass."

Against the said decree of the High Court, dated the 14th February 1902, the Appellants appealed to His Majesty in Council.

Mr. DeGruyther for the Appellants urged that the Courts in India have wrongly held that Nadars as a caste are prohibited from entering the temple and that Nadars and Shanars are the same; that custom of exclusion if proved is barred in law.

Sir Robert Finlay, K. C., and *Mr. Kenworthy Brown* for the Respondents were not called upon.

Their Lordships said they would advise His Majesty to dismiss the appeal and give their reasons on a subsequent date.

Their LORDSHIPS' JUDGMENT was delivered by

LORD ROBERTSON.—The question between the parties is whether the Appellants and the caste to which they belong have legal right to enter and worship in a temple at Kamudi. This temple is dedicated to the worship of Shiva, and the customary ceremonies of Hindu worship are there carried on. It is common ground between the disputants that the Appellants represent a caste called the Nadar or Shanar caste. It is alleged by the Respondents that the presence of persons belonging to the Appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. Both Courts in India have decided against the Appellants, the judgment of the Subordinate Judge discussing the question in great detail and with much research, and the High Court at Madras resting their decision upon extremely comprehensible and cogent grounds.

The controversy touches, but does not involve, delicate and abstruse questions of Hindu religious doctrine. In the view of their Lordships, it admits of decision

SANKARALINGA NADAN v. RAJA RAJESWARA DORAI.

upon a much more palpable and limited range of facts.

First of all, the Appellants, as matter of fact, worship by themselves in a temple of their own. Second, the result of the evidence is a complete failure to prove any resort by persons of the Appellants' caste to the temple in dispute. Those two facts not merely negative the case of the Appellants, that they "have been from time immemorial . . . . participating in the pooja and worship" in the disputed temple, but they make easy the Respondents' further contention that this separation in worship between the two classes was not accidental or voluntary, but rested on a deeper ground.

The evidence has been admirably analysed by the High Court, and their appreciation of the quality of the evidence, on the one side and on the other, concurring as it does with that of the Subordinate Judge, is entitled to the greatest weight.

The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the Respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the Respondents' treatment of the Appellants in other respects. All this, however, as matter of theological argument, is too rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the Respondents have succeeded in proving is that by custom the Appellants are not among the people for whose worship this particular temple exists.

Their Lordships have spoken of "the Respondents," generally; but it is necessary to note the episode in the proceedings euphemistically described as "the compromise" The original Plaintiff in the suit was the Rajah who was the hereditary trustee of this temple, which was the temple of one of the villages in his zemindari. After the case had been decided in his favour by the Subordinate Judge, this person thought fit to profess that he now saw that he and the judge were wrong; and he asked that the judgment should be altered, so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disproved. The Court, on being applied to, very properly reinforced the cause of the worshippers of the temple by joining certain new Plaintiffs to the original Plaintiff (whose confidence in the justice of his suit had by this time convalesced). The principles applicable to the case of a trustee who thus betrays his trust by surrendering a decree have been wel stated and applied by the High Court.

For these reasons their Lordships, on the 16th June last, agreed humbly to advise His Majesty that the appeal ought to be dismissed, and ordered the Appellants to pay the costs of the appeal.

Solicitor: *Mr. Douglas Grant* for the Appellants.

Solicitors: *Messrs. Chapman-Walker & Shepherd* for the Respondents.

J. H. W. A. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 267 OF 1907.

BRETT, J.
CHITTY, J.
1908.
Heard, 7, 8 and 9, January.
Judgment, 3, March.

LALITESWAR SINGH, Defendant, Appellant,

BHABESWAR SINGH, Plaintiff, and Madheshwar Singh and others, remaining Defendants, Respondents.

Durbhanga Raj—Babuana *grant—Incidents—Whether impartible, and alienable without legal necessity—Will by grantee—Validity—Partition—Family custom*—Kulachar.

Property granted as babuana *to junior members of the family of the Maharaja of Durbhanga is ancestral property in the hands of the grantee governed by the ordinary rules of Mitakshara law; and the sons of the grantee can claim the right to restrain alienation by him except in cases of legal necessity, and the right to claim partition; the original grantee has no power to dispose of the property by Will.*

RAMESWAR SINGH *v.* JIBENDAR SINGH (5), RAM CHANDRA MARWARI *v.* MUDESHWAR SINGH (6) *referred to.*

The peculiar incidents attaching to the Raj, viz., impartibility and succession by primogeniture cannot apply to babuana *property in the absence of proof of particular custom taking it out of the ordinary category of Hindu family property.*

This was an appeal preferred on the 5th of July 1907, against the decree of H. E. Ransom, Esq., District Judge of Zillah Durbhanga, dated the 27th of May 1907.

The facts of the case are fully set out in the judgment of Chitty, J.

Messrs. Jackson and *Hill*, *Babus Lal Mohan Dass*, *Buldeo Narain Singh* for the Appellant.

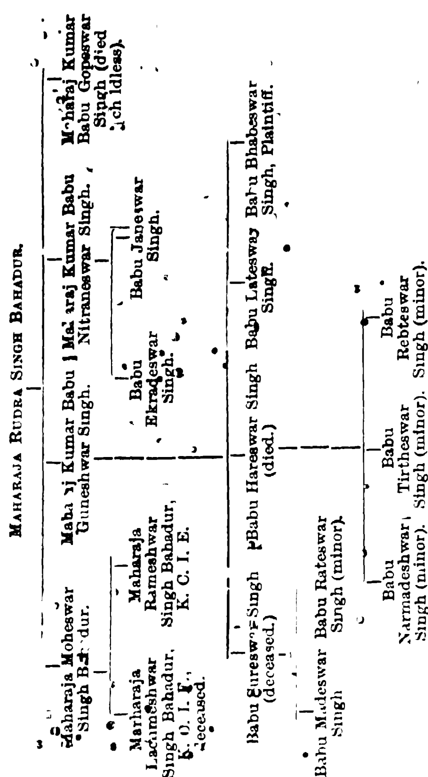
Mr. Garth, *Dr. Rash Behari Ghose*, *Babus Umakali Mukerjee*, *Golap Chandra Sarkar*, *Akshoy Kumar Banerjee*, *Lakshmi Narain Singh* and *Chandra Sekhar Prosad Singh* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

CHITTY, J.—This is an appeal from a decree of the District Judge of Durbhanga passed in favour of the Plaintiff and ordering a partition of the property in suit. The Plaintiff, Babu Bhabeswar Singh, instituted the suit against his brother Babu Laliteswar Singh and his five nephews. His claim was (1) for a declaration that the alleged Will of Babu Guneswar Singh (father of Plaintiff and Defendant and grandfather of the other Defendants) dated 17th March 1903 was invalid and ineffectual against the property in suit, (2) that it be determined that the property was joint and the Plaintiff's share therein was one-fourth and (3) that the said property be partitioned. He further put forward a claim as against Defendant No. 1 for an account, for a Receiver, and for discovery. The relationship of the parties and their position in the family of the Maharaja of Durbhanga appears from the following genealogical table :—

(5) 9 C. W. N. 567 : s. c. I. L. R. 32 Cal. 683 (1905).
(6) 10 C. W. N. 978 : s. c. I. L. R. 33 Cal. 1158 (1906).

LALITESWAR SINGH *v.* BHABESWAR SINGH.



There is no question that the parties are members of a Hindu family governed, save for any special custom, by the Mitakshara law. The property in dispute is the Pergunnah Padri and any accretions of it which there may be. This Pergunnah was granted by a former Maharaja Rudra Singh to his second son Guneswar according to the *kulachar* or custom of the Durbhanga family, as *babuana*, that is to say, for the maintenance of himself and his descendants in the male line, with the condition that on failure of male heirs in such line the property should revert to the Raj. The grant appears to have been made before any of Guneswar's sons were born. The grant was not by *sanad*, but it is referred to in a *sanad*, dated 7th Phalgun 1257, and granted by the Maharaja Rudra Singh in fovour of his eldest son and successor Maharaja Maheshwar Singh. Guneswar enjoyed the property during his life-time, and dealt with it in various ways, to which we shall hereafter refer. He had four sons to each of whom he appears to have made an allowance. Two predeceased him and at his death Defendant No. 1 was the elder of the two, then surviving. At the close of his life Guneswar was removed to Benares, where he was under the care of Defendant No. 1. He is said to have executed on 17th March 1905 a Will of which he appointed Defendant No. 1 executor trustee. The effect of the Will was to tie up the whole property, (subject to an annual allowance of Rs. 11,000 to each of his sons or their respective descendants) for an indefinite period after the testator's death for the payments of the debts incurred by him during his lifetime. The Will further provided for the maintenance and up keep of the family idols, dedicating as *debutter* certain specified properties. Finally by the Will after the satisfaction of all the debts due to creditors and also the settlement of all disputes and suits relating to the estate, the residue of the estate was to be partitioned among the four branches of the family. The factum of this Will was disputed and Defendant's application for probate was contested. The Court of first instance refused probate, but that decision was reversed on appeal to this Court. A further appeal to His Majesty in Council has been lodged, but for the purposes of the present case the Will must be regarded as having been executed, and as being the last

LALITESWAR SINGH v. BHABESWAR SINGH.

Will and testament of Babu Guneswar Singh. The Appellant in his written statement contended that the Will was valid and operative, that Babu Guneswar Singh was competent to execute such a Will, and that a custom of executing such Wills prevailed in the Durbhanga family. He further submitted that even if the said Will was not valid, in view of the nature of the tenure held in the said Pergunnah Padri and the incidents thereof the same was not liable to partition, and that neither Plaintiff nor any of the Defendants could claim such partition.

Eleven issues were framed by the learned Subordinate Judge before whom the suit originally came. They are set out in the judgment now under appeal. The point for our determination may however be stated broadly thus :—Was the *babuana* grant in the hands of Babu Guneswar Singh ancestral or self-acquired property? If the former, his interest therein ceased at death, and he could make no valid testamentary disposition with regard to it. If the latter, he could dispose of it as he pleased.

The Appellant's Counsel argued on the following lines :—(1) there was no partition (he said) of the properties, the subject of the *babuana* grant, from the properties of the present Raj, the inability of a father to alienate arose from the interests of his sons acquired at birth, the property in paternal and ancestral estate acquired by birth under Mitakshara law was so connected with the right to partition, that it did not exist where there was no such right: therefore (he argued) there was no proprietary right in this estate on the part of the sons. (2) That the eldest son, where the Mitakshara law prevails and there is a custom of primogeniture, does not become a co-sharer with his father in the estate: therefore to exclude the general operation of law as to an estate being alienable a custom that it is inalienable must be proved. (3) The testator, if he could alienate by gift might do it by Will. (4) The right to have a *babuana* allowance does not create a community of interest which would be a restraint on alienation. (5) To prevent alienation there must be a co-ownership in the son or sons. (6) The burden of proof is upon those who seek to restrain alienation and (7) where there is no right on the part of the sons to partition there is no right to the estate.

The fallacy of this argument appears to me to lie in the assumption that the peculiar incidents attaching to the Raj itself must necessarily attach also to the property granted out of it as *babuana*. The attribute of impartibility and the custom of succession by primogeniture, which undoubtedly obtain with regard to the Raj itself, have arisen for a particular purpose, namely, to keep the Raj intact from generation to generation in the direct male line. This custom is well recognised, and has been accepted by the Courts. But for it, however, the family would be subject to the ordinary Mitakshara law. Now the peculiar incidents of the tenure of the Raj itself do not, it is conceded, apply in their entirety to property granted to the younger members of the family who are styled Babus. The grant is one for maintenance and is irrevocable only so long as there are in existence direct male

LALITESWAR SINGH *v.* BHABESWAR SINGH.

descendants of the grantee but on failure of them it reverts to the Raj. It is not subject to the rule of primogeniture; but descends to all the male members of the grantee's line according to the ordinary rules of inheritance. The custom therefore which operates in the case of the Raj itself cannot be held to apply to a *babuana* grant without the requisite proof which is necessary in such cases. The burden of proof would lie upon the person seeking to establish the particular custom, and to take the case out of the ordinary category of Hindu family property, that is to say, in this case upon the Appellant.

A considerable body of evidence has been adduced upon the point but we do not consider it necessary to examine it in minute detail.

Much reliance was placed by the Appellant's Counsel on the fact that Maharaj Kumar Niteswar Singh made a Will. Babu Niteswar Singh was a son of the Maharaja Rudra Singh and had obtained Pergunnah Nisankpur Khudha as his *babuana* grant. He left two infant sons and several daughters. He certainly, on 31st July 1883, made a Will whereof he appointed the late Maharaja Sir Rameshwar Singh executor and the Maharaja obtained probate of it. The value of the circumstances as tending to establish a custom is however not great. By the Will the testator desired that provision should be made for the marriages of his then unmarried daughters, and the guardianship of his sons, but beyond that the property was left to his two sons. He did not therefore attempt to alter the ordinary course of inheritance. There was no contest, or occasion for dispute regarding that Will and it may well have been accepted as an expression of the testator's wishes, which left matters very much as they would have been had no such Will been made. This solitary instance of a purely negative character cannot be regarded as proof of the custom to which Appellant desires to establish.

Then there was evidence of gifts by some of the Babus of small portions of land out of their respective Pergunnahs.

Babu Kirat Singh in 1818 appears to have made a gift of 41 bighas of land to Sri Harlata Ojhain. Nearly 40 years later in 1857 he divided his property between his two sons in the proportions of 9 annas to 7 annas. There is nothing to show that the sons or either of them raised any objection to this course. It was probably a family arrangement. We then find some 8 alienations by Babu Guneswar Singh himself of small plots of land in no case exceeding 50 bighas. The Plaintiff contended that these had been made with the express consent of Babu Guneswar Singh's sons. The finding of the learned District Judge on this point is not quite clear, but this much is certain that they raised no objection to any of these alienations. They were made on particular occasions and to particular persons, *e.g.*, to the family priests in connection with the sradh ceremonies of the donor's wife. They were such small alienations as the head of a family might well make without question by his co-sharers. They cannot in our opinion be taken as proof of a customary power of alienation, which could be enforced against the will of other members of the family. There

is lastly a considerable body of oral testimony but it really does not carry the matter much further. The Appellant who is the eldest member of the family did not himself venture into the witness-box. We are told that this was because he had been disbelieved by the Court of first instance in the probate proceedings. That could hardly be an excuse for his declining to give evidence in a subsequent case, if his testimony could further his contention. It may therefore be assumed that it could not. There is upon the record his deposition in the former case, in which he stated :—"Had the Will not been executed, so far as I know, I would have been the *karta* of the family. All my father's properties are joint. . . . . . I have not enquired whether the *babuana* interest is partible or not." This is certainly an admission which in the absence of any present explanation by the Appellant must be taken against him. On the evidence as a whole I entirely agree with the learned District Judge that no family custom has been proved, which would authorise an alienation of this property by Will.

It was argued by Appellant's Counsel that this case was practically concluded by the decision of the Judicial Committee of the Privy Council in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1) but that case, as also the others cited and relied upon by him, dealt with the tenure of the impartible Raj itself. They did not touch the question of the character of *babuana* property, which as I have pointed out is subject to different considerations. The other cases were *Baboo Gunesh Dutt Singh* v. *Maharaja Moheswur Singh* (2) and *Sri Raja Rao Venkata* v. *Court of Wards* (3).

The case of *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (4) is an authority for the proposition that landed property acquired by a grandfather and distributed among his sons does not by such gift become their self-acquired property so as to enable them to dispose of it to the prejudice of the grandsons. So here the grant of the Pergunnah Padri to Babu Guneswar Singh as *babuana* did not make it his self-acquired property. The question of the nature of *babuana* grants in the Durbhanga family has been before this Court recently in two cases and those decisions are adverse to the Appellant's contentions. Those cases are *Rameswar Singh* v. *Jibendar Singh* (5) and *Ram Chandra Marwari* v. *Mudeshwar Singh* (6). The question in each case was as to creditor's rights, the contention being that *babuana* property was inalienable and so not available for the satisfaction of debts. In the latter case the learned Judges say :—"The grant was made by the owner of the impartible Raj Estate to enure for the benefit not only of Guneswar Singh but of his direct male line. It was ancestral property in the hand of the Raja and did not lose its character by the transfer." With that expression of opinion I entirely agree. It is said that an appeal is pending to His Majesty in Council

(1) L. R. 15 I. A. 51 (1888).

(2) 6 M. I. A. 164 (1855).

(3) 3 C. W. N. 415; s. c. L. R. 26 I. A. 83 (1899).

(4) 6 W. R. 71 (1863).

(5) 9 C. W. N 568: s. c. I. L. R. 32 Cal. 683 (1905).

(6) 10 C. W. N. 978 : s. c. I. L. R. 33 Cal. 1158 (1906).

LALITESWAR SINGH v. BHABESWAR SINGH.

against that decision, but that cannot affect the decision in the present case. If, as I think, this property in the hands of Guneswar Singh was ancestral property, his sons acquired an interest in it at their birth. He had no interest in it of which he could dispose by Will, and the property is now subject to the ordinary incidents of ancestral property namely partition between the present owners. The Appellant's contentions are somewhat inconsistent, for he is constrained to admit (having regard to the provisions of the Will itself) that there must ultimately be a partition among the descendants of Babu Guneswar Singh. I am of opinion that the learned District Judge's decision is correct and that Plaintiff is entitled to an immediate partition as well as to the other reliefs which he claims.

The appeal is accordingly dismissed with costs.

BRETT, J.—I agree entirely with the conclusions arrived at by my learned brother in his judgment, and with his reasons and I hold that the appeal must be dismissed with costs. I only desire to add a few supplementary remarks.

The line of argument which has been taken by the learned Counsel for the Appellant has been that property which forms the subject of a *babuana* grant is not the property of the joint family, that it is alienable at the will of the grantee, and that the incidents which attach to the Raj must be held to apply to the property which forms the subject of the *babuana* grant to the extent that as in the case of the Raj the junior members of the family have no right to claim partition or to retain alienation because they have no rights of ownership so in the case of a *babuana* grant the junior members of the grantee's family have no such rights.

In other words his arguments amounts to this that under a *babuana* grant the property passes to the original grantee absolutely and he has the right to alienate the whole or any part of it subject to no restraint from the junior members of his branch of the family who too have no right to claim partition: and from this it follows that the grantee has full power to dispose of the property by Will.

The argument cannot in my opinion be sustained either in principle or by authority.

A *babuana* grant is made to a junior member of the family and to his descendants in the male line for their maintenance, and if the line of argument of the learned Counsel were followed to its logical conclusion the result would be that the object for which the grants are made might be defeated by the first grantee who could dispose of the whole of the property at once and so defeat the right of all his descendants in the male line.

The argument of the learned Counsel that the whole or any part of the property covered by the grant is alienable by the first grantee is based on the contention that the property passes to him as an absolute gift and by such transfer ceases to be ancestral and becomes the self-acquired property of the grantee only. In my opinion the contention is not sound in principle. Admittedly the property which forms the subject of a *babuana* grant is ancestral in the hands of the grantor, and apply-

ing the principle laid down in the case of *Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (4) the property would not lose its original character by reason of the grant nor in the present case would it lose it under the terms of the grant. The grant is made for the maintenance of the grantee, as a junior member of the family, and his descendants in the male line subject to the restriction that on failure of male descendants it reverts to the Raj.

Now the right of the junior members of the family in the case of a Raj like the Durbhanga Raj to *babuana* grants for maintenance undoubtedly arises out of the fact that they are members of the joint family who, were it not for the special customs prevailing in the case of the Raj, would have the same rights as members of a joint Hindu family governed by the Mitakshara law ordinarily have under that law and those rights include a right to a share in the ancestral family property. In consequence of the incidents of primogeniture and impartibility which by immemorial custom attaches to the Raj they lose their right to enjoy a share of the family property, but as a compensation for that loss they are entitled to receive from the Raja certain portions of the landed property of the Raj as *babuana* grants for the maintenance of themselves and their descendants in the male line. The grant is not of a portion of landed property to pay off a certain fixed sum of money which the grantee is entitled to claim on account of his maintenance from the Raja, but it is a grant for the maintenance of the grantee and his male descendants so long as there are any. The fact that the Raja continues to be registered as proprietor in the Official Registers, on which the learned Counsel relies for other purposes, certainly supports the view that the property does not lose its original and ancestral character by reason of the grant or become the self-acquired property of the grantee alone. It is admitted that on the death of the original grantee the property passes to his heirs as ancestral property with all the incidents attaching to such property under the Mitakshara law. The grant is made under the *kulachar* or family custom for the maintenance of male members of a branch of the family so long as there may be any, and not merely for the maintenance of the individual in whose name in the first instance the grant is made. There is in my opinion no reason which can, in principle be supported for holding that the property which is the subject of the grant ceases to be ancestral only for the period that the first grantee lives so as to enable him to defeat the whole object of the grant.

Nor can the argument be supported by authority. In the case of *Baboo Gunesh Dutt Singh* v. *Maharaja Moheswar Singh* (2), their Lordships of the Privy Council do not lay down, as the learned Counsel suggests, that the incidents which attach to the Raj must be held to attach to the grant because they hold that "the property is never separated from the zemindari at all," in fact that opinion is expressed to distinguish *babuana* grants from absolute grants. The learned Counsel admits that the right of

(4) 6 W. R. 71 (1863).

(2) 6 M. I. A. 165 (see p. 197) (1855).

LALITESWAR SINGH v. BHABESWAR SINGH.

primogeniture and impartibility which are incidents of the Raj itself cannot apply to *babuana* grants, and it is not clear on what he bases his contention that because the right of alienation is not restricted in the case of the holder of the Raj, therefore the holder of a *babuana* grant has the same unrestricted right.

The grant in the case of *Rajah Nursing Deb* v. *Roy Koylas Nath* (7), on which the learned Counsel relies, was not a *babuana* grant at all. It was a grant of landed property made in discharge of a decree obtained for a specific sum of money as maintenance. That case has therefore no application to the present.

Nor do the cases of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (1) and of *Sri Raja Rao Venkata* v. *Court of Wards* and *Venkata Kumara Mahipati Surya Rao* (3) assist his argument. They simply lay down what are the incidents which attach to the Raj itself, which in this case are not disputed.

In the case of *Rameswar Singh* v. *Jibendar Singh* (5), it is not laid down as the learned Counsel suggests that the original grantee of a *babuana* grant has the right to alienate the whole or any part of the property covered by the grant subject to no restraint by other persons interested in the grant, but that the right to alienate may be exercised for sufficient and good cause. And in the case of *Ram Chandra Marwari* v. *Mudeshwar Singh* (6), it has been laid down that a *babuana* grant of ancestral property by the owner of an impartible estate to enure for the benefit not only of a junior member of the family but of his male descendants in the direct line does not lose its ancestral character by the grant. It does not become self-acquired property in the hands of the grantee or his direct male descendants. The latter case is direct authority against the contention of the learned Counsel and though we have been informed that the case is under appeal to the Privy Council I see no reason to dissent from it. In fact I am in agreement with the view taken by the learned Judges in that case.

No authorities have been quoted to support the contention that the property covered by a *babuana* grant becomes self-acquired only so long as it is in the hands of the original grantee and in my opinion the contention is unsound.

It follows then that the property being ancestral the other members of the family have the rights in it which they can claim under the Mitakshara law that is the right to restrain alienation except in cases of legal necessity and the right to claim partition; and the original grantee has no power to dispose of the property by Will.

The Plaintiffs are therefore entitled to the reliefs claimed and the appeal must be dismissed with costs.

N. G. *Appeal dismissed.*

(1) L. R. 15 I. A. 51 (1888).
(3) 3 C. W. N. 415: s. c. L. R. 26 I. A. 82 (1899).
(5) 9 C. W. N. 567: s. c. I. L. R. 32 Cal. 653 (1905).
(7) 9 M. I. A. 55 (1862).
(6) 10 C. W. N. 978: s. c. I. L. R. 33 Cal. 1158 (1906).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE

No. 224 OF 1905.

MITRA, J.
CASPERSZ, J.
1908.
Heard,
3, March.
Judgment,
12, March.

BHADESHWAR SINGH and others, Appellants,
v.
RAI BABU GANGA PERSHAD SINGH BAHADUR, Respondent.

Durbhanga Raj—Babuana *grant—Mortgage by grantee—Legal necessity—Alienability—Ancestral property.*

Property granted as babuana *to junior members of the family by the Maharaja of Durbhanga is ancestral property and is governed by the ordinary rules of Mitakshara law to which the Raj itself would be subject but for the peculiar custom necessary for its continuance as a Raj.*

Such property is alienable for legal necessity.

LALITESWAR SINGH *v.* BHADESWAR SINGH (3), RAM CHANDRA MARWARI *v.* MUDHESWAR SINGH (2) *followed.*

This was an appeal preferred on the 7th of June 1905, against the decree of Babu Nalini Nath Mitra, Subordinate Judge of Zillah Tirhoot, dated the 20th of March 1905.

The facts of the case will appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Akhoy Kumar Banerjee* for the Appellants.

The Advocate-General (Mr. P. O'Kinealy), Babus Umakali Mukerjee and *Shorosi Churn Mitra* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

This is an appeal in a suit to enforce a mortgage bond, dated the 27th February 1891, against the descendants of the mortgagor, Maharaja Babu Kumar Guneshwar Singh, who was one of the younger sons of Maharaja Rudra Singh of Durbhanga. In accordance with the *kulachar* or family custom, the Raj devolved upon, and was granted by the Maharaja to his eldest son Moheshwar Singh, afterwards Maharaja Moheshwar Singh, and a Pargana was granted to each of the younger sons including Babu Guneshwar Singh who obtained Pargana Padri. The bond in suit deals with certain mehals, comprised in Pargana Padri, which were hypothecated thereby, and the sole point for determination is whether the mortgagee is legally entitled to enforce his security against property which has now descended to the Defendants. The Subordinate Judge has given the Plaintiff a decree, and the Defendants have preferred this appeal.

The grant of Pargana Padri to Babu Guneshwar Singh by Maharaja Rudra Singh of Durbhanga was what is known as a *babuana* grant, that is a grant for maintenance of a Babu or younger son of the Maharaja. It admits of no doubt, and it is conceded, that Pargana Padri like other *babuana* properties was held by the grantee and after his death by his male descendants, and that it will ultimately, on failure of the grantee's descendants in the male line, revert to the Durbhanga Raj. This was pointed out in the case of *Rameswar Singh v. Jibendar Singh* (1) where it was held

(2) 10 C. W. N. 978: s. c. I. L. R. 33 Cal. 1158 (1906).
(3) 12 C. W. N. 958 (1908).

(1) 9 C. W. N. 567: s. c. I. L. R. 32 Cal. 683 (1905).

babuana property is alienable. The Pargana alienated in that case was Pargana Jabdi, but in *Ram Chandra Marwari* v. *Mudeshwar Singh* (2), the learned Judges considered the case of Pargana Padri, which is the property now in suit, and observed—"Here the grant was made by the owner of the impartible Raj estate to enure for the benefit not only of Guneshwar Singh but of his direct male line. It was ancestral property, in the hands of the Raj, and did not lose its character by the transfer." This, also, was the view adopted by two of the Judges of this Court (Brett and Chitty, JJ.), in *Laliteswar Singh* v. *Bhabeswar Singh* (3), wherein judgment was delivered on the 3rd March 1908, and it was said:—"The property being ancestral, the other members of the family have the rights in it which they can claim under the Mitakshara law, that is, the right to restrain alienation except in cases of legal necessity, and the right to claim partition." These observations were made in respect of the same Pargana (Padri) with which we are now concerned, and partition was enforced at the instance of one of the younger sons of Babu Guneshwar Singh against another son and five grandsons of Babu Guneshwar Singh.

Now, the bond, dated the 27th February 1891, recites that the mortgagor, Babu Guneshwar Singh, had borrowed from time to time large sums of money from the Plaintiff's firm, and that he had spent the same—"in meeting the valid necessities of the joint undivided family, and the joint undivided family, of which I am the manager and *karta*, was benefited thereby." In mortgaging certain mehals of Pargana Padri Babu Guneshwar Singh covenanted that "when the said mortgaged hypothecated properties devolve after my death on, and be taken possession of by, my sons and heirs, the said Mahajan (money-lender) shall release from mortgage liability the share of such of my sons and heirs as may pay, in accordance with the conditions laid down above, the proportionate share of debts principal and interest due from him: but the shares in the properties of the other sons and heirs shall remain mortgaged and hypothecated for the remaining debt left unpaid." The Subordinate Judge has found, and his finding has not been impugned, that the loan was incurred for antecedent debts and family necessities, and not for any immoral purposes, and that Babu Guneshwar Singh was not even extravagant. The evidence leaves no doubt that this finding is correct.

But it has been urged that the terms of the *rajgi sanad*, dated the 7th Falgun 1257 F. S. (1850), conferred upon Babu Guneshwar Singh a mere life interest in the usufruct, and no interest in the *corpus*, of the Pargana, granted by way of maintenance, or power to alienate the same. The words used, however, are—"the profits of the tract of Pargana Padri together with the customary proprietary dues." These words certainly import an absolute estate, but they do not negative the other incidents attaching to a grant of *babuana*; that is to say, the grant was of certain property which remained part of the Raj though

(2) 10 C. W. N. 978: 3 C. I. L. R. 33 Cal. 1158 (1906).

(3) 12 C. W. N. 958 (1908).

BHABESHWAR SINGH v. RAI BABU GANGA PERSHAD SINGH BAHADUR.

it was diverted for a particular purpose and continued subject to the rules of the Mitakshara law, for so long as it was enjoyed by the grantee and his male descendants. It is impossible to conceive of a grant of successive life estates, with a reversion to the Raj between each and every devolution, and yet this must be the only logical result of the Defendant's contention that Babu Guneshwar Singh had no power of alienation, but had a mere life interest in the profits.

Although the original grant of Pargana Padri is not forthcoming, the *rajgi sanad*, already mentioned, coupled with the other evidence in the case, proves that the grant was to a younger son and his issue in the male line, and that the property would revert to the Raj upon failure of male descendants, of the grantee. Such a tenure or interest was resumable only upon the contingency specified in the grant. See *Maharaj Kumar. Jagat Mohan Nath Shah* v. *Brinda Saha* (4), and, meanwhile, that interest is not inalienable. The documents in favour of alienability are overwhelming; they are set forth in the judgment of the Court below. In this state of the evidence, we are unable to accept, the vague statements of some of the witnesses, on the side of the Defendants, that *babuana* grants are not transferable by the grantee or any subsequent holder of the same. The case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (5) dealt with an impartible Raj, and, not with a derivative or limited interest carved out of such a Raj, but we may regard it as an authority for the proposition (see page 65) that when part of a Raj is granted devoid of the peculiar customs of that Raj the part so granted retains, nevertheless, the ordinary attributes of the Mitakshara law to which the Raj itself would be subject but for the peculiar customs necessary for its continuance as a Raj.

We have shown that Pargana Padri was all along an ancestral property, that the mortgage bond in suit was executed or legal necessities and not for any immoral purposes, and that the alienation by Babu Guneshwar Singh was not n excess of his powers as *karta*. The mortgage, therefore, can be enforced against the mortgaged villages.

The appeal is dismissed with costs.

N. G. *Appeal dismissed.*

(4) 1 C. L. J. 557 (561) (1905).

(5) L. R. 15 I. A. 51 (1888).

THE
Calcutta Weekly Notes.

Vol. XII.] MONDAY, AUGUST 24, 1908. [No. 41

Contents.

NOTE

The following constitution of Benches and distribution of business amongst them will take effect from date :—

PRESIDENCY GROUP AND PRIVY COUNCIL DEPARTMENT.—Mr. Justice Rampini and Mr. Justice Doss.

RAJSHAHYE AND BURDWAN GROUPS.—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

PATNA GROUP.—Mr. Justice Coxe and Mr. Justice Bell.

CRIMINAL BUSINESS.—Mr. Justice Brett and Mr. Justice Ryves.

ORIGINAL SIDE.—Mr. Justice Stephen, Mr. Justice Woodroffe and Mr. Justice Fletcher will sit singly.

THE LONG VACATION OF THE CALCUTTA HIGH COURT commences after Court on the 27th of August and terminates on the 9th of November next. The Civil Courts will however close on the 25th of September, *i.e.*, a month after, and re-open on the 27th of October. Such an interval between the suspension of business in the Appellate Court and that in the Courts subordinate to it causes no inconsiderable amount of inconvenience to suitors in both Courts. If the long vacation commenced about the middle of September, many litigants anxious to get legal relief would not have to wait for many months to come. Further, this vacation, long as it appears, is not available to the majority of the people connected with the legal profession. It is only the Hon'ble Judges and some of the more prosperous members of the Bar who can fully avail of it. The solicitors and the members of the junior Bar who have to depend on them have to stick to their offices till the general holidays begin. Most of the vakils of the High Court have also to follow suit. Lawyer's offices cannot very well be closed so long as business both in the city and the country goes on as usual. We do not certainly grudge the Hon'ble Judges and the leaders of the Bar a good holiday after their arduous work all through the summer. Only we venture to suggest that if the long vacation commenced about the middle of September and terminated about the middle of November or even a little later, as formerly, it would suit the convenience of all concerned in the law Courts and the vacation would in that case also correspond with the slack season in every business.

IT IS RUMOURED THAT MR. JUSTICE WOODROFFE who is going home on furlough may not return to his work at the end of his leave. We hope the rumour is not true; it will be a great loss to the High Court. Mr. Justice Woodroffe has, in the short time he has been on the Bench, earned the esteem of everyone connected with it and of the general public. For patient hearing, courtesy, a conscientious desire to discharge his duties, thorough independence of character, and legal learning, there is now hardly any Judge on the Indian Bench who enjoys a better reputation. The profession and the public earnestly hope that Mr. Justice Woodroffe will not make up his mind to retire so early in life but return to the sphere of work where judges of his sterling qualities are badly needed. He may not have any wants in life but a call to duty, even when voluntarily undertaken, is certainly as potent a factor in determining one's life work as any worldly considerations.

SIR ROBERT RAMPINI.

It has been announced that the Hon'ble Sir Robert Rampini, the senior Puisne Judge of the Calcutta High Court now officiating as the Chief Justice, will retire from the Bench after the long vacation. As he will not return to India after the long vacation we bid him a hearty farewell and our good wishes follow him in his retirement. Mr. Justice Rampini's career both in the land of his birth and in the land of his labours has been a distinguished one. He was a brilliant student both at school and at the University of Edinburgh. At the Civil Service examination he came out first in his year. In the course of active service in Bengal, he obtained high proficiency certificates in all the vernacular dialects of Bengal, Behar and Orissa. His official experience was equally varied. During his official career he

saw service as a Magistrate, as a Famine Relief Officer, as a school Inspector, as a District and Sessions Judge, and as a Legal Remembrancer to the Government of Bengal. While serving in the last capacity, he got called to the Bar.

In 1888 he was for the first time appointed to officiate as a Judge of the Calcutta High Court. Since then he officiated several times till he was confirmed in 1893. His long standing and experience on the Bench has brought on him the honour of acting as the Chief Justice and it is only appropriate that while still serving in this capacity the further honour of a knighthood has been conferred on him. As a Judge he is remarkably quick and intelligent and is regarded as one of the ablest Judges of the High Court. He, no doubt, at times, used to take strong views of matters but no one can say that he was not quite impartial in his treatment of counsel or causes that came up before him; and even in his idiosyncracies there was never any suspicion of any personal or racial bias. In private life he was always very polite and genial.

As a legal author he has attained considerable distinction in India. His commentary on the Bengal Tenancy Act is the standard work on the subject. He has also followed up the work of some of his predecessors in office and brought up to date O'Kinealy's Code of Civil Procedure and Field's Law of Evidence. It is not commonly known that Sir Robert Rampini also evinced considerable interest in the furtherance of Indian Art and historical research in Bengal.

A Judge rarely gets a chance of figuring as a public man. But during Mr. Justice Rampini's tenure of office as an Additional Member of the Viceroy's Council he did not mince matters but boldly pointed out why the Civil Servants of to-day made such poor judicial officers and urged upon the Government to remedy the present state of things. Let us hope that even in his retirement Sir Robert Rampini will exert himself for improvement in the judicial service in India and for the strengthening of the High Court.

CRIMINAL CASES OF 1907.

(*Continued from* p. ccxxvi.)

BRIBERY.—Sec. 163 requires proof (i) that an official has received an illegal gratification "as a motive or reward" for official conduct, *i.e.*, on the understanding that the bribe is given in consideration of some official act or conduct, though such understanding need not be proved by explicit evidence of any precise agreement, but may be inferred from circumstances: (ii) that the official conduct must be *his own*, so that obtaining a bribe as a motive or reward for another's conduct is not within the section, though it may be an abetment of sec. 161 or cheating: (iii) that the gratification was for himself or another, though the latter was not an official (*Emperor* v. *Bhagwandas*, 31 Bom. 335).

FALSE INFORMATION.—The question whether sec. 182 or sec. 211 applies to false informations given to the police, with a view to institute criminal proceedings, has been dealt with at great length by the Author in his Article in *11 C. W. N. clxiii, clxiv*, in which it was contended that the view in *Emperor* v. *Saroda*, 32 Cal. 150, and *Gati* v. *Emperor*, 4 C. L. J. 88, were unsound. The ruling in *Emperor* v. *Ramchandra*, 31 Bom. 204, supports the Author's opinion.

FALSE EVIDENCE.—[*Fabrication of false evidence*]. Under sec. 193, I. P. C., it is necessary to show an intention that the fabrication should appear in an evidence in a judicial proceeding. The causing of a false marriage entry in a register, when there is no such intent, is not an offence (*Mohamed* v. *Emperor*, 11 C. W. N. 911: *see* also the cases in *1 Ind. Jur. O. S. 105: 5 Bom. H. C. R. 65: 5 Mad. H. C. R. 373: 12 Bom. H. C. R. 1*), though the materiality of the evidence is not necessary on a charge of *giving false evidence* (*1 Mad. H. C. R. 38; 16 W. R. Cr. 37: 6 W. R. Cr. 84*, and *Reg.* v. *Damodar*, 5 Bom. H. C. R. 68). A very curious case, that of juggling with witnesses, is reported in *Emperor* v. *Cheda*, 29 All. 351.

OPPORTUNITY TO PROVE CHARGE.—Opportunity must be given to a person to prove his charge before instituting a prosecution against him under sec 211 (*Emperor* v. *Tula*, 29 All. 587). This was decided by the Calcutta High Court in *Queen-Empress* v. *Sham*, 14 Cal. 707 and discussed in *33 Cal. 1.*

ESCAPE FROM LAWFUL CUSTODY.—The custody of a chowkidar to whom a person illegally arrested is made over is not "lawful custody" (*Emperor* v. *Debi*, 29 All 377: *King-Emperor* v. *Johri*, 23 All. 266), but is lawful when the original arrest is legal (*Emperor* v. *Parsidhan*, 29 All. 575: *Queen-Empress* v. *Potadu*, 11 Mad. 480).

UTTERING FALSE COIN.—A gold mohur of Shahjahan is not "*coin*" within sec. 230, I. P. C. (*Emperor* v. *Khushali*, 29 All. 141: *see* also *Reg* v. *Bapu*, 11 Bom. H. C R. 172), but gold mohurs are "*coins*" when they have a current though not a fixed value as such (*Queen* v. *Kunj*, 5 N. W. P. 187). As to what constitutes "*Queen's coin*," see *Emperor* v. *Deni*, 28 All. 63.

PUBLIC NUISANCE.—To constitute a nuisance under sec. 268 it is not necessary that it should produce smells injurious to health, but it is sufficient if it is offensive to the senses (*Berckfeld* v. *Emperor*, 34 Cal. 73). *See* also the English case of *Rex* v. *Neil*, 2 C. and P. 485.

CULPABLE HOMICIDE.—Where two persons were found, immediately after a shot was fired, at the scene, each with a gun, and it was not proved who fired the fatal shot or that they acted in concert, it was *held* that neither was guilty of murder (*Nibaran* v. *King-Emperor*, 11 C. W. N. 1085, following *King* v. *Richardson*, 1 Leach Cr. C. 431), but where three persons assaulted another with *lathis*, and one struck the fatal blow, and it was not known who did so,

the offence was *held* to be grievous hurt and not culpable homicide amounting to murder (*Emperor* v. *Bhola*, 29 All. 282: *see* also *Queen-Empress* v. *Duma*, 19 Mad. 483). Where the fatal blow was struck on the spur of the moment by one, and the spear wounds by the others were below the waist, the latter were held guilty of grievous hurt (*Chandi* v. *Emperor*, 11 C. W. N. xci, following *22 Cal. 306*).

WRONGFUL CONFINEMENT.—An officer arresting and confining the judgment-debtor in the house of the judgment-creditor is not guilty of wrongful confinement (*Emperor* v. *Samuel*, 30 Mad. 179).

LAWFUL EXERCISE OF POWERS.—A person making an attachment to realize revenue under a warrant issued by a *tehsildar* under Act III of 1901, (N.-W. P.) is not acting in the lawful discharge of authority (*Emperor* v. *Radhe*, 29 All. 572). *See* as to escape from unlawful custody the cases in *29 All. 377*, and *Ibid 575*, supra.

EXTORTION AND ROBBERY.—The mere writing of a letter of demand of money alleged to be not due is not an attempt to extort (*Dharal* v. *Raghubir*, 11 C. W. N. cclxii). As to the difference between secs. 392 and 397, see *Khiroda* v. *King-Emperor*, 11 C. W. N. cxciv.

MISCHIEF.—[*By cattle*]. To render a person liable for mischief by cattle trespass he must have in some way caused the entry of the cattle on the damaged field, with the knowledge that his act would cause damage (*Emperor* v. *Mehdi*, 29 All. 565). The same was laid down in *14 W. R. Cr. 21* and *7 Bom. 126*. [*Civil dispute*]. The throwing down of a wall built over a path under a claim of right of way is not mischief but a matter for the Civil Courts (*Kedar* v. *Emperor*, 11 C. W. N. cxxvii). But where one party is found to have been all along in possession and to have grown the crop, the act of the other in going on the land and ploughing it up, after having failed in settlement proceedings shortly before, is mischief (*Chakoo* v. *Emperor*, 11 C. W. N. 467).

(To be continued.)

E. H. MONNIER.

Reviews.

THE LAW OF TENDER. *By George Lucas Brynon Harris, Barrister-at-Law. Butterworth & Co., London. 1908.*

The Law of Tender though an important branch of English law and of constant application in commercial and other causes has for the first time received adequate and exhaustive treatment in this work. It will obviate the necessity of any serious independent researches into the "black letter sources." The subject in all its various aspects has been handled with great thoroughness. The Introductory Remarks, (which we may note in passing are not couched in the conventional language of law-books) show that the learned author has not gone about his work in the spirit of a mere compiler or digest-maker. The author rightly concludes that the law of tender partakes more of the character of adjective than of substantive law and in its inception was intended to modify the extreme rigour of the ancient law of debts in favour of the unfortunate debtor. The following summary of the contents will give an idea of the scope and magnitude of the author's labours.

Part I. Tender on the Contract of Debt. Chaps. I—XVI, pp. 14 228.

Part II. Tender of Amends. Chaps. XVII-XVIII, pp. 229 246.

Part III. Tender on the Contract of Sale (generally). Chap. XIX, pp. 247-249.

Part III (continued). Tender on the Contract of Sale of Land. Chaps XX—XXII, pp. 250-274.

Part III (continued). Tender on the Contract of Sale of Goods. Chaps XXIII—XXVII, pp. 275-319.

Part III (concluded). Tender on the Contract of Sale of Stocks and Shares. Chap. XXVIII, pp. 320-326.

Part IV. Tender of Conduct Money (on Civil and Criminal Process). Chaps. XXIX—XXXII, pp. 327-352.

Part V gathers up the "Disjecta Membra" and includes two chapters on "Tender of Evidence" and "Tender of Vadium" Chaps. XXXIII XXXIV, pp. 353 374.

The author rightly characterises the materials out of which he has had to build as "the scattered, elusive, and often inaccessible units of an eminently practical and important phase of law." The guiding principles of the law of tender have been repeatedly laid down by great English Judges, but are apt to be lost sight of in their application. We can at this moment recall more than one instance of its misapplication in this country. A work like the present in which these principles as also the modes of their application in the various transactions of life are discussed with great ability and insight, will be of great assistance to Judges and practitioners in law.

CIVIL PROCEDURE CODE, 1908, CASE NOTED. *By Janaki Nath Pal, B. L., Shastri, Calcutta. Printed and published by B. B[illegible] at the "Law Publishing Press," Nos. 3 to 5, Bow Street. 1908. Price Rs. 5, for subscribers Rs. 3.*

We welcome this handy case-noted edition of the new Code of Civil Procedure. The notes to the sections consist of references to leading cases, with explanatory notes and extracts from the reports of the Simla Committee and the Select Committee The notes to certain portions of Sch. I, *e.g.*, the provisions relating to mortgage suits are fairly elaborate. Besides the comparative table showing the corresponding sections of the old and the new Code

references to the old Code are given below each section of the new Code. In the schedule portion the author has appended to each order of the 1st schedule, a table showing the sections of the old Code which correspond to the rules in the new. The subject index at the end of the book is the most elaborate we have come across and ought to enhance its value as a book of reference. The general get up of the work is also satisfactory.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ. CRIMINAL REVISION No. 801 OF 1908. LARU MIRJA, Petitioner, *v.* THE EMPEROR, Opposite Party. 31st July 1908.

Penal Code, sec. 193—Contradictory statements in cross-examination, reconciliation of—Magistrate's explanation.

The Petitioner was a defence witness in a case under sec. 325, I. P. C., against some servants of the Raja of Nagarkiary in the District of Manbhum. In the course of his cross-examination the Petitioner made the two following statements, *viz.* :—

(*a*) "I was never complainant in a tree-cutting case for the Raja."

(*b*) "I was complainant in the Pachrukhi case for tree-cutting about six months ago. The Raja has had many cases of this kind."

The trying Magistrate, Mr. A. E Scrope, directed the prosecution of the Petitioner on these two contradictory statements. The Petitioner moved the High Court and obtained the rule for setting aside the order for his prosecution. The trying Magistrate in his explanation to the High Court observed: "I submit that the question whether the statements are contradictory or not is eminently one for the trying Magistrate rather than for the High Court in its Revisional Jurisdiction. It is a question of simple fact as to whether the two statements can be reconciled, and were I not of opinion that they could not be, I would not have committed the accused. The Petitioner deliberately stated "I was never complainant for the Raja in a tree-cutting case." As I distinctly recollected he was complainant in such a case before me about 6 months ago, I asked him whether this was so and he then admitted he was" &c.

Their Lordships observed :—

"We think that the tone of the explanation submitted by the Sub-divisional Officer is not such as should have been adopted by that officer in showing cause to a rule issued by this Court, and we think further that the position he has taken up is not correct. In this case the second statement of the accused admitting that he had appeared in a case before the Magistrate in which the Raja was a complainant was no doubt contradictory to his former statement, but we must take it that when the fact was distinctly put to him his second statement was made in qualification of the previous statement. At all events we are of opinion that no prosecution under sec. 193, I. P. C, for giving false evidence could possibly succeed on those two statements &c."

Mr. Huq and *Babu Manmatha Nath Mukherjee* for the Petitioner.

Rule made absolute;
and order for prosecution set aside.

CIVIL APPELLATE JURISDICTION. Before STEPHEN and HOLMWOOD, JJ. APPEAL FROM APPELLATE DECREE No. 446 OF 1907. MAHARAJA SURJA KANT ACHARJEE, Appellant *v.* BHABA PRASAD KHAN CHOWDHURY, Respondent. 14th July 1908.

Ejectment, suit for—Permanent tenure—Presumption.

The suit was for ejectment. The Plaintiff was admittedly the landlord, but the defence was that the tenure being permanent the Defendant could not be ejected. The only question which was raised in second appeal was, whether the conclusions drawn by the lower Court from the facts which were found were such as the lower Court was justified in drawing.

The facts of the case were that the land formed part of a very old holding dating back to 1793 or 1794. The origin of the tenure was unknown and indeed a great part of its history was very vague owing to the loss of papers in the earthquake in 1897. The present holding was a two anna portion of the original holding, the separation between the two having occurred in the time of the present Defendant's grandfather before the year 1857. The 10 annas shareholder created certain *pucca* buildings on the land in his possession, and also constructed *pucca* ghats in the tank in connection with that land. He also successfully resisted a suit for ejectment in 1884.

Held—According to the judgment in the case of *Grant v. Mrs. Robinson* (11 C. W. N. 242), the lower Appellate Court was justified in drawing the inference that the tenure was a permanent one.

Babus Dwarka Nath Chuckerbutty and *Gobinda Chunder Dey Roy* for the Appellant.

Hon'ble Mr. S. P. Sinha (Advocate-General), Babus Joges Chunder Roy and *Priya Sankar Mozumdar* for the Respondent.

A. T. M. *Appeal dismissed.*

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 774 OF 1907.

CHITTY, J.

1908. Heard, 2, 3, and 4, June. Judgments, 3 and 4, June.

KRISHNA DHONE MITTER v. NANDARANEE DASSEE.

Ancient light—Easement, non user of, how far a release—Transfer of dominant tenement—Alienation of easement after attachment—Code of Civil Pocedure (XIV of 1882), sec. 276—License—Damage—Mandatory injunction.

The non-user of an easement is not an implied release of it, and the transfer of the dominant tenement carries with it the easement which then existed, although in suspense for the time being.

The easement of light and air falls within the definition of immoveable property and can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner.

If an easement enjoyed by the dominant tenement is expressly released after the latter is attached under a decree, it is an alienation of a portion of that property within the meaning of sec. 276 of the Code of Civil Procedure (XIV of 1882) and the transaction will be void.

Mere blocking up of the apertures of ancient windows would not necessarily amount to an abandonment of rights of easement.

Premises No. 1-2, Jaggernath Soorie's Lane, which belonged to one Chandramoni Dassee, was attached on the 12th September 1905 by the Sheriff in execution of a decree, dated the 30th November 1904, passed in Suit No. 659 of 1903 (wherein one Jadub Chandra Sen was the Plaintiff and Chandramoni Dassee the Defendant). These premises had four windows on the south wall for over 20 years, through which they enjoyed the free access of light and air as of easement. During the attachment, however, Chandramoni (the Plaintiff alleged in collusion with the Defendant), had the wooden frames of these windows taken out and the openings thereof closed up with brick and mortar. Under an order of sale, dated the 19th December 1905, the premises were sold to the Plaintiff on the 14th December 1906; the sale was confirmed on the 27th January 1907; sale certificate issued on the 1st March 1907; and the Plaintiff entered into possession thereof on the 20th March 1907.

The premises contiguous to the above, No. 13-1, Jaggernath Soorie's Lane, originally belonged to one Nabin Chandra Sen and, by diverse transfers, ultimately, on the 31st October 1906, became the property of the Defendant. In November 1906, the Defendant built a wall on the side of the Plaintiff's premises against the portions where the ancient windows were and further extended the wall to the east sometime in April and May 1906.

In this suit, the Plaintiff prayed for a declaration that he was entitled to the free access of light and air through those windows as an easement to his said premises; that the easement had not been affected in any way by the blocking up of the openings of the windows by the Defendant or Chandramoni; for injunction, mandatory and perpetual; for damages, in the alternative, for the infringement of the Plaintiff's rights; and, for other incidental reliefs.

The Defendent in his written state-

KRISHNA DHONE MITTER v. NANDARANEE DASSEE.

ment, amongst other things, denied the easement and submitted that the Plaintiff had no cause of action against him, on the ground that on the 31st October 1906, when he had purchased his premises, there were no windows on the Plaintiff's south wall and that the closing up of the windows by Chandramoni amounted to an extinguishment of the easement, if any.

Messrs. C. R. Dass, A. N. Chaudhuri and *N. Sircar* for the Plaintiff.

Messrs S. R. Dass and *B. L. Mitter* for the Defendant.

Mr. S. R. Dass raised the preliminary objection, by way of demurrer, that the Plaintiff had no cause of action as against the Defendant and that, if he had any cause of action, it was against the judgment-creditor at whose instance the sale was held or the judgment-debtor who had, by closing up the openings, purported to release, abandon and relinquish the easement, if any.

Mr. C. R. Dass, contra., submitted that the permission by Kristamoni to allow Defendant to build the wall was under an arrangement, and as such, being subsequent to the attachment, amounted to a private alienation of a portion of the property attached, within the meaning of sec. 276 of the Code of Civil Procedure and was void. Cited, *Anandalal Das* v. *Radha Mohon Shaw* (1), *Ram Onoograho Singh* v. *Mussamut Montorun* (2), *Debi Prosad* v. *Baldeo* (3), *Dinendra Nath Sannial* v. *Ramkumar Ghose* (4), *Stakoe* v. *Singers* (5).

An easement cannot be transferred apart from the dominant heritage. [See, Transfer of Property Act (IV of 1882), sec. 6 (c)]. The question whether there was an alienation or not is a question of fact and the case ought to proceed.

Mr. B. L. Mitter, in reply; submitted it was not an alienation within the meaning of sec. 276. The right of an easement is not separable from the dominant tenement. The section did not contemplate a case of this nature. *Abdul Roshid* v *Gappo Lal* (6). Nothing more passes to the auction-purchaser than the right, title and interest of the judgment debtor at the time of the sale. *Khub Chand* v. *Kalian Das* (7), *Sowdamini Chowdrani* v. *Krishnakishor Poddar* (8), *Sankaralinga Reddi* v. *Kandasami Tevan* (9).

The JUDGMENT OF THE COURT, delivered on the 3rd June 1908, regarding this demurrer, was as follows :—

CHITTY, J.—This is a suit for an injunction and, in the alternative, damages for the infringement of the Plaintiff's right to light and air to the south side of his premises. The Plaintiff purchased these premises at an auction sale when the premises were sold by the Sheriff of Calcutta on the 14th of December 1906. The sale was confirmed by an order of this Court, dated the 29th January 1907, and a sale-certificate was issued on the 1st March 1907. It appears that the premises had belonged to one Srimati Chandramoney Dassee and they were attached in execution of a decree against her on the 13th September

(1) 2 B. L. R. (F. B.) 49 (1868).
(2) 6 W. R. (Civ.) 223 (1886).
(3) I. L. R. 17 All. 123 (1895).
(4) I. L. R. 7 Cal. 107 (1880).
(5) 8 El. and Bl. 31 (1857).
(6) I. L. R. 20 All. 421 (1889).
(7) I. L. R. 1 All. 420 (1876).
(8) 4 B. L. R. (F. B.) 11 at p. 16 (1866).
(9) I. L. R. 30 Mad. 413 (1907).

KRISHNA DHONE MITTER v. NANDARANEE DASSEE.

1905. During the attachment, and prior to the sale, the Plaintiff alleges that Chandramoney Dassee closed up four windows on the south side of her premises with bricks and mortar, thus closing the apertures which the Plaintiff alleges were ancient-lights. Whether Chandramoney Dassee did this for a consideration, *i.e.*, whether she relinquished the easement in favour of the the Defendant for money value or whether she closed the apertures of her own free will to suit her own purposes, is a question of fact which may have to be tried.

The Defendant, however, has raised the question, by way of demurrer, that the Plaintiff has no cause of action inasmuch as he purchased the property with the windows closed and cannot, therefore, insist upon any rights which the judgment-debtor Chandramoney Dassee may have previously possessed. The question has been argued whether the act of Chandramoney Dassee, in closing the openings, was an alienation within the meaning of sec. 276 of the Civil Procedure Code and so void against the purchaser, who has a claim enforceable under the attachment. I have some doubt as to whether it can be said to be an alienation, but if it is not, I do not see how I can prevent the Plaintiff from asserting a claim to any right of light and air which Chandramoney Dassee originally possessed. If it was not an alienation, the mere blocking up of apertures would not necessarily amount to an abandonment of her rights. That is a question of fact which I must try.

I think, therefore, that so far as the demurrer is concerned, the case must proceed. I will first try the question of the Plaintiff's right to the access of light and air to this house on its southern side.

The question of damages can stand over till that point is decided.

Mr. C. R. Dass.—The question of relief, generally.

THE COURT.—The question of damages or injunction.

The case thereupon proceeded to a hearing of the evidence adduced on behalf of the Plaintiff and the Defendant.

Mr. B. L. Mitter was heard again on behalf of the Defendant: He submitted that the transaction did not amount to an alienation but was merely a license and therefore did not fall within the operation of sec 276 of the Code of Civil Procedure. In support of his contention that there could be a license given, he cited, *Winter* v. *Brockwell* (10), *Davies* v. *Marshall* (11), *Liggins* v. *Inge* (12).

The Plaintiff was not called upon to reply.

The final JUDGMENT OF THE COURT, delivered on the 9th June 1908, was as follows:—

CHITTY, J.—The remarks which I made yesterday in disposing of the demurrer must be taken as part of my present judgment. The facts of the case have now been gone into. On those facts, it is proved beyond any doubt that the four apertures in question are ancient-lights. The Plaintiff has put forward the story that these apertures were closed

(10) East Rep. 308 (1807).
(11) 10 C. B (N. S.) 697 (1861), per Erle, C. J., at p. 709.
(12) 7 Bing. 682 (1831).

KRISHNA DHONE MITTER *v.* NANDARANEE DASSEE.

by arrangement between the sons of Chandramoney Dassee and the Defendant, who paid Rs. 10 to each of them for that privilege and then himself by his masons closed the windows with bricks and mortar and subsequently built the wall against the south wall of the attached premises of which the Plaintiff now complains.

The Defendant's story on the other hand is that he had nothing whatever to do with the sons of Chandramoney Dassee; that they blocked up the windows of their own free will; and that he subsequently built his wall against Chandramoney Dassee's house. It is admitted by his counsel that this wall was built solely by way of precaution to prevent the acquisition of any easement in the future. On these facts, and having regard to the details of the story told, it appears to me that the Defendant is on the horns of a dilemma. If we take his own case, it is clear from the evidence of Kedar Nath and Ashutosh that these openings were blocked, not in order to exclude the light and air, but because the window frames and bars had become so dilapidated as to be dangerous. There was a fear, it was said, of children falling out or of thieves effecting an entrance. When asked whether there was any intention of re-opening the apertures, Kedar Nath discreetly replied, not at that time. The non-user of easement is not an implied release of it and I could not, therefore, upon that evidence come to the conclusion that there was any intention on the part of Chandramoney Dassee and her sons to abandon the right which they undoubtedly possessed. If that be the case, the transfer of the dominant tenement to the Plaintiff would carry with it the easement which was then existing, but which by the closing up of the apertures might be in suspense.

The other point of view is that of a definite arrangement between the Defendant and Chandramoney's sons, principally Kedar Nath and I feel bound to say that, in my opinion, this is probably the truth of the case. The reason given by Kedar Nath for blocking the windows is so puerile that it can hardly be accepted. These are south windows and must be of extreme importance to the rooms which they light, and to block them up with bricks and mortar, because the frames and bars are out of repair, seems to me absurd. If there was this arrangement between the Defendant and Kedar Nath, it is difficult to see how the Defendant can rely upon it when he expressly denies it. But taking it to be the case, does it put him in any better position? A good deal has been said about the transfer of an easement and that it cannot be regarded as an alienation within the meaning of sec. 276 of the Code of Civil Procedure. I expressed yesterday some doubt on that point, but, on further consideration, I am inclined to think that it must be so regarded. The easement of light and air falls within the definition of immoveable property and it is a very important appanage of the property in this case which was under attachment. An easement can be extinguished by the dominant owner releasing it expressly or impliedly to the servient owner and if it was so expressly released, it would, in my opinion, be an alienation of a portion of the property attached. It would certainly

have the effect of materially diminishing the value if the easement was, as in this case, an important one. Mr. Mitter attempted to argue that the construction of the Defendant's wall by leave of Chandramoney or her sons would amount to a license which would have the effect of extinguishing the easement. I do not think that this is a correct way to look at it. In my opinion, it was either an express relinquishment or nothing at all. As to whether the release was carried out in proper form or not, whether there should have been a deed, is not a matter of any importance. If it was not properly carried out, it might be for that reason, invalid. If it had been properly and formally effected, it would, I think, be void under the provisions of sec. 276. As to the relief to be granted to the Plaintiff, there can be no doubt whatever. I have no particular sympathy for the Plaintiff who, no doubt, must be taken to have purchased this property with his eyes open, and possibly, by reason of this alteration in the south wall, to have procured it at a lesser price than he might otherwise have done. That, however, cannot interfere with his demand for his rights, if he has any. In my opinion, he has the right to have this wall, which is admittedly a temporary structure put up for a temporary purpose—the acquisition of rights in the future—removed so far as it covers closed apertures. It was suggested that it was not a case for a mandatory injunction but I cannot imagine any case in which a mandatory injunction would be more appropriate. To award damages would be simply to compel the Plaintiff to sell his right to the Defendant at a price to be named by the Court. I therefore pass a decree in favour of the Plaintiff for a mandatory injunction in the usual form for removal of so much of the Defendant's wall as has been built in front of the four apertures in the first floor of the south wall of the Plaintiff's premises. The Plaintiff must have his costs of this suit on scale No. 2.

Mr. A. N. Chaudhuri.—The Defendant must demolish this wall within a specified time.

THE COURT.—Within a week.

Mr. B. L. Mitter.—Will your Lordship give us a little more time, say to the end of next month?

THE COURT.—No. I will give you a week.

Messrs. Ghosh and *Kar*, Attorneys for the Plaintiff.

Mr. S. C. Bysak, Attorney for the Defendant.

P. R. C. *Suit decreed with costs.*

[EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 3 OF 1908.*

FLETCHER, J. 1908. Heard, 25, 26, 27 & 28, May. Judgment, 19, June.	BRAJENDRA KISSORE ROY CHAUDHURY *v.* L. O. CLARKE.

Tort—Trespass—House-search by Magistrate—Statutory justification—Indian Arms Act (XI of 1878), sec. 25—Arms, search for—Grounds of belief, recording of—Code of

* Original Suit No. 71 of 1907 before the 3rd Subordinate Judge of Mymensing, transferred on the application of the Plaintiff to the High Court by its order, dated the 3rd January 1908, in the exercise of its Extraordinary Original Civil Jurisdiction.

BRAJENDRA KISSORE ROY CHAUDHURY *v.* L. O. CLARKE.

Criminal Procedure (Act V of 1898), secs. 94, 105 and 165—Magistrate as "Court"—Judicial Officers' Protection Act (XVIII of 1850), sec. 1—Acts, judicial or executive—Malice—Bonâ fides—*Damages, substantial, exemplary or nominal.*

Unless a Magistrate can justify his acts as having been done under the authority of law, he is liable in an action of trespass for acts done by him to the persons or property of others.

If a Magistrate seeks to justify his acts under the provisions of a statute, he must bring himself strictly within the words thereof.

When a Magistrate holds a search of a house without first recording the grounds of his belief that the owner thereof has in his possession any arms, etc., for an unlawful purpose and that such owner cannot be left in possession of such arms etc., without danger to public peace in the way provided for in sec. 25 of the Indian Arms Act (XI of 1878), he cannot justify the search under that Act.

If there are no proceedings pending before him, a Magistrate cannot be said to be acting as a "Court" within the meaning of sec. 94 of the Code of Criminal Procedure (Act V of 1898), and cannot, therefore, direct a search to be made in his presence pursuant to sec. 105 of that Code.

Sec. 165 of the Code of Criminal Procedure (Act V of 1898) does not authorise a search for the purpose of discovering arms generally.

A Magistrate, when he is conducting a search for the discovery of arms, cannot be held to be 'acting judicially' within the meaning of the Judicial Officers' Protection Act (XVIII of 1850).

The bonâ fides *of a Magistrate in conducting a search does not release him from the obligations the law casts upon him: while, having regard to his* bonâ fides, *his conduct may not be such as the damages to be awarded for trespass should be exemplary, yet they ought to be substantial and not purely nominal.*

Suit for the recovery of Rs. 10,500 or such other sum by way of damages as the Court may allow for trespass and costs of suit.

The Plaintiff who is a wealthy zemindar of what is known as the 'Gauripur Estate' sued the Defendant who was the Magistrate of the District of Mymensing for having, on the afternoon of the 28th April 1907, accompanied by the Sub divisional Officer, the District Superintendent of Police and other officers and 'a large number of Mahomedan rowdies' wrongfully and wantonly trespassed into one of the Plaintiff's zemindary kutcheries situate at Jamalpur in the District of Mymensing and broke open almarahs, boxes and chests and destroyed and scattered zemindary papers and documents belonging to the Plaintiff without any lawful and reasonable excuse or justification or authority. The Plaintiff charged that the Defendant acted wrongfully and maliciously and pleaded that he had been greatly humiliated in the estimation of the public and, in particular, of his own tenants in the district of Mymensing and that he had been put to great inconvenience and difficulty in realising rents from his tenants consequent upon the destruction of the papers, etc.

The Defendant, although he admitted that he held the search for arms at the

BRAJENDRA KISSORE ROY CHAUDHURY *v.* L. O. CLARKE.

Plaintiff's kutchery on the 28th April 1908, amongst other things, specially pleaded in defence,—

(*i*) That at the time of the alleged trespass or matters complained of, he was the District Magistrate of Mymensing and that as such Magistrate he was acting and did act under and by virtue and in pursuance of the powers conferred upon him by law and particularly by all or some one or more of the following sections of the Criminal Procedure Code, namely secs. 94, 96, 105 and 165 thereof;

(*ii*) In the alternative, the Defendant says that at the time aforesaid he as such Magistrate as aforesaid was acting and did act under and by virtue and in pursuance of the powers conferred upon him by the Indian Arms Act, 1878, and particularly by sec. 25 of the said Act;

(*iii*) The Defendant further says, in the alternative, that at the time aforesaid he as such Magistrate as aforesaid was acting judicially and in the discharge of a judicial duty and within the limits of his jurisdiction and that he at the time believed himself to have (as he submits he had in fact) jurisdiction to do or order the acts done or ordered by him and he submits that under and by virtue of the Act for the Protection of Judicial Officers, being Act XVIII of 1850, he is not liable to be sued in this or any other Civil Court for the same and that accordingly this suit is not maintainable against him; and,

(*iv*) The Defendant submits that this suit is barred by the law relating to the limitation of suits.

The question of limitation arose in this way: The plaint was presented on the 25th July 1907, that is to say, within the period of 90 days from the 28th April 1907, when the cause of action arose, under Art. 2 of the Limitation Act (XV of 1877). But, it having been held to have been insufficiently stamped, further stamps were supplied subsequently, and the plaint was admitted but on a date when the 90 days had expired.

Mr. A. Chaudhuri (with *Messrs. B. Chakravarti, J. N. Roy, L. P. E. Pugh* and *B. K. Lahiri*) for the Plaintiff.

The Standing Counsel (*Mr. W. Gregory*, with *Mr. J. E. Bagram*) for the Defendant.

Mr. Chaudhuri, showed that the defence did not avail: (*i*) None of the sections of the Code of Criminal Procedure applied to this case and the Defendant could not justify his acts under the Code. (*ii*) He did not record the reasons for believing that the Plaintiff had in his possession arms for a wrongful purpose as provided for in sec. 25 of the Indian Arms Act and therefore the search could not have been under that Act. (*iii*) The conducting of a search for discovering arms cannot be said to be a judicial act to afford the Defendant protection under the Judicial Officers' Protection Act (XVIII of 1850), sec. 25.

(*iv*) Regarding the question of limitation, it was pointed out that under sec. 4 of the Limitation Act as also sec. 48 of the Civil Procedure Code a suit is instituted when the plaint is presented to the proper officer; and if a plaint is returned for insufficiency of stamps and presented again within a reasonable time, the date of the first presentation is the date of institution. Under sec. 54 of the Code of Civil Procedure, the Court may allow a Plaintiff, in case of deficiency of stamp-duty paid on the plaint, to supply the deficiency, even after the period of limitation for the suit has expired. Cited, *Moti Sahu* v. *Chhatri Das* (1), *Hari Mohan Chuckerbutty* v. *Naimuddin Mahomed* (2), *Rajkishori Koer* v. *Madan*

(1) I. L. R. 19 Cal. 780 (1892).
(2) I. L. R. 20 Cal. 41 (1892).

BRAJENDRA KISSORE ROY CHAUDHURY v. L. O. CLARKE.

Mohan Singh (3), *Dhondiram* v. *Taba Savadan* (4), *Assan* v. *Pathumma* (5).

[The plea of limitation was then abandoned by the Defendant]

The Standing Counsel for the Defendant.—I submit that I was acting in my judicial capacity. The word "judicial" has two meanings :—It may refer to the discharge of duties exercisable by a Judge or Justices in Court; or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind (see, Stroud's Judicial Dictionary, 2nd Ed., 1903, p. 1029), *Linford* v. *Fitzroy* (6). I had general jurisdiction to hold the search under the Indian Arms Act. I distinguish this case from *Ferguson* v. *Earl of Kinnoull* (7), *Barnardiston* v. *Soame* (8), I rely on *Kureem* v. *Sandys* (9).

[THE COURT.—The Defendant has no power to search for arms, unless he records his reasons in writing pursuant to that Act]

He has a general jurisdiction in the premises which the act contemplates: the absence of the recording is a mere technical omission He acted without malice or improper motive in the honest exercise of his judgment. *Tozer* v. *Child* (10).

[THE COURT.—You must show that you were doing an act in respect of which you had to bring to bear a judicial mind as pointed out by Lopes, L. J., in *Royal Aquarium* v. *Parkinson* (11)]

The distinction between a ministerial and judicial act was taken and argued in the case of *Taaffe* v. *Downes* (12), also see, *Anderson* v. *Gorrie* (13).

In those cases, the absence or presence of jurisdiction of the officer gave rise to some difficulty, but by the Act for the Protection of Judicial Officers, 1850, the Legislature has deliberately widened the scope of the justification by providing that he will be protected 'for any act done . . . whether or not within his jurisdiction.'

[THE COURT.—It is quite clear that in this country a Magistrate acts in some respects as a judicial officer and in others as a ministerial officer]

And in this case, it will be a matter of fact to decide in which capacity I acted. I say I had jurisdiction to order the search and I was personally present. The case of trespass does not lie against me. *Calder* v. *Halket* (14).

[THE COURT.—You have first to show that you were acting judicially. That is the whole crux of the case. If you were, it does not matter whether you had jurisdiction or not]

That is so: and I am a judicial officer.

[THE COURT.—The Collector is a judicial officer, no doubt, but it must be shown that he was acting as such officer]

I say I was acting in my judicial capa-

(3) I. L. R. 31 Cal. 75 (1903).
(4) I. L. R. 27 Bom. 330 (1902).
(5) I. L. R. 22 Mad. 494 (1897).
(6) 13 Q. B. 240, per Lord Denman, C. J., at p. 246 (1849).
(7) 9 Cl. and F. 251, per Lord Campbell, at p. 312 (1842).
(8) 6 Howells St. Trials, p. 1063 (1674).
(9) 1 Boulnoi's Rep. 1, per Colvile, C. J., at pp. 3 and 12 (1856).
(10) 26 L. J. Q. B 151 (1857)
(11) [1892] 1 Q. B 431 at p. 452.
(12) (Reported by Mr. Hatchell) reprinted in 13 Eng. Rep. 15 (1813).
(13) [1895] 1 Q. B. (1894) 668, per Lord Esher, M. R. at p. 671.
(14) 2 M. I. A. 293 (1839).

BRAJENDRA KISSORE ROY CHAUDHURY v. L. O. CLARKE.

city under sec. 25 of the Indian Arms Act.

[THE COURT.—If a Magistrate acts under sec. 25 of the Indian Arms Act, what is the Court which exercises revisional jurisdiction over him,—the High Court?]

No, my lord.

[THE COURT.—That shows, in one way, he was not acting judicially when he was acting under the Indian Arms Act. Sec. 33 of that Act appears to my mind to be strong proof to show that a person does not act judicially under the Arms Act, because, under that section, a suit lies against him inspite of the Judicial Officers' Protection Act, 1850]

I submit my act is protected though done erroneously and illegally. *Teyen Ramlal* (15). Furthermore, I am protected if I acted under the Code of Criminal Procedure, in good faith, in ignorance of the strict provisions of law, thinking I had jurisdiction to act in the way I did. *R. Ragunada Rau* v. *Nathamuni Thathamayyangar* (16).

[THE COURT.—The act of actual searching is a ministerial act, the issue of a search-warrant would be a judicial act. In this case, there was only the ministerial act and not the judicial]

Mr. Bagram for the Defendant.—I justify the search also under sec. 165 of the Code of Criminal Procedure. There was a shooting case under investigation at the time and the District Superintendent of Police was the officer in charge of the investigation thereof. He would be perfectly within his rights to hold the search and, I submit, that my presence on the occasion or my ordering the search does not vitiate the search in any way which the District Superintendent of Police, as the investigating officer, was entitled to hold under sec. 165.

There is no question as to that the Defendant acted in good faith and, if any damages are allowed, they ought to be nominal.

Mr. Chaudhuri in reply.—There was no authority by the Magistrate to investigate under sec. 165 of the Criminal Procedure Code. [See, definition of "Investigation" sec. 3 (*l*) of the Code]. That section does not apply. The liability of a public servant for injury done by his illegal act, does not cease, even if it be shown he acted in good faith. *Sinclair* v. *Broughton* (17). Regarding the *quantum* of damages, the Plaintiff does not wish to make money by this litigation. He is here for the vindication of his rights as a subject and is entitled to substantial damages. See, Broom's Constitutional Law (2nd Ed.) 609.

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—In this suit, the Plaintiff who is a wealthy zemindar in the District of Mymensingh, sues the Defendant, who is a member of the Indian Civil Service and was during the month of April 1907 District Magistrate of Mymensingh, to recover damages for an alleged trespass committed by the Defendant in searching the Plaintiff's kutchery at Jamalpore on the 28th April 1907. The defence raised by the Defendant is that he was authorised to conduct the

(15) I. L. R. 12 All. 115 (1890).
(16) 6 Mad. H. C. Rep. 423 (1871).
(17) I. L. R. 9 Cal. 341 (1882).

search by statute. The statutory provisions relied on by the Defendant are (a) The Indian Arms Act, 1878, (b) The Code of Criminal Procedure, and (c) Act XVIII of 1850 ("An Act for the Protection of Judicial Officers").

Now the facts relating to the search may be shortly stated as follows:—On the 28th April 1907, the Defendant who was then at Mymensingh received in the early morning an urgent telegram from Mr. Barneville, the Sub divisional Officer, and Mr. Luffeman, the head of the police at Jamalpore, informing him that a riot had narrowly been averted on the previous night. The state of feeling between the Hindus and Mahomedans at Jamalpore had been very intense since the 21st April but the reasons for the origin of that state are not material to be considered here.

Upon receipt of the telegram above mentioned, the Defendant started for Jamalpore and arrived there at about 10 o'clock in the morning. On his arrival, he was informed by Mr. Luffeman of the fact that a man named Gundoo Sheikh had been wounded on the previous evening by a shot fired from a revolver or a gun and that the police had heard that the zemindars had been storing fire-arms in their kutcheries.

Upon receipt of this information, the Defendant determined to search the kutcheries of certain zemindars in the district, including the Plaintiff's kutchery and having summoned certain gentlemen to be witnesses of the search, he proceeded on the afternoon of the 28th April to search the kutcheries accompanied by Mr. Barneville, Mr. Luffeman and a number of police and the witnesses to the search. The Plaintiff's kutchery was searched between 3 and 4 in the afternoon and it is with regard to this search that the Plaintiff seeks to recover damages in this suit. The Defendant admits the fact of the search, and that it was done by his orders and under his direction but pleads that he was authorised to conduct the search by virtue of the provisions of the statutes above mentioned.

Now, the general rule of the Common Law is that a Magistrate is liable in an action of trespass for acts done by him to the persons or property of others, unless he can justify the act as having been done under the authority of the law. And, if a Magistrate pleads a statute or statutes as justifying his acts, he must bring himself within the words of the statute strictly.

It becomes necessary, therefore, in the first place to consider the statutory provisions relied on by the Defendant as authorising the search.

The first of these statutory provisions is sec. 25 of the Indian Arms Act, 1878, which is in the following terms:—"Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition, or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammu-

nition or military stores are or is to be found, may seize and detain the same, although covered by a license, and keep in safe custody for such time as he thinks necessary. The search in such case shall be conducted by or in the presence of a Magistrate or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the Local Government." The Defendant admits in the present case that he did not, before causing the search to be made, first record the grounds of his belief as provided by sec. 25 of the Arms Act He says, he had no copy of the Arms Act with him, although he admits, he could have obtained one from the Sub-divisional Officer in a few minutes.

In these circumstances, the Defendant, not having complied with the provisions of that statute, cannot justify the search under the provisions of the Indian Arms Act.

Secondly, the Defendant relies upon the provisions of secs. 105 and 165 of the Code of Criminal Procedure. Sec. 105 of the Criminal Procedure Code enacts that a Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant under the provisions of the Code. It is obvious in the present case that the Defendant was not competent to issue a search-warrant under the provisions of the Criminal Procedure Code. The Defendant was not acting as a "Court" within the meaning of sec. 94 of the Criminal Procedure Code as there was no proceeding pending before him.

But then it is said that, even if the Defendant cannot justify the search under the provisions of sec. 105 of the Criminal Procedure Code, yet, as he took Mr. Luffeman along with him, who was making an investigation into the case of Gandoo, the man who had been wounded on the night of the 27th April, the search can be justified as being a search made by Mr. Luffeman.

In my opinion, this section will not avail the Defendant. I am satisfied on the evidence that the search was not intended to be made under the provisions of sec. 165 of the Criminal Procedure Code. The search of the Plaintiff's and the other kutcheries was for the purpose of discovering arms generally, which, sec. 165 does not authorise.

In my opinion the search made by the Defendant was not, nor was it ever intended that it should be, made under sec. 165 of the Criminal Procedure Code and I accordingly hold that that section does not justify the Defendant's action.

Lastly, the provisions of Act XVIII of 1850 ("An Act for the Protection of Judicial Officers") are relied on by the Defendant. Such Act provides that no Judge, Magistrate, Justice of the Peace, Collector or other persons acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction, provided that he acted in good faith.

Now, in order that the Defendant should bring himself within the provisions of that statute, it is necessary that the act done or ordered to be done by him should be done, or ordered to be done by him in discharge of his judicial duty. What

judicial duty was the Defendant performing in conducting the search of the Plaintiff's premises? In my opinion, he was performing no judicial duties at all. The Defendant, as District Magistrate, has important duties, both executive and judicial, cast upon him and the Defendant was not, I think, performing any judicial duty in conducting the search of the Plaintiff's premises for arms.

In these circumstances, I must hold that the search of the Plaintiff's premises by and under the direction of the Defendant was not warranted by law. The entry by the Defendant into the Plaintiff's premises being, therefore, a trespass, I have to consider, before I determine what amount of damages I shall award to the Plaintiff, whether the Defendant was actuated by malice or other improper motives.

It cannot be said, in this case, that the Defendant had any feelings of hatred or revenge against the Plaintiff with whom he was not acquainted. It has, however, been argued that the Defendant had, in the unfortunate disturbances which had arisen between the Hindus and Mahomedans at Jamalpore, taken the side of the Mahomedans and that the search on the 28th April 1907 was really conducted by the Defendant owing to the improper feelings that he held against the Hindus at Jamalpore generally. In support of this, it is alleged that, as the Defendant, when he arrived at Jamalpore on the morning of April 28th, was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the Hindus' property and to marry their widows in *nika*-form and that a large number of the Hindus were fleeing from the place in a state of panic, if the Defendant had honestly done his duty, he would, in the first place, have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government.

It may be that a man of wider experience or riper judgment would have done so; but, even if I were to assume that this was the primary duty of the Defendant, this allegation against the Defendant only comes to this, namely, that he committed an error of judgment.

The Defendant was severely cross examined by the learned counsel for the Plaintiff, and I am satisfied, from what I have heard in this case, that the Defendant, in determining upon the search that was made on the 28th April 1907, was acting *bonâ fide* and was not actuated by malice or other improper motives against any particular individual or section of the community.

But, whilst I find that the Defendant was not actuated by malice, I cannot absolve the Defendant with regard to one matter, namely, that the Defendant failed to exercise proper supervision and control over the people under him conducting the search. Now, what are the facts relating to the actual search itself? By the time the Defendant and the searching party reached the Plaintiff's kutchery, the kutcheries of three other zemindars and a Hindu temple had been previously searched without finding anything suspicious. In these circumstances, one would have thought that the Defendant would have then doubted whether the information given to him by the police was correct and would have pro-

ceeded with great circumspection, the more specially so, as he admits that, at the search of one of the kutcheries previously searched, 'a complaint' had been made to him by a Hindu gentleman, who was accompanying the search party, as to the method in which the search was being conducted. What then are the facts relating to the actual search of the Plaintiff's kutchery? The servants of the Plaintiff (except one Safaullah, a Mahomedan who had charge of the keys of the kutchery and who was not on the premises when the Defendant and the search party arrived) having 'fled owing to the panic, it became necessary for the search party to break open the outer door to the kutchery.' Having thus effected an entrance, some of the Mahomedan mob which had collected and were accompanying the search party were requisitioned to go and bring *daos* and assist in opening the boxes which contained the zemindary papers. That the search was conducted, with unnecessary damage to the property of the Plaintiff cannot to my mind be doubted for an instant. The papers out of various boxes in the kutchery were strewn haphazardly on the floor of the kutchery. Mr. Horniman of the *Statesman* newspaper who, accompanied by Mr. Newman of the *Englishman* newspaper, had been especially delegated to proceed to Jamalpore and report on the state of the disturbances at Jamalpore has graphically described the condition of affairs as he found them at the Plaintiff's kutchery on May 1st. I am satisfied on the evidence that the state of affairs at the Plaintiff's kutchery on May 1st was the same as it had been left on the conclusion of the search.

It is only fair, however, to the Defendant to state that he had had no previous experience in conducting a search and that he did not himself enter the kutchery but relied on the police to conduct the search in a proper manner. But, whilst this goes to establish the Defendant's *bonâ fides*, it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner.

Turning then to the question of damages, I am of opinion that the conduct of the Defendant has not been such as the damages to be awarded should be exemplary. But, whilst I think that the damages should not be exemplary, I also think that they must be substantial. I am unable to accede to the argument of the learned counsel for the Defendant that the damages in this case should be purely nominal.

Having given the matter the best consideration that I can, I think the justice of the case would be met if I order the Defendant to pay to the Plaintiff Rs. 500 as damages The Defendant must also pay to the Plaintiff his costs of this suit on scale No. 2.

Mr. Hirendra Nath Dutt, Attorney for the Plaintiff.

Mr. H. C. Eggar, Attorney for the Defendant.

Decree for damages and costs

P. R. C.

[EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT NO. 5 OF 1908.*

FLETCHER, J.

1908.

Heard, 28, 29, May & 1, June.

Judgment, 19, June.

BROJENDRA KISSORE RAY CHAUDHURI
v.
M. A. LUFFEMAN.

Tort—Trespass—Acts done under orders of lawful superior, responsibility for—House-search—Trespass ab initio—*Trespass on person—Master and servant—Loss of service.*

A person cannot be held responsible for acts done by him under the orders and directions of his lawful superior.

If a police-officer, whilst lawfully conducting a search, assaults some person on the premises, his entry on the premises does not necessarily become unlawful from the outset.

SMITH *v.* EGGINTON (1) *followed.*

SIX CARPENTERS' CASE (2) *distinguished.*

In all cases of action for trespass to the person of the servant, it is necessary for the master to prove that he has, to some extent at least, been deprived of the services of his servant owing to the wrongful act of the alleged trespasser.

Suit for the recovery of Rs. 10,500 or such other sum as the Court may allow, by way of damages and of the costs of suit, for trespass to the property of the Plaintiff and the person of the Plaintiff's servant on the 27th and 28th of April 1907.

The facts of the case appear from the judgment.

Mr. A. Chaudhuri (with *Messrs. B. Chakravarti, J. N. Roy, L. P. E. Pugh* and *B. K. Lahiri*) for the Plaintiff.

The Standing Counsel (*Mr. W. Gregory* with *Mr. J. E. Bagram*) for the Defendant.

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows :—

FLETCHER, J.—In this suit the Plaintiff, who is the same person as is the Plaintiff in the suit in which I have just delivered judgment,* seeks to recover damages against the Defendant, who was, in the month of April 1907, District Superintendent of Police in the District of Mymensing for certain alleged unlawful acts done by the Defendant on the 27th and 28th of April 1907.

It will be convenient to deal in the first place, with the acts alleged to have been done by the Defendant on the 28th April. This suit, so far as it relates to those acts, is founded on exactly the same facts as those dealt with in the suit against Mr. Clarke. The acts so done were done by the Defendant under the orders and directions of Mr. Clarke, his lawful superior; and for those acts, he cannot be held responsible. The suit, therefore, so far as it relates to the incidents of the 28th April, fails.

Coming then to the incidents on the 27th of April which are relied on by the Plaintiff in this suit, it appears that, about 9 o'clock in the evening, the Defendant and Mr. Barneville were sitting

(1) 7 Ad. and El. 167, per Littledale, J. App. 176 (1837).

(2) 8 Co, Rep. 146 (a), s. c. 1 Sm. L. C. (11th Ed) p. 122.

* Original Suit No. 72 of 1907 before the 3rd Subordinate Judge of Mymensing, transferred to the High Court by its order dated the 3rd January 1908.

* *Brojendra Kissore Roy Chowdhury* v. *L. O. Clarke*, vide, *supra.*, p. 977.

together in the Dak Bungalow, when they heard a report of a fire-arm and the Defendant went out and found a man running past the Bungalow who told him, a man had been shot. The Defendant accompanied by Mr. Barneville immediately started in the direction in which the report of the shot had come, and on the way, they met a wounded man being assisted by others. From them, they learnt the place of occurrence to which they proceeded. On arriving there, the Defendant, states that, he was told, the shot had been fired by one Prokash Dutt accompanied by four or five young men, who were strangers to Jamalpur and that the men, after the occurrence, had run in the direction of the Plaintiff's and his mother's kutcheries. The Defendant states that he proceeded towards the kutcheries with a view to effecting the arrest of the men and that, when approaching the kutcheries, he met the Inspector Kamini with a body of constables who informed him that the men had run into the kutcheries.

The Defendant then entered the Plaintiff's mother's kutchery, known as the four-annas kutchery, and there arrested certain persons. The acts that are said to have occurred at the four-annas kutchery are not material to be considered at present, and will only be material if I find that the Plaintiff is entitled to maintain this suit. The Plaintiff says that, from the four annas kutchery, the defendant proceeded to his kutchery and assaulted one of the Plaintiff's servants Bhownath Ojha and caused damage to the kutchery buildings. The Defendant, in his evidence before me, states that he never went to the Plaintiff's kutchery buildings at all, that from the four-annas kutchery, he proceeded through the compound of the Plaintiff's kutchery (having only inspected the *basha* of the Plaintiff's Naib on the way) to the temple of the Hindu goddess which has been so frequently mentioned in this case.

I have first, therefore, to decide whether the Defendant did enter the Plaintiff's kutchery on the night of the 27th of April. In my opinion, the evidence shows that he did and it is to be noticed that the Defendant in his written statement admits that he went to the Plaintiff's kutchery. Moreover, in the notice before action, the fact that the Defendant went to the Plaintiff's kutchery is distinctly alleged. The Defendant had notice of this fact all along, and if he meant to controvert the fact that he went to the Plaintiff's kutchery, he ought to have done so at the earliest moment. The Defendant has called no evidence to corroborate his statement that he did not enter the Plaintiff's kutchery. In these circumstances, I find as a fact that the Defendant did enter the Plaintiff's kutchery on the night of the 27th April. In the next place, for what purpose did the Defendant enter the Plaintiff's kutchery? The Plaintiff's witnesses' evidence shows that he was searching for some persons and the only inference that I can draw from this is that he was searching for people connected with the shooting affray. The entry of the Defendant into the Plaintiff's kutchery was, therefore, in the first place, lawful: were then such unlawful acts done by or under the direction of the Defendant after his entry as made him a trespasser *ab initio*?

Now, the facts relied on against the Defendant are, first, the damage to the corrugated-iron door of the Plaintiff's Naib's bed-room; secondly, the damage done to the buildings by the Mahomedan mob; and, thirdly, the assault on Bhownath Ojha. First then as to the damage done to the corrugated-iron door to the bed room of the Plaintiff's Naib, I do not think there is any evidence to connect the Defendant with this act. Similarly, with regard to the damage to the buildings by the mob, although there can be no doubt but that damage was done, there is no evidence to show that the mob acted by or under the direction of the Defendant or that he in any way approved of their action.

The main contest has been as to whether or not Bhownath Ojha was assaulted by the order of the Defendant.

But, even if I were to find as a fact that Bhownath Ojha was assaulted under the orders or by the direction of the Defendant, can the Plaintiff maintain the present suit? Now, the learned counsel for the Plaintiff put the Plaintiff's cause of action on this portion of the case on two grounds,—first, trespass to the land of the Plaintiff, and, secondly, trespass to the person of the Plaintiff's servant.

Now, with regard to the first of these two causes of action, I can find nothing in the evidence to show that, at the time when Bhownath Ojha was alleged to have been beaten, the Defendant had finished his search and was remaining on the Plaintiff's premises for the unlawful purpose of committing an assault on Bhownath.

The general rule laid down in the *Six Carpenter's* case (1) is, that, where there is an authority given by law for doing an act, there an abuse may (not necessarily must) turn the act into a trespass *ab initio* [see, judgment of Littledale, J., on *Simple* v. *Egginton* (2)].

It would be much too wide an extension of the doctrine of trespass *ab initio* to hold that if a police-officer, whilst lawfully cuducting a search, assaulted some person on the premises, his entry on the premises had become unlawful from the outset.

The suit, therefore, in so far as it is founded on a trespass to the land of the Plaintiff, fails.

The second cause of action relied on by the Plaintiff is a trespass to the person of his servant Bhownath. Now, undoubtedly, a master may, in certain circumstances, maintain an action for a trespass done to the person of his servant whereby he is deprived of the servant's services. The commonest form of action of this nature is an action for seduction which is brought by the parent not for the dishonour done to his daughter, but on the theory that the parent has been deprived of his daughter's services owing to the wrongful act of the seducer. But, in all cases of action for trespass to the person of the servant of the Plaintiff, it is necessary for the Plaintiff to prove that he has, to some extent at least, been deprived of the services of his servant owing to the wrongful acts of the Defendant.

In the present case, it is not suggested that Bhownath went to his native vill-

(1) 8 Co., Rep. 146 (a), s. c. 1 Sm. L. C. (11th Ed.) p. 132.

(2) 7 Ad. and El. at p. 176 (1837).

age owing to the effects of the alleged assault upon him. His own statement is that he fled from Jamalpore owing to the panic prevailing there. In these circumstances, I must hold that, even if I were to find that the assault on Bhownath was done under the orders or by direction of the Defendant, the present suit must fail.

It becomes, therefore, immaterial to consider the conduct of the Defendant, for, even if express malice were found against the Defendant, the Plaintiff would still have no cause of action against the Defendant for the assault on Bhownath.

This suit, in my opinion, fails and must be dismissed with costs on scale No. 2.

Mr. Hirendra Nath Dutt, Attorney for the Plaintiff.

Mr. H. C. Eggar, Attorney for the Defendant.

P. R. C. *Suit dismissed with costs.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 146 OF 1906.

MACLEAN, C. J. COXE, J. 1908. 28, January.	MAHAMMAD SAFI and ors., Appellants, v. HARAN CHANDRA MUKERJEE and ors., Respondents.

Land Acquisition Act (I of 1894)—Objection—Reference—Party—Jurisdiction of Court.

A Court has no jurisdiction to deal with objections except those which were made by persons who were parties to the proceedings before the Collector and which brought about the reference.

This was an appeal preferred on the 2nd of May 1906, against the decree of Moulvi Abdul Barry, Subordinate Judge, 2nd Court of Zillah Hughly, dated the 9th of February 1906.

The facts of the case appear from the judgment.

Babus Provas Chandra Mitter, Surendra Nath Ghosal and *Sushil M. Mullick* for the Appellants.

Babu Surendra Nath Guha for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—I think this appeal must succeed. The difficulty, if difficulty there be, arises out of certain proceedings under the Land Acquisition Act. Certain property had to be acquired by Government. Some of the parties interested in the apportionment of the compensation money awarded, objected to the apportionment, and a reference was made under the Act by the Land Acquisition Collector to the Court of the Subordinate Judge of Hughly. There were several parties interested in the money awarded. There was the zemindar and a succession of tenants, of whom the present Appellants were some, apparently in the line of succession the third. They were awarded a sum of Rs. 1,222 odd. The landlord and some of the tenants superior to the present Appellants objected to the apportionment and the reference was made for apportionment of the compensation amongst the interested parties. The struggle apparently was between the zemindar and the superior tenants on the one side, and the present Appellants who by the award of the Collector seem to have obtained the larger part of the sum

awarded, which was Rs. 1,612, on the other. The matter proceeded before the Subordinate Judge: but on the 5th of September 1905, the date of the reference being the 13th of February 1905, one Haran Chandra Mukerjee, the present Respondent, appeared upon the scene and asked that he might be made a claimant in the case and applied for time to put in a statement: and on the 7th September that application was allowed. The matter then proceeded before the Subordinate Judge and, he by his judgment, dated the 9th of February 1905, awarded the whole of the compensation money to Haran Chandra Mukerjee who the Appellants say ought not to have been allowed to intervene at so late a stage. Hence this appeal.

A preliminary objection is taken that the proper Court-fee has not been paid on the appeal. If that be so, we think it is clearly a mistake: and, under sec. 582A of the Code of Civil Procedure we can set it right and allow the proper Court-fee to be paid which must be supplied within a week from this date. This enables us to decide the appeal on the merits.

I think the Subordinate Judge had no jurisdiction to allow Haran Chundra Mukerjee to be made a party to these proceedings at the stage he did. It is clear from a recent case in this Court, the case of *Abu Bakar* v. *Peary Mohan Mukerjee* (1), that the only persons who can raise any objection to the award of the Collector are the persons who are parties to the proceedings in the first instance and that the Court can only deal with the objections which they have made to the award. In that case, secs. 18, 20 and 21 of the Land Acquisition Act were carefully considered and it was held that under those sections the Court can only deal with an objection which has been referred to it, and it cannot go into any question raised for the first time by a party who had not referred any question or any objection to it under sec. 18 of the Act. If that be the law, it is clear that the present case is a weaker one for the Respondent, because here Haran Chandra Mukerjee was not even a party to the proceedings before the Collector, and consequently had made no objection to the award: and no objection by him had been referred to the Court.

The appeal, therefore, succeeds and the matter must go back to the Subordinate Judge to deal with the objections which were actually referred to him; and the Appellant must have the costs of this appeal—hearing-fee three gold mohurs.

The Appellant is entitled to a refund of the Court-fee paid and to be paid on the memorandum of appeal, under sec. 13 of the Court Fees Act.

I may add that the rights if any of Haran Chandra Mukerjee who must be regarded as not properly a party to these proceedings will not be affected by them.

COXE, J.—I agree.

Appeal allowed:

S. C. S. *Case remanded.*

(1) I. L. R. 34 Cal. 451 (1907).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 196 OF 1907.

MACLEAN, C. J.
DOSS, J.
1908.
5, May.

PRABAL CHANDRA MUKHERJEE, Claimant, Appellant,
v.
RAJA PEARY MOHUN MUKHERJEE, Claimant, Respondent

Land Acquisition Act (I of 1894)—Objection—Reference—Party—Jurisdiction of Court.

A Court has no jurisdiction to deal with objections except those which were made by persons who were parties to the proceedings before the Collector and which brought about the reference.

This was an appeal preferred on the 30th of May 1907, against the decree of Babu Dinanath Sarkar, Subordinate Judge, 2nd Court of Zillah Hughly, dated the 25th of February 1907.

In this case reference was made to the lower Court by the Collector under sec. 30 of the Land Acquisition Act. The Respondent was made a party for the first time in the lower Court on his application. The question in this appeal was whether the Court had jurisdiction to make him a party.

Babu Shib Chandra Palit for the Appellant.

Babus Mohendra Nath Roy and *Hari Bhusan Mukherjee* for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

MACLEAN, C. J.—This appeal must succeed upon the short ground that it is covered by the decision of this Court in the case of *Abu Bakar* v. *Peary Mohan Mukerjee* (1), which was followed by another Division Bench of this Court in the case of *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (2), and in appeal from Original Decree No. 146 of 1906,* where the same view was held, namely that the Court has no jurisdiction to deal with objections except those which were made by persons who were parties to the proceedings before the Collector, and which brought about the reference.

The appeal, therefore, must be allowed, the order of the Subordinate Judge must be discharged and the compensation money must be paid to the present Appellant, without prejudice to the rights if any, of Raja Peary Mohun Mukherjee, because he must be treated as if he was not a party to these proceedings.

The Appellant must have the costs of this appeal—hearing fee, four gold mohurs.

DOSS, J.—I agree.

S. C. S. *Appeal allowed.*

(1) I. L. R. 34 Cal. 451 (1907).
(2) 12 C. W. N. 98 (1907).

* *Mahammad Safi* v. *Haran Chandra*, 12 C. W. N. 985.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 411 OF 1907.

COXE, J.
RYVES, J.
1908.
12, June.

RAHIMUDDIN SARKAR Defendant, Appellant
v.
JAGAT KISHORE ACHARYA, Plaintiff, Respondent.

Bengal Tenancy Act (VIII of 1885), sec. 106—Record-of-rights—Application to correct entry, made before Amending Act of 1898—Reference to Civil Court under Amending Act—Jurisdiction—Interpretation of

RAHIMUDDIN SARKAR v. JAGAT KISHORE ACHARYA.

Statute—Change of procedure during pendency of proceeding.

A record-of-rights having been prepared in 1896 the landlord applied in 1897 for the correction of an entry under sec. 106 of the Bengal Tenancy Act as it then was. After the Amending Act of 1898 was passed the case was referred to the Civil Court under the proviso to sec. 106 of the Act as amended:

Held—*That the Court has jurisdiction to try, notwithstanding that the proceedings were commenced prior to the passing of the Amending Act which first empowered a reference to the Civil Court.*

In matters of procedure an Amending Act would affect legal proceedings instituted under the repealed provision.

This was an appeal preferred on the 6th of March 1907, against the decree of Babu A. N. Majumdar, Subordinate Judge of Zillah Mymensingh, dated the 8th of November 1906, reversing that of Babu Hari Churn Gangopadhya, Munsif, 2nd Court of that district, dated the 26th of April 1906.

The facts of the case will appear from the judgment.

Babu Harendra Narayan Mitra for the Appellant.

Babus Dwarka Nath Chuckerbutty and *Satish Chandra Ghosh* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

The facts of this case are not beyond doubt; but it appears that the Appellant was recorded as a raiyat at fixed rates in the record-of-rights prepared by the Settlement-officer of Mymensingh in 1896. The landlord Respondent put in a petition under sec. 106 of the unamended Bengal Tenancy Act asking that this entry might be corrected. This was in 1897. The proceedings were greatly delayed for some unknown reason and on the 11th July 1900, that is to say, after the passing of the Amending Act of 1898 the case was referred to the Civil Court under the proviso to sec. 106 of the Act, as amended. Further delay ensued. The case was disposed of by the Munsif in 1906 and the landlord's suit was dismissed. Subsequently the Subordinate Judge on appeal by the landlord decreed the suit and gave the landlord a declaration that the disputed land was not held in *mokurari jama* but at a rent which was liable to enhancement. Presumably what he meant was that the entry, that the Defendant was a raiyat at fixed rate, was wrong and that he ought to have been entered as an ordinary occupancy raiyat. The Subordinate Judge also dismissed the cross-objection as to jurisdiction which has again been raised by the present Appellant before us.

The decision of the Subordinate Judge has been attacked on two grounds.

The first ground is that, inasmuch as the proceedings were initiated under the Bengal Tenancy Act before it was amended the Settlement-officer acted without jurisdiction in referring it to the Civil Court under the proviso to sec. 106 of the Act as amended. No authority has been shown in support of this view. But reference has been made to sec. 8 of the Bengal General Clauses Act of 1899. That section of course cannot apply to the Amending Act of 1898 which was passed before it. The enact-

ment that does apply is sec. 4 of Act V of 1867 (B. C.) and it is clear that that section does not yield any support to the Appellant's case. It is argued, however, that on the general principle which finds a place in sec. 8, cl. (e) of the Subsequent General Clauses Act, we should hold that the landlord is not entitled to the benefit of the reference to the Civil Court under the Bengal Tenancy Act as amended. Cl. (e), sec. 8 of the Subsequent Bengal General Clauses Act, 1899, provides that when an enactment is repealed the repeal shall not affect any pending legal proceeding. But it seems to us that when the repeal of a section is accompanied by the substitution of a new section, although any pending legal proceeding may not be affected by the repeal, there is nothing in the section to prevent its being affected by the new provisions so substituted. It is generally settled that in matters of procedure an Amending Act does affect legal proceedings. In this case the Defendant cannot have been prejudiced in any way. Sec. 106 of the old Act and sec. 106 of the new Act are of course dissimilar. But so far as this case is concerned the only difference between the two sections that matters is the addition of a proviso that the Settlement-officer may refer proceedings to the Civil Court for decision. We see no reason why that proviso should not be applied to the proceedings which were instituted before the section was amended.

The second point is that the Subordinate Judge is wrong on the merits in declining to find that the Defendant is a raiyat at fixed rates. Now what the Subordinate Judge has found is that the *kabuliyat* on which the Defendant relies is not genuine, that his own conduct is inconsistent with the theory that he is anything more than an ordinary raiyat with occupancy rights, that he has failed to prove that his rent is invariable and with respect to the fact that he had erected permanent buildings on his land without objection by the landlord, that the fact is quite consistent with the supposition that he is an ordinary raiyat with right of occupancy. On these findings of fact we do not see that the Subordinate Judge could have come to any other decision and we are not prepared to say that any question of law arises upon them.

Reference has been made to the decision in *Nabu Mondul* v. *Cholim Mullik* (1). That case seems to us to be clearly distinguishable. In that case the question was whether the Appellant's tenure was permanent or not. The learned Judge who decided the case held that the presumption that the grant was a permanent grant might be inferred from the fact that the landlord stood by and made no objection to the erection of masonry buildings. In this case the Defendant is not a tenure-holder at all but an occupancy raiyat. He cannot be ejected nor can his rent be enhanced except under strict conditions. His right is heritable. His tenancy has therefore many elements of permanence and he stands in no need of a presumption drawn from the conduct of his landlord, in allowing him to build houses. The ruling which has been cited could hardly be made applicable to the case of a raiyat at all, and it certainly does not in the

(1) I. L. R. 25 Cal. 896 (1898).

least justify any inference that the present Appellant is a raiyat at fixed rates. That question did not arise and could not arise in the case quoted above, which dealt with an entirely distinct class of tenancy.

It is also argued that the Subordinate Judge is wrong in finding that the Defendant has failed to prove that his rent was invariable. This seems to us to be a question of fact with which we are not entitled to deal. The Subordinate Judge says :—"The *dakhilas* relied upon by the Respondent also do not favour the contention that the *jama* remained unchanged since 1246." He then goes on to illustrate his finding by pointing out what he calls considerable variation in the rent realised since the year 1294. We are unable however to accept the contention that this illustration indicates that the learned Subordinate Judge has paid no consideration to the evidence of the Defendant in respect of the rent which was realised before 1294 It is not incumbent on the Appellate Court to set out all the evidence in detail. We see no reason in this case to doubt that the Subordinate Judge has considered all the rent receipts that were placed before him as evidence. We think his decision thereon is based on his consideration of all those receipts and cannot be interfered with by us in second appeal.

The result is that the appeal fails and must be dismissed with costs.

N. G. *Appeal dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE No. 190 of 1906.

CASPERSZ, J.
SHARFUDDIN, J.
1908.
8, July.

BUNIAD LAL and ors., Plaintiffs, Appellants,
v.
SHYAM LAL and ors., Defendants, Respondents.

Court Fees Act (VII of 1870), sec. 7, sub-sec. V, cls. (a) and (d)—Revenue-paying estate—Suit for possession of share in—Court-fee on plaint—"Definite share," if must also be separately assessed with revenue.

In a suit to recover possession of a definite share in a permanently settled revenue-paying estate, the Court-fee on the plaint should be calculated according to the first part of cl. (a) of sec. 7, sub-sec. V of the Court Fees Act, i.e., at ten times the proportionate revenue annually payable. Whether such share is recorded in the Collector's register as separately assessed with revenue or not does not matter.

The words "definite share" in the first part of the clause does not mean a definite share separately assessed with revenue.

HUBIBUL HOSSEIN *v.* MAHOMED REZA (1) *referred to.*

This was an appeal preferred on the 4th of June 1906, against the decree of Babu Nanda Lal Dey, Subordinate Judge of Zillah Bhagulpore, dated the 23rd of May 1906.

The facts of the case material to this report will appear from the judgment.

Babu Joy Gopal Ghosha for the Appellants.

(1) I. L. R. 8 Cal. 192 (1881)

BUNIAD LAL v. SHYAM LAL.

Babus Jogesh Chandra Roy, Umakali Mukerjee, Lachmi Narayan Singh, Narendra Chandra Bose, Hari Bhusan Mukherjee and *Rama Kanta Bhuttcharjee* for the Respondents.

The JUDGMENT OF THE COURT was as follows :—

This is an appeal from a decision of the Subordinate Judge of Bhagulpore, dated the 23rd May 1906, which appears to be an order rejecting the plaint because the Plaintiff Appellant in this Court did not pay the deficit Court-fee as directed in a previous order, dated the 22nd idem. That previous order refers to another order, passed on the 16th May 1906, which is to the following effect :—"I am of opinion that the share of the revenue-paying estate, which has been claimed in this case, is 8 annas which is not a definite share recorded in the Collectorate and which has not been separately assessed. Hence the present case is governed by sec. 7, sub-sec. V, cl. (*d*) of the Court Fees Act. The Plaintiff has himself valued the 8 annas share at Rs 16,000, but he has paid Rs. 25 only as Court-fee on the plaint. Ordered that the Plaintiff do pay the balance of the Court-fee of Rs. 630 on or before 21st May. 1906." Between these two dates, namely, the 16th May and the 23rd May, there were certain proceedings by way of review. The application of the Plaintiff for review of the order of the Subordinate Judge, dated the 16th May 1906, was rejected by the Court.

It has been contended, though not very seriously, on behalf of the Defendants, that no appeal lies against an order of this kind rejecting the application for review. But, as we have already stated, the real order appealed from is the order rejecting the plaint, which has the force of a decree, and this is how the appeal has been described. We, therefore, think that this appeal can be maintained.

On behalf of the Plaintiff it has been contended that the valuation was duly made with reference to sec. 7, sub sec. V, cl. (*a*), Court Fees Act, VII of 1870.

We are not concerned with the three annas share of the property because the Plaintiff has withdrawn his prayer for confirmation of possession over that share; but as regards the other share, namely, 5 annas, the plaint discloses the fact that it was sought to recover possession of that share. The question is whether ten times the proportionate Government revenue payable in respect of that share was the proper value to be taken for the purposes of the Court-fee payable: or whether the market-value of that share, being a proportionate amount of Rs. 16,000, ought to be taken for the purposes of assessing the Court-fee.

We have not been referred to any authority directly in point, and the question, therefore, is *res integra*. But the decision in *Hubibul Hossein* v. *Mahomed Reza* (1) supports us in the view that we shall express.

Reading cl. (*a*), sub-sec. V, sec. 7 of the Act, we think that when land, which is the subject-matter of a suit, is a definite share (such as five annas) of an estate, paying annual revenue to Government, the Court-fee should be fixed on

(1) I. L. R. 8 Cal. 192 (1881).

the value as mentioned, that is, ten times the proportionate revenue payable annually. It is true that the second part of cl. (*a*) contemplates land which is part of a permanently settled estate, such part having been separately assessed by the Collector with annual revenue. If the Legislature had intended that the 'definite share' mentioned in the first part of cl. (*a*) must also be a definite share separately assessed with revenue by the Collector, as in the second part of that clause, it would have said so; but on the face of the plaint, 5 annas is a definite share of an estate; whether it is separately assessed with revenue or not, does not matter.

The case contemplated by cl. (*d*) is of a very different description. Though it is not necessary to decide that point, it is possible that some allusion is made in cl. (*a*) and in cl. (*d*), to the different separate accounts mentioned in secs. 10 and 11 of the Revenue Sale Law, Act XI of 1859. Cl. (*d*) is in two parts, but those parts are linked together by the conjunctive "and"—therein differing from cl. (*a*) which uses the disjunctive "or." The principle underlying the distinction between the two clauses seems to be that Court-fee must be paid on the market-value of distinct plots because they may be the most valuable part of the estate and the rule of proportion not having been applied by the Collector cannot be invoked by the owner. But the rule naturally applies to a definite share of an estate, because it is a share in each plot. However that may be, cl. (*d*) does not provide for the case of a "definite share:" and, as we have already said, five annas of a property is a definite share. The Subordinate Judge is wrong in his reading of the section.

We accordingly set aside the decision complained of, and direct the lower Court to admit the plain, and to try the suit with regard to the five annas share in accordance with law.

We assess the costs at five gold mohurs.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION]

REV. No. 608 OF 1908.

STEPHEN, J.
HOLMWOOD, J.
1908.
29, June.

In the matter of
AJODHYA PROSAD SINGH
and 16 others,
Petitioners,

v.

THE EMPEROR,
Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 107 and 118—Order binding down a party without separate finding in regard to each member of the party—Illegality.

Where in a proceeding under sec. 107, Cr. P. C, against a party consisting of 17 persons, the Magistrate bound down all of them without coming to a separate finding as regards each of them individually,

Held—*The order is bad in law and ought to be set aside.*

This was a rule granted on the 4th of June 1908, against an order of Babu S. C. Mitter, Deputy Magistrate of Monghyr, dated the 31st of March 1908, binding down the Petitioners under sec. 107, Cr. P. C., which was, on appeal, affirmed by Mr. H. F. Sammon, District Magistrate of Monghyr.

The material facts will appear from the judgment.

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, AUGUST 31, 1908. [No. 42

Contents.

NOTES.

The High Court, Original Side, will be closed for the Annual Vacation (including Mohalaya, Durgah, Lakhi and Kali Pujas, Bhratriditia, Eed-ul-Fitr and Jagadhatri Puja on and from Friday, the 28th August to Saturday, the 7th November 1908, both days inclusive, and will resume its sitting on Monday the 9th November 1908.

The Insolvent Court will sit on the 1st September and 20th October 1908.

The offices of the Court, Original Side, will be closed for general business for the Annual Vacation on and from Monday, the 14th September to Wednesday, the 4th November 1908, both days inclusive.

One Judge will remain in town for urgent business and arrangements will be made for the attendance of such superior and subordinate officers as may be required for the disposal of urgent business.

By order,
W. R. FRINK,
Registrar.

HIGH COURT O. S.,
The 19th August 1908.

It is hereby notified that the High Court, Appellate Side, will be closed for the annual vacation from Friday, the 28th August, to Saturday, the 7th November 1908, both days inclusive.

The Hon'ble Mr. Justice Sharfuddin and the Hon'ble Mr. Justice Coxe will sit as the vacation Judges, except during the following Court and Gazetted (Executive) holidays, *viz* :—

Gazetted holiday on account of Mahalaya.	Friday, the 25th September 1908.
Gazetted holidays on account of Durga and Lukhi Pujahs.	Tuesday, the 29th September, to Saturday, the 10th October 1908.
Gazetted holidays on account of Kali Pujah.	Saturday and Sunday, the 24th and 25th October 1908.
Court holiday on account of Bhratriditia.	Tuesday, the 27th October 1908.
Court holiday on account of Eed-ul-Fitr.	Wednesday and Thursday, the 28th and 29th October 1908.
Gazetted holidays on account of Jogadhatri Pujah.	Monday and Tuesday, the 2nd and 3rd November 1908

Motions and cases in which vakeels are engaged will be heard on Tuesdays and Thursdays and such other days as may from time to time be fixed, at 11 o'clock A.M.

The office of the Appellate Side will be closed for the vacation from Friday, the 25th September, to Thursday, the 29th October 1908, both days inclusive

Such Translators, Examiners, Copyists and Assistants of the Record Department as may be required, will attend office throughout the vacation, except on the Court's sanctioned holidays and the Gazetted holidays above specified.

A. P. MUDDIMAN,
Registrar.

The 21st August 1908.

THE *Law Magazine and Review* FOR AUGUST CONTAINS an articles, which reviews the Civil Judicial Statistics for England and Wales for 1906 as edited by Sir John Macdonell. We have noticed these statistics in our columns before and pointed out that legal proceedings in the Courts of first instance show a decline. This decline is all the more remarkable since proceedings in the County Courts continue to show a decline for two years in succession. This decline in legal proceedings is general and is also noticeable in appeals. We are glad to find that neither the editor of the Judicial Statistics nor the reviewer attempts to advance the stereotyped explanations offered for such facts. "Apparently" says the reviewer "it does not fluctuate with improvement of trade or the reverse or good or bad harvests. If it does the connection has been too subtle for us to discover it." There is too great a tendency to generalize amongst writers dealing with such subjects and it is a relief to find the facts presented as they are. Such figures are bound to vary from time to time within certain limitations the causes of which can only be determined by a long series of observations.

THERE IS ONE EXCEPTION TO THE GENERAL DECLINE in appeals to the superior Court and that is in respect of appeals to the Judicial Committee of the Privy Council. The number of proceedings before the Judicial Committee during 1906 fell short of one hundred by one This number has only been surpassed in the last 20 years by the figures of 1898 and 1903. It is certainly a curious fact that although the number of appeals from India is as a whole stationary, yet it generally forms rather more than half of the total. In 1906 out of 99 proceedings begun in the Judicial Committee

the number of Indian appeals was 53. It is no less remarkable that in some years such as 1900, 1901, 1904 the reversals in such appeals exceeded 40 per cent. Appeals from Canada show a slight tendency to increase, 1906 being a second year. Appeals from Australia show a decline, the figures for 1906 being lower than those of any year during the last 10 years except 1899. The establishment of the Australian High Court, which to a great extent takes the place of the final Court of Appeal, is the obvious cause of this decline. The amount of reversal of Australian judgments which in 1902 amounted to 81 82 per cent., has diminished in 1906 to 20 per cent. The appeals from West Indies numbered only two. It is somewhat extraordinary, that for 1827—32 when the population was about 800,000 the average annual appeals were about 14 but now that the populations has increased to 2,000,000 the appeals have dwindled to two.

IT WILL BE REMEMBERED THAT IT WAS AT OUR suggestion that the provision for the release of first offenders on probation of good conduct (sec. 562) was embodied in the Code of Criminal Procedure of 1898. This provision had no place in the original Bill and it was in fact introduced at the very last stage, just before the bill was passed, evidently to pacify to a certain extent the public feeling which had been roused against the bill because of the provisions which increased the power of the police and the executive officers and also supplemented Chalmers' Sedition Bill by which the Indian Penal Code was amended at the same time. Sec. 562 of the Code of Criminal Procedure is however more or less an antiquated measure which was borrowed chiefly from the English Summary Jurisdiction Act of 1879. An inspection of the section will show that its scope is confined to offences of a "trivial nature" as is contemplated in the English Act of 1879. The Probation of First Offender Act of 1887 marks a further progress inasmuch as it does not limit its operation to "trival" cases. Still further advance was made in British legislation during last year with a view to keep pace with the civilized world where the sense of duty of the State for the reform of the erring members of society is progressing apace. It may not be out of place here to suggest to the Indian Legislature that instead of exhausting all their energy in panic legislative measures, they might as well direct their attention to the serener sphere of humane legislation for the reformation of criminals.

THE PROBATION OF OFFENDERS ACT OF 1907 (7, Ed. VII, c. 17) is a measure potent with great possibilities in the work of reforming the criminals and as such is deserving of the most serious attention both of the public and the Legislature. It is to be noticed that the expression "first" has been omitted from the title. The first section which we reproduce below also shows that it embraces all kinds of offenders, men, women and children; that it is not confined merely to trival offences (as sec. 562 of the Code of Criminal Procedure) and that the justices may take note of the character, antecedents, age, health, mental condition of the person charged or any extenuating circumstances under which the offence was committed and may inflict a nominal punishment or may release the offender on probation without proceeding to conviction.

THE FIRST SECTION OF THE PROBATION OF OFFENDERS Act of 1907 runs as follows:—

"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—

(1) Dismissing the information or charge; or

(2) Discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

Although the Act fixes three years as the maximum period of probation yet the Home Secretary anticipates "that the ordinary term of probation will be six months, and that orders for more than a year will be rare and exceptional."

SEC. 2 OF THE ACT AUTHORISES THE COURT TO HAVE a condition inserted in the recognizance 'that the offender be under the supervision of such persons as may be named in the order during the period specified in the order." Sec. 3 arranges for the remuneration of persons who may undertake the supervision of the offender under sec. 2. The Home Secretary in his memorandum for the guidance of the magistrates says that he "is inclined to think that much valuable assistance in carrying out the Act will be given in London by volunteers." Should a similar legislation be introduced in India we are sure that the magistrates throughout the country will get considerable co operation from voluntary agency. Sec. 5 of the Act confers power on the magistrate to discharge the probationer even before the period of probation expires on report of good conduct. This furnishes the necessary inducement for reformation.

THE HOME SECRETARY BELIEVES THAT VOLUNTARY agency for the supervision of probationers will be able to exercise a healthier influence than persons officially connected with the Police. When voluntary

agency may not be available the Home Secretary says that "great care will be necessary in making a selection, and so police officers appointed should not wear uniform in the discharge of their duties under the Act." Public opinion in England seems to be as much opposed to police agency in such matters as people here, as the following criticism of this suggestion in the pages of the *Law Magazine and Review* will show.

One would not disparage in any way the good work done by these men; but it must be remembered that though it may be a good thing to convert a policeman into a probation officer, where otherwise there would be no probation officer, it does not follow that the policeman makes the best probation officer; and in any case it would be rash to found a system upon the success of men of perhaps exceptional calibre. Chicago, too, has tried policemen as probation officers, and it seems to be agreed that they are not a success in that capacity, however useful they may be in assisting other probation officers. The policeman will always tend to adopt the role of the prosecutor—which is alien to the right conception of a probation officer—and must inevitably suggest the strong arm of the law, the sword of Justice not her balances, to the probationer whom he is trying to befriend. Dress him in mufti as much as you like, what will you make of him but a plain clothes constable? In low circles the plain clothes man incurs the odium that attaches to the spy.

CRIMINAL CASES OF 1907.

(*Continued from p. ccxxxiv*).

Civil Trespass.—Trespass on land used by the complainant as a pathway, when a question of title is raised, is not criminal simply because the complainant used the way for more than six months; the question of title having been left undecided (*Rabi* v. *Purna*, 11 C. W. N. 171).

Lurking House Trespass.—Where the accused was found at midnight in the complainant's house without his consent or invitation, a conviction under sec. 456 is legal (*Emperor* v. *Ishri*, 29 All. 46). The same questions were raised and so decided in *19 All. 74* and *22 Cal. 391.*

Using forged document.—A mere statement to the Court, which was in possession of a document sent to it by a Registrar, that the document is genuine is not an user (*Asimuddi* v. *King-Emperor*, 11 C. W. N. 838). It has also been ruled in a very recent unreported case that *filing* a document but not *tendering it* afterwards is not an user.

Trade Marks.—Where the accused employed bottles and labels apparently similar but disclosing great differences on careful examination, *held* that no offence had been committed. The Criminal Courts should not be resorted to in cases of dispute as to the right of user of a trade-mark (*Surja* v. *Mohabir*, 11 C. W. N. 887).

Bigamy.—A native Christian who, having a Christian wife, marries a Hindu according to the Hindu rites, is guilty under sec. 494, though he had renounced Christianity before contracting the second marriage (*Emperor* v. *Lazar*, 30 Mad. 550).

Defamation.—[*Witnesses*]. The liability of a witness to a criminal prosecution for defamation committed in the witness-box has been a matter of conflicting rulings in all the High Courts. An Allahabad Full Bench case by a majority has settled it in the affirmative for that Province (*Emperor* v. *Ganga*, 29 All. 685). In Madras the decisions have gone the other way (*Re Alraja*, 30 Mad. 222; *Manjaya* v. *Sesha*, 11 Mad. 477). All the rulings of the four High Courts are referred to in the Allahabad Full Bench decision. [*Good faith*]. The extent of the right of comment on a book or work of another has been discussed in *Emperor* v. *Abdool*, 31 Bom. 293. The circumstances under which it is necessary to prove express malice in a case arose in *Grant* v. *Emperor*, 11 C. W. N. 390.

III—Evidence Act.

General matters—Evidence as to negotiations of compromise, and admissions during such negotiations, are without a prejudice and inadmissible (*Bhanja* v. *Emperor*, 11 C. W. N. xxvi). This doctrine, if applicable in criminal cases, must be limited to the cases of compoundable offences. The piece-meal examination of the testimony of witnesses, without a broad view of the circumstances and probabilities, generally leads to a failure of justice. Even if witnesses resist cross-examination, but if their evidence is opposed to the ordinary course of human conduct, it should be accepted with the greatest caution (*Nibaran* v. *King-Emperor*, 11 C. W. N. 1085).

Res gestæ.—The doctrine of the relevancy of facts as part of the *res gestæ* is approved of in sec. 6, Ill. (*a*) of the Act. Hearsay evidence of the statements of bye-standers as to an occurrence is admissible only if made at the time of the transaction or so shortly as to form part of the transaction (*Chain Mahto* v. *Emperor*, 11 C. W. N. 266). In *Re Surat Dhobni*, 10 Cal. 302, the statement was made immediately after the commission of the offence and *in the presence of the accused*, and it was held admissible under both secs. 6 and 8.

Confessions.—[*Person in authority*]. A *panchayet* was held to be a person in authority within sec. 24. (*Emperor* v. *Jasha*, 11 C. W. N. 904: contra *4 All. 46* and *4 Bom. Law Rep. 785*). In *9 C. W. N. 974* a *panchayet*, when assuming such authority and leading the accused to believe he had it, was treated as a person in authority.

[*Improper inducement*]. To tell a person *to speak the truth* does not render a confession inadmissible (*Emperor* v. *Jasha*, 11 C. W. N. 904), but to tell him that *he had better speak the truth* makes the statement inadmissible. (*See* the rulings in the Author's *Law of Confessions*, pp. 30—32). [*Retracted confessions*]. The case of *Emperor* v. *Kehri*, 29 All. 434, is one of those unfortunate decisions of the Allahabad High Court which should never have been reported. It holds that a conviction can be sustained on the unretracted confession of a co-accused not only

against the maker but also against the co-accused. The whole subject is discussed, and all the rulings cited in the Author's *Law of Confessions*, pp. 92 97. This Allahabad case is not consistent with the rulings in *1 All. 664* and *Ibid 675.*

DYING DECLARATIONS.—A dying declaration taken in the absence of the accused and by a person other than the committing Magistrate must be *proved* by the recording officer or other person who heard it (*Panchu* v. *Emperor*, 34 Cal. 698). The written record is inadmissible, but may be used to refresh the deponent's memory (*Emperor* v. *Samiruddin*, 8 Cal. 211).

ADMISSIBILITY WITHOUT PROOF —Sec. 80 does not dispense with proof of the identity of the accused as being the maker of the confessor (*Emperor* v. *Joshi*, 11 C. W. N. 904 : *see* also *11 Cal. 580* and *Queen-Empress* v. *Fakir*, 21 All. 159, 162, 163).

ONUS.—The fact of an accused being found near the place of occurrence with a gun immediately after a gun was fired is strong circumstantial evidence, but its weight is weakened if two unconnected persons are so found (*Nibaran* v. *King-Emperor*, 11 C. W. N. 1085)

PRESUMPTIONS —[*Possession of stolen property*]. The finding of stolen property in the accused's hut, where his wife lived and to which others had access, is not sufficient to support a conviction under sec. 411, I. P. C. (*Ejaiuddi* v *Ijjabali*, 11 C. W. N xviii), nor the finding, six months after, of articles of ordinary use without any identifying marks (*Emperor* v. *Sughar*, 29 All. 138). *See* on the point *6 All 224* and *11 Cal. 160*. The question as to who is in possession of stolen property found in a room of a Hindu joint family has been discussed in several Allahabad cases : see *Queen Empress* v. *Sangam*, 15 All. 129 and *Emperor* v. *Budh*, 29 All. 598.

COMPETENCY OF A WITNESS.—Before a child of tender years is asked questions, the Court should test his capacity to understand and give rational answers, and his capacity to understand the difference between truth and falsehood (*Shaikh Fakir v. Emperor*, 11 C. W. N. 51).

CORROBORATIVE STATEMENT.—A statement by a person who was discovered gagged in a jungle that the accused tried to kill her is not admissible as a complaint, nor under sec. 8 as conduct, nor under sec. 157 if not corroborative of any statement in Court nor used to contradict (*Kheroda* v. *King-Emperor*, 11 C. W. N. cxciv).

IV—GENERAL AND LOCAL ACTS.

ACT XIII OF 1859.—A labourer's contract cannot be enforced nor repayment of money ordered after the expiry of the contract (*Khoda* v. *Moti*, 11 C. W. N. 247). This ruling is questionable. It was followed by Holmwood, J., but dissented from by Stephen, J., in a recent unreported case : *Cr. Rev. Misc. No. 76 of 1908*). A coolie sardar or recruiter is not within the Act (*Khetu* v. *Dixon*, 6 C. L. J. 180).

ACT XI OF 1878.—A sword stick is "arms" within sec. 4 of the Act. (*Emperor* v. *Satish*, 34 Cal. 749),

ACT XVIII OF 1879.—[*Pleaders*]. The words "any such misconduct as aforesaid" in sec. 14 relate to all the cases set out in sec. 13. A lower Court may, therefore, inquire into a matter falling within sec 13 (*f*) (*Re Muhammad* 29 All. 61). See *27 Cal. 1023 : 15 Cal. 152* and *26 Mad. 448*. [*Advocate*]. An arrangement with a client without the intervention of a solicitor in Bengal at a half fee, and a threat to take a brief on the other side, unless a certain amount was paid, are unprofessional (*In re S. K. H.* 34 Cal. 729). See *Re Subsidiary*, 29 All 95 and *Re Cowasjee*, 34 Cal. 129 as to other matters of professional etiquette.

ACT XIV OF 1882.—The imprisonment inflicted under sec 369 may be simple or rigorous, but its nature must be determined at the time of its passing, otherwise it must be deemed to be simple. (*Amir Ali* v. *Mathoo*, 11 C W. N. 740)

ACT XXI of 1883 —Secs. 3 and 111 were explained, and it was also held that a Presidency Magistrate is a Magistrate of the first class for the purposes of the Act. (*Emperor*, v. *Jeevanji*, 31 Bom. 611).

ACT XIII OF 1889 —Supplying liquor to a soldier's servant with the latter's money and for his use is not within sec. 13 (*Emperor* v. *Pascal*, 31 Bom 523). Time runs from the date of the notice under sec. 90 (4) of the Cantonment Code (*Simpson* v. *Emperor*, 11 C. W. N li).

IX OF 1890.—Neither sec. 47 nor the rules made thereunder create criminal offences (*Re Basanti*, 11 C. W N. 583). Where in consequence of the omission by station master to take down the line clear signal a collision took place, it was *held* he was guilty under sec. 101 (*Joygopal* v. *Emperor*, 11 C. W. N. 173). The case is distinguishable from *Queen* v. *Manphool*, 5 N. W. P. 240. The essence of the offence under sec. 112 is dishonest or fraudulent intention. Merely travelling without a ticket is not an offence (*Queen Empress* v. *Rampal*, 20 All. 95 : *Kuloda* v. *Emperor*, 11 C. W. N 100), but to do so with a false and irrelevant ticket with such intent is an offence (*Kuloda* v. *Emperor*, supra).

VIII OF 1897.—The Magistrate should hold an inquiry under sec. 12 as to the age of the offender by taking evidence (*Dedar* v. *Emperor*, 11 C. W. N. xi).

BENGAL COUNCIL ACTS —[*II of 1867*] Where the premises of a firm were used at night for gambling for months together to the profit of the durwans in charge it was *held* that the rooms were not a "common gaming house" (*Mohesh* v. *Emperor*, 11 C. W. N. 972) If the game is one mainly of skill it is not gaming, though there is some element of chance : where as it is so if the game is one merely of chance (*Hari* v. *King Emperor*, 6 C. L J. 708). [*III of 1885*]. The bye law under sec. 139 as to encroachments is not *ultra vires* (*Ramantar* v. *Arrah*

Municipality, 11 C. W. N. 1099). [*III of 1899*] A lime trader who has taken a license under sec. 191 must take another under sec. 466 to store lime (*Bepin* v. *Corp*, 34 Cal. 913). A letter without a formal notice under sec. 408 is in contravention of the law. If a general notice is issued under the section a copy of the standard plan must be sent with it pointing out the work to be done (*Kanai* v. *Corp*, 11 C. W. N. 508). Where a notice under sec. 408 has expired the offence is completed and limitation begins from that period (*Kumud* v. *Corp.*, 34 Cal. 909). The Magistrate should exercise a proper discretion before acting under secs. 449, 450, 453. Circumstances under which the order was held improper stated (*Chuni* v. *Corp.*, 34 Cal. 341: see *Abdul* v. *Corp.*, 33 Cal. 287). [*III of 1906*]. As to what is necessary to bring a case under sec. 2, see *Kokil* v. *Emperor*, 6 C. L. J. 710.

BOMBAY ACTS.—[*Aden Courts Act*]. Construction of secs. 29 and 30 (*Emperor* v. *Bhagwandas*, 31 Bom. 335). [*IV of 1887*]. The presumption under sec. 7 only arises upon an arrest and search under sec. 6. Powers of Magistrates discussed (*Emperor* v. *Fernad*, 31 Bom. 438) [*IV of 1902*]. Power of the Commissioner to prohibit a police officer from meeting and discussing any subject in connection with the force without consent discussed (*Emperor* v. *Atmaram*, 31 Bom 480.

MADRAS ACTS.—[*IV of 1864*] It is necessary under sec. 18(n) that cattle should have been kept for trade, but habitual user of the place must be proved (*Emperor* v. *Mayandi*, 30 Mad. 220). Sec. 222 applies to lanes having no side drains or ditches (*Emperor* v *Nagan*, 30 Mad. 221).

N. W. P. ACTS.—[I OF 1891]. As to payment of water rate, see (*Emperor* v. *Sumer*, 29 All. 375) [*I of 1900*]. If permission to build is applied for, and not refused before the statutory period, a person may build and may erect such scaffoldings as are necessary for the construction of the building (*Emperor* v. *Gokul*, 29 All. 737).

E. H. MONNIER.

(*Concluded.*)

CURRENT INDIAN CASES.

BOMWESTCH *v.* BOMWESTCH, I. L. R. 35 Cal. 381. *Marriage with deceased wife's sister—Custody of child—Maintenance.*

A marriage with a deceased wife's sister is void *ab initio* and the child in law is an illegitimate child and the mother is entitled, unless a strong case is made out to the contrary, to the custody of the child. Maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his or her parent, and an account of the amount allowed for maintenance is not ordered so long as the infant is properly maintained.

JOGNESH PRAKASH *v.* MANIRUDDI, I. L. R. 35 Cal. 417. *Bengal Tenancy Act, sec. 188.*

Sec. 188 of the Bengal Tenancy Act has no application when there is a separate contract in favour of one set of landlords.

RAJKUMAR *v.* SHEO NARAYAN, I. L R. 35 Cal. 431. *Mortgage decree—Costs—Execution.*

A decree for costs is a part of the mortgage decree and the decree-holder must proceed in the first instance against the mortgaged property for recovery of costs.

CHATRING MOOLCHAND *v.* R H. WHITCHURCH, I. L. R. 32 Bom. 208. *Contract Act, secs. 16, 19A—Undue influence—Interest.*

A high rate of interest which would induce a Court of equity to give relief on the ground of being hard and unconscionable is not by itself evidence of undue influence. This fact coupled with other circumstances may be sufficient to make out a *primâ facie* case of undue influence.

HORMUSJI *v.* HIRAJBHAI, I. L. R. 32 Bom. 214. *Charity—Cypres doctrine—Altered scheme.*

When owing to altered circumstances the charity specifically provided by the donor cannot be literally carried out with any advantage the Court may grant sanction to an altered scheme in which the general intentions of the donor are to be carried as nearly as possible to his original directions.

BALAJI *v.* GANGADHUR, I. L. R. 32 Bom. 255. *Fraud, allegation of.*

A case of fraud should not be the subject of a mere vague allegation in the plaint or written statement but it must be supported by particulars.

RAMCHANDRA *v.* KRISHNARAO, I. R. R. 32 Bom. 259. *Guardianship—Hindu joint family.*

Per CHANDAVARKAR, J. "Where a joint Hindu family consists of co-parceners who are all minors, the co-parceners forming one group, the Court has jurisdiction to appoint a guardian of the property for that group as a whole. But when, subsequently, one of that group arrives at the age of majority the ruling of the Full Bench, *Virupakshappa* v. *Nilgangava*, I. L. R. 19 Bom. 309) must apply and the guardianship of the person so appointed by the Court must cease."

GANGU v. CHANDRABHAGABAI, I. L. R. 32 Bom. 275. *Hindu Law—Inheritance—Disqualification.*

"We hold, then, that the wife or widow of a disqualified Hindu does not become incapable of inheriting property merely by reason of her husband's disqualification, whether she claims as heir to a deceased person through her husband or otherwise, if she is herself free from any of the defects which exclude a person from inheritance under the Hindu Law." (*Per* CHANDAVARKAR and KNIGHT, JJ.)

SHRINIWAS v. NARHAR, I. L. R. 32 Bom. 296. *Limitation Act, sec. 19.*

In regard to a debt payable in instalments the statement of the debtor as to one of the instalments was considered to be an acknowledgment of liability within the meaning of sec. 19 of the Limitation Act.

ABDULLA KHAN v. KHAN MIA, I. L. R. 32 Bom. 315. *Hindu Law—Mitakshara—Succession—Sister's place.*

"We hold that in cases governed by the Mitakshara, and sister comes in as heir to a deceased Hindu immediately after the grandmother, so that, where the competition is, as in the present case, between her and a half brother's son, the latter, being higher in the line among heirs specifically mentioned in the Mitakshara, is entitled to preference over her as heir, though it would be otherwise in cases governed purely by the law of the Vyavahara Mayukha." *Per* CHANDAVARKAR and KNIGHT, JJ.)

Notes of Cases.

ENGLISH LAW COURTS.

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN.
LORD ATKINSON.
LORD COLLINS.
SIR ARTHUR WILSON.
1908.
21st July.

MORARJI MOHANJI, Defendant, Petitioner,
v.
RUSTOMJI ARDESHIR COOPER, Plaintiff, Respondent.

Special leave—Contract—Breach—Measure of damages—Issue not properly raised.

Petition for special leave to appeal. The facts giving rise to the litigation shortly stated are as follows:— The Appellant, a merchant in Bombay, purchased from time to time certain goods from the Respondent. He also gave an order for certain goods and failed to pay for them on due date. The Respondent then sold these goods by auction, and brought an action in the High Court of Bombay, to recover from the Appellant, as damages, the difference between the contract price and the price realised by auction sale.

The defences which were set up by the Appellant were really three. In regard to a certain portion of the goods he admitted purchase but pleaded that he had paid for them; in regard to certain goods he said he never purchased them at all; he denied there was any contract by which he agreed to purchase, but alleged he had received certain goods, from the Plaintiff to sell on commission. Both Courts in India found that the Defendant did purchase. The only question was, having regard to the goods, what was the due and proper measure of the damages?

Mr. DeGruyther, K. C., for the Appellant urged that the true measure of the damages in law was the difference between the contract price and the market rate of those goods on the date of breach.

SIR ARTHUR WILSON.—Was that contention raised in the Courts in India?

Mr. DeGruyther.—It was. It appears that the original issues which were fixed by the Judge trying the case, amongst others, contained this issue:— "What is the amount of damage sustained by the Plaintiff in respect of goods sold by public auction?" Now in the statement of account which the Plaintiff lodged with his plaint, he set out in detail the amount he realised by auction, and in the prayer for relief asked for the difference between the contract price and the price which had been realised by the auction sale. The Defendants in their written statement did not in terms say:—In any event we are not liable to pay you the difference in price taking the account as you have made it up, but we are only liable to pay the difference between the contract price and the market price on the due dates A compromise was then sought to be entered into. but eventually failed. The present Appellant" Counsel then appears to have said the issue as set forth above was not sufficiently distinct, and ought to further raise the question as to whether the Defendant was entitled to sell these goods by public auction, and charge us with these amounts. The Judge who tried the case held that the point had not been raised specifically in the written statement, and consequently declined to fix this issue at all. Although only the Plaintiff had been examined at that stage under sec. 149 of the Code of Civil Procedure. The Court of Appeal was of opinion that as we did not raise this in our written statement, we must be taken to have admitted the right of the Plaintiff to sell these goods by auction; and this admission involved the further admission that if the goods were sold by auction we would pay the difference between the two prices. The point of law which leave to appeal is asked is that the damages in any event have been wrongly assessed, and that the original omission to state i

the alternative in the written statement could not in the pleadings in India be taken to be in fact an admission that there was a contract to pay these differences. The section, says the Court, may at any time before passing a decree amend the issues, or frame additional issues upon such terms as it thinks fit, and all such issues as may be necessary shall be so made, or framed. There is a discretion to be exercised. When we asked for this issue to be clearly specified it was at a very early stage. Issues were framed. The Plaintiff went into the witness-box, and was cross-examined, and before any further evidence was taken we said, the issues did not really raise the point which we were anxious to raise, namely, that under no circumstances could the Plaintiff sell these goods by auction. The High Court construed the silence in the written statement in regard to this as an admission. I need hardly remind your Lordships that that has not been the view taken in India with regard to the failure to traverse a material allegation. I submit that the discretion of the Courts in India has been wrongly exercised in assuming that the failures to specifically allege this particular matter in the written statement operated as an admission on the part of the Plaintiff to pay as damages the difference between the price realised by auction sale and the contract price.

LORD MACNAGHTEN.—Their Lordships are unable to advise His Majesty to grant special leave.

J. H. W. A *Leave refused.*

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CIVIL APPELLATE JURISDICTION. Before DOSS, J. APPEAL FROM APPELLATE DECREE No. 980 OF 1907. BARADA CHARAN DUTTA, Defendant No. 3, Appellant *v.* SRIMATI HEMLATA DASSI AND ANOTHER, Respondents. 30th July 1908.

Ejectment, suit for—Non-transferable occupancy holding—Usufructuary mortgage—Receipts—Recognition.

The appeal arose out of an action by the landlords to recover possession of a non-transferable occupancy holding. The Plaintiff Respondent sought to recover possession on the ground that the raiyat had executed a usufructuary mortgage of his holding, had placed him in possession and was himself no longer in possession of the same. It was found by both the Courts below that the raiyat did execute a usufructuary mortgage in favour of the Defendant No. 3 and that the original raiyat was no longer in possession. Upon those findings, the lower Appellate Court gave the Plaintiff a decree for *khas* possession.

The Plaintiff was a purchaser of certain specific lands corresponding to a 13 annas share which belonged to his vendor and was also a descendant of the same family. These lands being *debutter* lands, the duty of the *shebait*, that is, the duty of maintaining the worship of the idol to whom the lands were dedicated was also transferred to him. The Defendant No. 3 alone appealed and contended that the transfer of the *debutter* lands to the Plaintiff was invalid according to law and that, therefore, the Plaintiff was not entitled to maintain the suit.

Held—That as the transfer was made for the purpose of carrying on the worship of the idol, it was valid.

Khetter Chunder Ghose v. *Hari Das Bandopadhya* (I. L. R. 17 Cal. 557) followed.

It was next contended that the rent receipts granted on behalf of the Plaintiff to the former raiyat showed that the possession of Defendant No. 3 as mortgagee of the holding had been recognised. In all the receipts the tenant to whom they were granted was the original tenant. In the receipt for 1307, the name of Defendant No. 3 described as mortgagee also appeared as the person through whom rent was received, but in the later receipts for the years 1308, 1309 and 1310 the name of the Defendant No. 3 appeared merely as the person through whom the rent was received.

Held—The receipts did not amount to a recognition by the landlord of Defendant No. 3 either as tenant or as mortgagee.

Ram Samy Purkait v. *Srinath Moyra* (7 C W N. 132) and *Maharaja Radhakishore Manikya Bahadur* v. *Srimutty Ananda Peria* (8 C. W. N. 235) followed.

The recognition of the status as a raiyat precludes the landlord from seeking to recover *khas* possession of the land.

The mere creation of a mortgage by a raiyat in respect of a non-transferable occupancy holding would not entitle a landlord to recover *khas* possession It is when the tenant transfers the possession of the holding to a usufructuary mortgagee and ceases to hold possession that the landlord becomes entitled to recover *khas* possession.

Krishna Chandra Dutta Chowdhury v. *Khiran Bajania* (10 C. W. N. 499), *Bidhumukhi Dasi* v. *Durga Charan Bose* (10 C. W. N. 719) referred to.

Babus Tara Kishore Chowdhury and *Nagendra Nath Mitter* for the Appellant.

Babus Girija Prosonno Roy Chowdhury and *Atul Krishna Roy* for the Respondents.

A. T. M *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI, C. J. and DOSS, J. LETTERS PATENT APPEAL No. 101 OF 1907 IN S. A. No. 1581 OF 1906. SURAMA MUSALMANI AND ANOTHER, Defendants, Appellants *v.* MUNSI DANES MAHOMED, Plaintiff, Respondent. 19th August 1908.

Pre-emption—Lease-hold interest—Ceremony.

The suit was to enforce the right of pre emption upon a lease-hold interest sold in Assam.

Both the Subordinate Judge and Mr. Justice Brett held that the formalities necessary to give rise to the right of pre-emption had been complied with. They therefore gave the Plaintiff a decree.

It was contended (1) that there was no right of pre-emption in a lease hold interest and (2) that the lower Courts were wrong in holding that the necessary ceremonies were duly performed.

Held—A lease-hold interest is immoveable property and there is therefore a right of pre-emption with regard to lease-hold interest.

It was not necessary for the proper performance of the ceremony that the vendor and the vendee should be there when the pre-emptor was uttering "I am making or I have made a demand of pre-emption."

Moulvi Syed Shamsul Huda and *Babu Girija Prosonno Roy Chaudhury* for the Appellants.

Moulvi Mahammad Yusuff and *Babu Jadu Nath Kanjilal* for the Respondent.

A. T. M. *Appeal dismissed.*

CIVIL APPELLATE JURISDICTION. Before RAMPINI, C. J. and DOSS, J. LETTERS PATENT APPEAL No. 106 OF 1907 IN S. A. No. 1619 OF 1906. DEB NARAIN DUTT, Plaintiff, Appellant *v.* BARADA PROSAD DASS AND OTHERS, Respondents. 19th August 1908.

Civil Procedure Code (XIV of 1882), sec 462—Guardians and Wards Act (VIII of 1890), sec 29 (b)—Certificated guardian—Compromise—Perpetual lease—Sanction of District Judge.

A suit was brought by the certificated guardian as the next friend of a certain minor to eject the present Appellant, who was the Defendant in that suit, from a certain land. The case was compromised under the provisions of sec. 462, C. P. C. By the compromise the then Defendant agreed to attorn to the minor Plaintiffs provided they give him a permanent lease of the land in dispute and the case was disposed of accordingly. But the certificated guardian of the minors never took the permission of the District Judge according to the provision of sec. 29 of the Guardians and Wards Act. The terms of the compromise were not carried out and the Plaintiff, the Defendant in the former suit, sought to compel the minor Defendants to give him a permanent lease of the land.

The lower Court dismissed the suit on the ground that the provisions of sec. 29 of the Guardians and Wards Act had not been complied with. The certificated guardian before he agreed to give a permanent lease to the Plaintiff was bound to obtain the leave of the District Judge under the provisions of sec. 29, cl. (*b*) of the Act. He did not do so and the lower Court held that the present Plaintiff's suit must fail.

The Plaintiff appealed and contended *inter alia* that the lower Court was wrong on that point.

Held—That the provisions of sec. 462, C. P. C., are not controlled by those of sec. 29 of the Guardians and Wards Act or *vice versa*. They are two independent sections. Although under sec. 462, C. P. C., the Court sanctioned the compromise, still it was necessary for the certificated guardian to obtain the sanction of the District Judge in accordance with sec. 29, cl. (*b*).

Babu Shib Chunder Palit for the Appellant.

Babu Joy Gopal Ghosha for the Respondents.

A. T. M. *Appeal dismissed.*

IN THE MATTER OF AJODHYA PROSAD SINGH v. THE EMPEROR.

Babus. Joges Chandra Roy and *Monmatha Nath Mukerjee* for the Petitioners.

Babu Atulya Charan Bose for the Prosecution.

The JUDGMENT OF THE COURT was as follows :—

In this case 17 persons have been bound down under sec. 107, C. Cr. P.; and a rule has been granted to show cause why the order binding them down should not be set aside on the ground that there is no finding against the persons bound down sufficient to warrant the order.

The facts of the case are that certain proceedings under sec. 145 were contemplated and then not undertaken, but instead of that the proposed second party to these proceedings were proceeded against under sec. 107, C. Cr. P. They have throughout been treated as second party, and no distinction is made between any of them and there is no finding against any of them individually. For this reason the order before us is bad and must be set aside.

It will remain open to the Magistrate to take such proceedings as he sees fit under sec. 107; only in order to bind down any persons under that section he must come to definite findings that the persons bound down are themselves separately guilty of conduct making them liable to be so bound down.

B. C. *Rule made absolute.*

PRIVY COUNCIL.

[APPEAL FROM BOMBAY.]

LORD MACNAGHTEN. LORD ATKINSON. SIR ANDREW SCOBLE. SIR ARTHUR WILSON. 1908. 21, July.	THE BANK OF BOMBAY and anr., Appellants, v. SULEMAN SOMJI and ors., Respondents.

Executor, also residuary legatee—Mortgage by—Legatee's right to impeach—Legacy charged on immoveable property—Priority—Notice - Constructive notice—Delay—Consent.

A mortgage by an executor who is also residuary legatee to secure his private debt, though valid as against creditors, may be set aside, even at the suit of a pecuniary legatee for the nature of the claim of a legatee may be ascertained from the Will, whereas if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid or that there are other assets for payment of the debts, if any.

GRAHAM v. DRUMMOND (1) *distinguished.*

In re QUEALE'S ESTATE (2) *referred to.*

When the mortgage was executed years after the time fixed in the Will for payment of the legacy and the legacy had remained unpaid, the lapse of time was a circumstance that might be taken into consideration in determining whether the executor was acting with the consent of the legatee.

Held—*That in the circumstances of the present case the rights of the parties remained unaffected by the delay.*

(1) L. R. (1896) 1 Ch. 968.
(2) 17 L. R. (Ir.) 361.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

This was an appeal from a judgment or order of Jenkins, C. J. and Batty, J., of the High Court of Judicature at Bombay (in appeal from its Original Civil Jurisdiction) which reversed or varied a judgment or order of Mr. Justice Chandavarkar declaring (amongst other things) that a certain mortgage executed in favour of the Bank of Bombay had priority over the claims of certain pecuniary legatees under the Will of one Somji Parpla deceased.

The material and relevant facts and circumstances relating to this appeal are as follows :—

The said Somji Parpla died on the 15th February 1885, leaving him surviving his widow Labai and eight sons, of whom four were sons of a former wife. The said four sons of the former wife (hereinafter called "the four elder sons,") were Rohimtoola Somji Parpla, the Respondent Jafer Somji, Goolam Hoosein Somji, and the Respondent Alladin Somji. The said four sons (hereinafter called "the four younger sons") of the second wife Labai, were the Respondents Suleman Somji, Goolam Ali Somji, Mahomed Somji and Habib Somji. The said Somji Parpla made his Will on the 13th February 1885, which was attested on the day of his death.

By his said Will the said Somji Parpla after enumerating the items of property belonging to him (which included a moiety of a house in Bhaji Pala Street, and the entirety of some land in Falkland Road with a theatre erected thereon (which then stood in the name of the said Goolam Hoosein Somji), and defining his heirs, among other provisions, provided as follows :—

"Cl. 3. I bequeath all my abovementioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the abovementioned moiety of the house, situated in the Bhaji Pala Street and the Theatre, &c. (*i.e.*) the whole of the (said) property and goods to the sons of my former deceased wife, (namely) Rahimtulla, Jafer, Gulam Husein, and Alladin, four persons. None of (my) other heirs has any claim or title thereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rahimtulla, and I reserve the right of my three sons only, namely, Jafer, Gulam Husein, and Aladin, these three persons to (my) said moiety of the house. To the remaining property the abovementioned four persons are entitled in equal (shares)."

"Cl. 4. For (my) remaining heirs I order my abovementioned sons, four persons whose names are Rahimtulla, Jafer, Gulam Husein, and Aladin, that they shall duly give and act in accordance with what is written below :—

Cl. 5. To my present surviving wife Labai and to her sons named Suleman, Gulam Ali, Mahomed and Habib, my said elder sons, four persons, to whom I entrust all my goods and property, shall within six years namely, six years after my decease duly make up and pay Rs. 30,000 namely, thirty thousand to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period, and up to that period there shall duly be paid Rs. 125 namely, one hundred and twenty-five

THE BANK OF BOMBAY v. SULEMAN SOMJI.

every month for household expenses, and before the abovementioned sum of Rs. 30,000 namely, thirty thousand is fully made up if the betrothal (or marriage, etc.) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty-five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against four persons (namely my) sons by my first deceased wife or against my said goods and property in any way whatever.

"Cl. 6. As to the (sum of) rupees thirty thousand directed to be paid out of my abovementioned goods and property, as a share of inheritance by my abovementioned elder sons, four persons, to my surviving wife and her sons mentioned in the 5th clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jafer Somji, Gulam Husein Somji, Jafar Ladhabhai Chatu, and my second surviving wife, I appoint these four persons (as trustees), and I direct them as follows:—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the abovementioned sum of rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons, as a share of inheritance, the outlays on auspicious and inauspicious occasions, whatever the same may come to, having been deducted as to whatever sum may remain over a good 'estate,' or a house, shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them; or (the money) shall be deposited at interest, at a good place, and out of the income that may be realised therefrom (moneys) shall be paid to my surviving wife during her lifetime, for her and her children's lodging, food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out), of the said (sum of) rupees thirty thousand the same shall truly be divided and given in equal shares to her children.

"Cl. 9. I recommend four my elder sons mentioned in the fourth clause as follows:—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhaji Pala Street.

"Cl. 10. I recommend my said four elder sons to whom I bequeath all my goods and property, shop, etc, as follows:—After my lifetime they shall continue to carry on trade and business in my name, and having come to an understanding between themselves and apportioned their respective shares, they shall make a writing in respect thereof, and shall carry on trade and business in accordance with their own free will and pleasure.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

"Cl. 12. I nominate or (and) appoint my said four sons named Rahimtulla, Jafer, Gulam Hussein and Aladin, executors of (this) my said Will. They shall truly bring into force all the provisions of the said Will, and I further direct (my) said executors or my elder sons as follows:—As long as they shall carry on trade and business in my name they shall set apart Rs. 300 three hundred every year on account of charity, and out of the same they shall truly give (money) in charity in such manner as they may think proper."

The testator died on the 15th February 1885. He left him surviving his widow Labai (who died in 1893) and the four younger sons of whom Suleman Somji attained 18 in the lifetime of his father, Goolam Ali *alias* Aba Miya Somji attained 18 in 1897 and Mahomed Somji and Habib Somji (who were twins) attained 18 in 1901. From the death of the testator down to the death of his widow she and the four younger sons, and from her death until after the institution of the suit, the four younger sons continued to occupy the said house in Bhaji Pala Street aforesaid or part thereof. The said Jafar Ladhabhai Chatu died in 1894 and the said Goolam Hossein Somji died since the institution of the suit. The Respondent No 5 remained as the sole survivor of the four trustees of the said sum of Rs. 30,000, bequeathed by the said Will of the testator. Divers sums were from time to time paid by the four elder sons in respect of the said sum of Rs. 30,000 and the said monthly allowance of Rs. 125 respectively, but at the commencement of the suit large sums remained unpaid and owing in respect thereof respectively.

After the death of the testator, the four elder sons carried on business at Bombay, Indore and other places, as contractors for the construction of roads, buildings and other works, as co-partners, under the style or firm of Somji Parpia & Company.

The Appellants the Bank of Bombay (hereinafter called "the Bank") acted as bankers to the four elder sons, and on the 1st September 1890 they deposited with the Bank the following deeds and documents as security for advances.

Deeds relating to the house in Bhaji Pala Street. 1. Copy of the Will of Meenabai, widow of Dhanji Parpia, dated 18th December 1880. 2. Conveyance, dated 12th March 1861, by Khan Mahomed Habibhoy and Karim Khatav to Dhanji Parpia.

Deeds relating to a Theatre in Falkland Road. 1. Copy of "Lease, dated 14th October 1892, by Sha Moolchand Nensey to the said Gulam Husein Somji Parpia. 2. Conveyance, dated 26th August 1882, between Peerbhoy Nathoo to the said Goolam Hoosein Somji. 3. Indenture, dated 22nd August 1884, between Javerbai and the said Goolam Hoosein Somji.

On the 12th January 1899, the Bank held thirteen bills of exchange drawn by "Somji Parpia & Co." at Bombay on "Somji Parpia & Co." at Indore, some of which had already fallen due, but all of which would have fallen due on the 14th February 1899. The Bank called upon the four elder sons to pay off those bills of exchange which had fallen due and to find security for the others, and it was ultimately agreed between the parties

THE BANK OF BOMBAY v. SULEMAN SOMJI.

that the four elder sons should find security for the amount of all the said bills of exchange in consideration of the Bank agreeing not to enforce payment before the 12th October 1899.

Accordingly on the 12th January 1899 (fourteen years after the death of Somji Parpia), the mortgage in question in these proceedings was executed in favour of the Bank, and included the said house in Bhaji Pala Street, and the said land in Falkland Road with the theatre erected thereon. The said deeds and documents which were in the possession of the Bank showing title to the mortgaged property, showed one moiety of the house in Bhaji Pala Street to belong beneficially to the said Rahimtoolla Somji Parpia, and the other moiety to belong to the persons claiming under the said Somji Parpia, and showed the said land in Falkland Road with the theatre to belong to the said Goolam Hoosein Somji. The Bank never saw or were aware of the contents of Somji Parpia's Will, and believed that the four elder sons (who had been in enjoyment thereof since Somji Parpia's death in 1885) could pass a good title to the mortgaged property. The Bank took their said mortgage for valuable consideration and in good faith without notice of any prior charge or incumbrance.

The title of the said Rahimtoolla Somji Parpia to one moiety of the said house in Bhaji Pala Street was derived under the Will of Meenabai (the widow of Somji Parpia's brother Dhunji Parpia), but the four younger sons alleged that Meenabai had no power to dispose of the said moiety by Will and that the proproperty devolved on Meenabai's death on the four elder sons and four younger sons equally as the heirs of the said Dhunji Parpia.

In September 1903, the four younger sons commenced this action against the four elder sons and the Bank, claiming that they were entitled to a charge on the mortgaged property (but in priority to the Bank's mortgage), to secure the balance alleged to be due in respect of the said legacy of Rs. 30,000, and claiming also other reliefs. The said Rahimtoolla Somji Parpia did not defend the said action. Written statements were filed by the others of the four elder sons, and by the Bank.

On the 14th January 1904, the Bank's said mortgage was transferred to the Appellant Dwarkadas Dharamsey, and he was subsequently added as a Defendant to the action. He also filed a written statement.

The action was tried before Mr. Justice Chandavarkar on the 1st, 4th, 5th and 6th August 1904; and on the 11th August 1904, judgment was delivered. The Respondent Suleman Somji and the said Goolam Hussein Somji were called to prove that the Bank had actual notice of the Will of Somji Parpia, but the learned Judge did not accept their evidence. The learned Judge held: That the Plaintiffs had a charge on the property, the subject of the Appellants' mortgage. That actual notice of the Will of Somji Parpia was not proved. That the Bank had constructive notice of this Will. That according to Indian law there is no distinction between the powers of an executor over the real property and personal estate of a testator, such as obtains in English law. That the Bank did not

THE BANK OF BOMBAY v. SULEMAN SOMJI.

know of the breach of trust on the part of the Defendants Nos. 1 to 4 and was not a party to their fraud. That the Bank were *bonâ fide* transferees for value of the properties comprised in this mortgage. That only a three-fourth share of the house in Bhaji Pala Street was bound by the Appellants' mortgage and that the theatre on the land in Falkland Road was included in the Appellants' mortgage, accordingly he made a decree to the effect: That the Bank had a first charge. That the Bank's security comprised three-fourth parts of the house in Bhaji Pala Street, and the entirely of the land and buildings in Falkland Road. That the four younger sons were entitled to the remaining one-fourth part of the house in Bhaji Pala Street. That they were entitled to a charge for the said legacy, but ranking subsequently to the Bank's security.

The learned Judge in the course of the judgment, observed:

"The truth of the matter appears to me to be this. Judging from this evidence and the surrounding circumstances neither Labai and her adult son Plaintiff No. 1 nor Defendants Nos. 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as Defendants Nos. 1 to 4 had the property absolutely bequeathed to them under their father's Will, they had every right to alienate it. Defendants Nos. 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and Plaintiff No. 1 were unaware of the fact that Defendants Nos. 1 to 4 had deposited their deeds with the Bank and were contracting debts. They hoped to share in the profits which Defendants Nos. 1 to 4 were expected to make out of their trade by having their legacy provided out of those profits. The Bank were not informed of the legacy or the Will because the parties believed that the legacy had nothing to do with the property bequeathed to Defendants Nos. 1 to 4. When, however, they saw that Ahmedbhoy had fallen out with Defendants Nos. 1 to 4 and the Bank were trying to enforce their rights under the mortgage, they (Plaintiffs and Defendants Nos. 1 to 4) found that Plaintiffs had a charge and that that was a good weapon of attack. These are the probabilities of the case and they go to support the *bonâ fides* of the Bank."

Two appeals were presented against the said judgment, *viz.*—

(1) Appeal No. 1370 by the four elder sons against the decision to the effect that the said mortgage included the building on the land in Falkland Road.

And (2) Appeal No. 1374 by the four younger sons against the decision to the effect that the said mortgage had priority over their said legacy and monthly allowance.

Cross objections, by way of cross appeal, against the said judgment were delivered by the Bank and the Appellant Dwarkadas Dharmsey.

The said appeals were heard by the High Court of Judicature at Bombay on appeal from its original jurisdiction (hereinafter called the Appellate Court)

THE BANK OF BOMBAY v. SULEMAN SOMJI.

on 16th and 17th of January 1905 and on the latter day judgment was reserved.

Judgment on the said appeals was delivered by the Appellate Court on the 20th of February 1905, when the first Appeal No. 1370 was dismissed with costs. And the said decree of the 23rd of August 1904 was varied, by declaring to the effect that the undivided moiety of the said house in Bhaji Pala Street and the entirety of the land in Falkland Road, including the theatre thereon, formed part of the estate of the testator and were, as such, available for the payment of the said legacy of Rs. 30,000 and allowances of Rs. 125 per month to the four younger sons, in priority to the claim thereon of the Bank, as mortgagee under the said mortgage and of the Bank's transferee the Appellant Dwarkadas Dharamsey. And the second Appeal No. 1374 was ordered to be placed on the board on the 24th of February 1905 for further argument and for consideration of the question of costs.

The second Appeal No. 1374 was before the Appellate Court on the 6th of March 1905 and the 3rd and 6th of April 1905 and on latter day the Court reserved its judgment.

On the 14th of April 1905, the further judgment of the Appellate Court on the second Appeal No. 1374 was pronounced, and it was decided to the effect that the said monthly sum of Rs. 125 per month ceased on the expiration of six years from the testator's death and that thereafter interest at 6 per cent. ran on the said legacy of Rs. 30,000, or the unpaid balance thereof, as provided by secs. 131 and 132 of the Probate Act.

The judgment of the Court of Appeal dealt with the case of *Graham* v. *Drummond* (1) in the following terms, *viz.* :—

"In *Graham* v. *Drummond* (1) a second mortgagee from an executor and residuary legatee was held to have a title, which prevailed against creditors and Romer, J., (as he then was) in delivering judgment said :—'I think it is settled in law that if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.'

"Later the learned Judge says, 'The chief reasons given are that unsatisfied creditors have no lien or charge on any assets and persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged.

"'For if they were so bound, they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me) and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the exe-

(1) L. R. (1896) 1 Ch. 968.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

cutor and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration.' But in *Graham* v. *Drummond* (1) as in *Taylor* v. *Hawkins* (3) it was a creditor who sought to impugn the alienation; here the Plaintiffs are legatees."

On the 6th of March 1904 an order was made by the Appellate Court, by consent, for the sale of the house in Bhaji Pala Street and the land in Falkland Road and that the net proceeds of sale of the land in Falkland Road and one-half of the net proceeds of sale of the house in Bhaji Pala Street should be carried to the credit of the estate of the testator, and that the other half of the net proceeds of sale of the house in Bhaji Pala Street should be carried to a separate account in the said suit—an account of the parties entitled to one-half of the Bhaji Pala property, not forming part of the estate of the deceased Somji Parpia. The said properties were sold and the net proceeds of sale dealt with, as directed by the last-mentioned order.

The Appellants being dissatisfied with the decision of the Appellate Court obtained leave to appeal therefrom.

Sir R. Finlay, K. C., Messrs. Levett, K. C., and *Frank Russel, K. C.,* for the Appellants.

Messrs. Dankwertz, K. C., and *Stokes* for the Respondents.

(1) L. R. (1896) 1 Ch. 968.
(3) 8 Ves. 209 (1803).

Their LORDSHIPS' JUDGMENT was delivered by

SIR ANDREW SCOBLE.—The facts relating to this Appeal are not in dispute, and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Labai, who also survived him. By his Will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co, and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title-deeds relating to the property in suit by way of equitable mortgage, with the Bank; and on the 12th January 1899, the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mort-

THE BANK OF BOMBAY v. SULEMAN SOMJI.

gage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by their father Somji Parpia, in his Will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. This Will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji Pala Street, the more valuable of the two properties, was indicated in the Will of Meenabai, widow of Somji Parpia's brother Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his Will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case; and if they had been asked about their father's Will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. Lovett, in his able argument for the Appellants, contended that, under the Will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J., in *Graham* v. *Drummond* (1) in which that learned Judge says (at p. 974):

"I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the Plantiffs are legatees, and the distinction between creditors and legatees is well pointed out in Spence's "Equitable Jurisdiction," Vol. II, p. 376, where it is said :—

"A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the Will, may be acertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore the mortgagee would be safe as against creditors"

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the Will of Somji in favour of the widow and her sons.

(1) L. R. (1896) 1 Ch. 968.

THE BANK OF BOMBAY *v.* SULEMAN SOMJI.

It was also contended that by the terms of the Will the legacy was to be made up and paid within six years after the testator's decease; that this period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the Will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that, in this case, two of the younger sons were still minors when the title deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the Will, their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance.

The case of *In re Queale's Estate* (2) bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a bank three leases to secure his own overdrawn account. The bank dealt with him as absolute owner, and eventually proceeded to sell the leaseholds; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment, Fitz Gibbon, L. J., says:—

"The Bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the bank can, in my opinion, have no better title than that which its debtor really had in the capacity in which he was dealt with, namely, as beneficial owner, *i.e.*, as residuary legatee."

(2) 17 L. R. (Ir.) 361.

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four Respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The Appellants must pay the costs of the appeal.

Solicitors: *Messrs. Cameron, Kemm & Co.*, for the Appellants.

Solicitors: *Messrs. Rawle Johnstone & Co.* for the Respondents.

Appeal allowed with costs.

J. H. W. A

ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT No. 135 OF 1908.

CHITTY, J.

1908.

Heard,

30, June and 1 & 2, July.

Judgment,

6, July.

POORENDRA NATH SEN and another,

v.

SRIMATI HEMANGINI DASSEE and anr.

Hindu Law—Will, construction of—Res judicata—*Partition by sons—"Shall divide my properties among my sons in equal shares," if operative as gift—Mother's share, how far affected by shares otherwise inherited by her—Estimating mother's share*—Stridhan *from her husband's estate, credit for—Form of decree.*

The decision in a former suit, of questions not absolutely necessary for the determination of that suit, cannot be regarded

POORENDRA NATH SEN v. SRIMATI HEMANGINI DASSEE.

as res judicata between the same parties in a later suit.

If there be an express gift to the sons by a Will of all the testator's properties, his widow's right to a share on partition by the sons is defeated.

DEBENDRA KUMAR ROY CHOWDHURY v. BROJENDRA KUMAR ROY CHOWDHURY (1) *followed.*

The direction in a Will—"On my youngest son . . . . attaining the age of 21 years, the said executrix shall divide my properties among my sons in equal shares" was construed not to operate as an express gift in favour of the sons but only to postpone partition to a particular date.

KISHORI MOHAN GHOSE v. MONI MOHAN GHOSE (2) *followed.*

SOPPLAH DASSEE v. BHOOBAN MOHAN NEOGHI (3) *distinguished.*

When a Hindu mother is otherwise entitled to a share in lieu of her maintenance on the partition of the father's estate by the sons, her right is not affected by the fact that she has already inherited a share of the same estate from one of her deceased sons.

JAGO MOHAN HALDER v. SARODA MOYEE DASSEE (4) *followed.*

In estimating the share which a mother is entitled to in lieu of her maintenance out of the father's estate, credit must be given for any property which she has received as stridhan *from the father's estate.*

JADOO NATH DEY SIRCAR v. BROJONATH DEY SIRCAR (5), KISHORI MOHAN GHOSE v. MONI MOHAN GHOSE (2).

One Baikanta Nath Sen, who was governed by the Bengal School of the Hindu Law, died on the 16th April 1895 leaving him surviving three married daughters by a predeceased wife, Srimati Hemangini Dassee, his sole widow, and by her three married daughters and six sons, and having previous to his death, in the year 1890, made and published his last Will and testament in the Bengali language, a copy translation whereof, by one of the sworn translators of this Court, is set out below:—

(This) is executed by Sri Boykanto Nath Sen father's name the late Radha Kristo Sen inhabitant of No. 20, Durponarian Tagore's Street, Calcutta.

I make this last Will by revoking all previous dispositions made by me. On my demise, my immoveable and moveable properties shall be disposed of and all acts in respect thereof done according to the purport hereof.

2. I appoint Srimati Hemangini Dassee my wife, inhabitant of Durponarain Tagore's Street, Calcutta, as executrix of my Will. On my demise, my entire estate shall come into her hands and under (her) management.

3. The said executrix shall collect my dues of all descriptions and pay off debts if there be any.

4. With reference to the state (income) of my estate, the said executrix shall meet requisite expenditures for performing the marriages of and social rites and observances relating to (my) four unmarried sons and for looking after and making management of the estate and for education and preservation of health.

5. The said executrix shall be competent to purchase Government securities with the surplus income of my estate. The said papers shall merge in the estate.

6. My sons possess no right to the Govern-

(1) I. L. R. 17 Cal. 886 (1890).
(2) I. L. R. 12 Cal. 165 (1885).
(3) I. L. R. 15 Cal. 292 (1888).
(4) I. L. R. 3 Cal. 149 (1877).
(2) I. L. R. 12 Cal. 165 (1885).
(5) 12 B. L. R. 385 (1874).

POORENDRA NATH SEN v. SRIMATI HEMANGINI DASSEE.

ment securities which (I) having (purchased and endorsed) in the name of my wife Srimati Hemangini Dassee have given (to her).

7. On my youngest son Sreeman Jagatpati Sen attaining the age of twenty-one years, the said executrix shall divide my estate among and give it to (my) sons in equal shares.

8. If the said executrix die before making division of the estate in the manner specified above, she shall (before her death) appoint to her office my third son Sreeman Ninad Sen, otherwise called Sreeman Nirendra Nath Sen, that is, he shall be the executor to my estate.

On the 7th June 1895, Srimati Hemangini Dassee applied for and obtained probate of the Will, and entered into possession of the estate left by the testator. During the minority of the testator's son Jagatpati, mentioned in the Will, a suit was instituted by the two sons of the testator for the construction of the Will, for administration and partition of the estate left by the testator (being suit No. 592 of 1895) against the executrix and other sons of the testator. On the 27th March 1896, a judgment was delivered in that suit by his Lordship Ameer Ali, J., whereby the Will was partially construed and it was held that the Plaintiffs had no right to immediate partition, the said Jagatpati not having attained the age of 21 years. On the 21st August 1906, the said Jagatpati attained 21 years of age. Thereupon, this present suit was instituted for further construction of the said Will, for administration and partition of the estate left by the testator, for account and other incidental reliefs. Since the institution of the suit, and on the 19th April 1907, the said Jagatpati Sen died intestate leaving him surviving Srimati Hemangini Dassee his heir under the Bengal School of Hindu law.

Mr. B. Chakravarti (with *Mr. A. N. Chaudhuri*) for the Plaintiffs. The question before the Court is, whether Srimati Hemangini Dassee is entitled to a share equal to that of her sons having regard to the facts: *viz.*,

(*a*) That she has been provided for in the Will by the gift of certain Government securities as her *stridhan.*

(*b*) That she has inherited the share that was of her son Jagatpati and was not unprovided for.

(*c*) That the Will having directed the division of the residue among the sons in equal shares on Jagatpati attaining 21 years of age, the sons took their shares by way of gift from their father and the mother had no claim against them for her maintenance.

Although a testator cannot deprive his widow by Will of her right to have maintenance, yet he can deprive her of her share on partition by the sons. *Debendra Coomar Roy Chowdhury* v. *Brojendra Coomar Roy Chowdhury* (1).

The utmost that a widow can claim is a share equal to that of her sons. [See, Strange on Hindu Law (1830) Vol. 1, p. 171; Shyama Charan Sarkar's "Vyavastha Darpana," (3rd Ed., 1883) p. 516; Dayabhaga III, 2, §§ 20—31; Mayne on Hindu Law (7th Ed., 1906), p. 618; and, Golap Chandra Sarkar on Hindu Law (3rd Ed., 1907), p. 283].

The widow having sufficient income for her needs cannot claim maintenance from her husband's family. *Ramawati Koer* v. *Manjhari Koer* (6).

Mr. B. C. Mitter (with *Mr. B. K. Lahiri*) for the Defendant Norendra Nath

(1) I. L. R. 17 Cal. 886 (1890).

(6) 4 C. L. J. 74 (1906).

Sen: An heir to whom property is given by Will does not take as heir but as devisee. [See, Phillips and Trevelyan on Hindu Wills (1901), 110]. *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (7). The Court will give effect to the intention of the testator. *Bhagabati Barmanya* v. *Kali Charan Singh* (8).

The intention is to be gathered from the wording of the Will, and whenever possible, literal construction ought to be given to the words. [See sec. 6 of the Hindu Wills Act (XXI of 1870)].

The share taken by the widow from her husband's estate is not taken by her by right of inheritance but by way of provision for maintenance for which the estate is bound. *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (3). If she be already provided for, she has no further claim from her husband's family. [See, Mayne on Hindu Law (7th Ed., 1906), p. 618] *Ramawati Koer* v. *Manjhari Koer* (6).

I submit that for these grounds the widow is not entitled to a share in this case in lieu of her maintenance out of her husband's estate.

The form of the decree that ought to be made in this suit will appear from *Jadoo Nath Dey Sircar* v. *Brojonath Dey Sircar* (5).

The Advocate-General (*Mr. S. P. Sinha*, with *Mr. C. R. Das*) for the executrix, Srimati Hemangini Dassee. There is no question that I, as the heir of my deceased son, Jagatpati, am entitled to his share in the estate. Now, the question is, am I entitled to another share of the estate equal to that of my sons? What is to be deducted from my right of a share in lieu of maintenance, is only the *stridhan* I have received from my husband's estate. [See, Golap Chandra Sarkar on Hindu Law (3rd Ed., 1907), p. 385, *et seq*].

I submit that the Will, in this case, does not make any difference to my rights. I have a right to claim my maintenance and in lieu of that, a share. Apart from the Will, I am entitled to a share without deduction. *Joytara* v. *Ramhari Sardar* (9). The Government Promissory Notes that I have got from the estate, as my *stridhan*, are not to be taken into account in settling my right to maintenance but the amount thereof may be deducted when I am held to be entitled to a share in lieu of such maintenance.

Then, I show that the share that I inherit from my son cannot be held to be *stridhan*. [See, Mayne on Hindu Law (7th Ed., 1906), pp. 818 and 822; Dayabhaga, XI, II, §§ 30-32, 55-59].

The next point I wish to press is that the Will does not contain any words of gift. The direction is merely to postpone partition and does not operate as a gift in favour of the sons. This case is not distinguishable from *Kishori Mohan Ghose* v. *Moni Mohan Ghose* (2).

Lastly, this question does not, I submit, again arise there having been a previous suit heard and determined in which this point was raised and decided, and must be considered as *res judicata* between the parties.

(3) I. L. R. 15 Cal. 292 (1888).
(5) 12 B. L. R. 385 at p. 390 (1874).
(6) 4 C. L. J. 74 (1906).
(7) I. L. R. 10 Bom. 528 (1886), *per* Sargent, C. J., at p. 576.
(8) 1 C. L. J. 482 (1905).

(2) I. L. R. 12 Cal. 165 (1885).
(9) I. L. R. 10 Cal. 638 (1884).

POORENDRA NATH SEN *v.* SRIMATI HEMANGINI DASSEE.

Mr. B. C. Mitter, in reply: The point was not material for the decision in the other suit. Findings on an unnecessary issue cannot operate as *res. Ghela Ichharam* v. *Sankalchand Jetha* (10), *Shib Charan Lal* v. *Raghu Nath* (11).

Mr. Chakravarti, in reply: In *Kishori Mohan Ghose* v. *Moni Mohan Ghose*, the direction to divide the estate was given to the executor who was an outsider to the family, but in this case, the direction is to the widow herself to divide, which must be taken to indicate the intention of the testator to make a gift in favour of the sons.

This is a case of deferred bequest. *In re Bennett's Trust* (12), *In re Wrey, Stuart* v. *Warey* (13), *In re Bevan's Trust* (14). [See also, Theobald on Law of Wills (7th Ed., 1908), p. 584].

In the case of *Kishori Mohan Ghose* v. *Moni Mohan Ghose* (2), the outsider-executor had to divide according to law, that is to say, after having reserved a share for the widow. In this case, a direction to divide being given to the widow, who is the executrix, she is, by implication, denied the right to claim a share.

If there is no gift under this Will to the sons, even then, under the general law, the mother is not entitled to maintenance (and, therefore, to a share in lieu thereof) if she is otherwise provided, namely, as in this case, by inheriting the share of her deceased son. [See, Shyama Charan's Vyavastha Darpana (3rd Ed., 1883), p. 146, *et seq*]. *Ramawati Koer* v. *Manjhari Koer* (6).

Mr. S. R. Das (with *Mr. B. C. Chatterjee*) for other Defendants.

Cur. adv. vult.

The JUDGMENT OF THE COURT was as follows:—

CHITTY J.—This is a suit by two of the six sons of the late Baikanto Nath Sen, against their mother and three brothers. Their mother Srimati Hemangini Dassee is now sued in her capacity as executrix of the Will of her husband, in her personal capacity, and also as heiress and legal representative of the sixth son, Jagatpati Sen, who died on the 17th April 1907 after the suit was first instituted. The present suit was first instituted on the 20th August 1906. In consequence of the leave under cl. 12 having been informally granted, it was withdrawn and instituted afresh on 14th February 1908. The object of the suit is to have the Will of Baikanto Nath Sen finally construed, and to have the property partitioned among those persons who are entitled to it. An account is prayed for against Hemangini Dassee and, if necessary, administration and other consequential reliefs.

The main question for my determination is whether Hemangini Dassee is entitled on partition not only to the share of her deceased son Jagatpati Sen (which is admitted), but also to another share as a mother, on her sons dividing the property among themselves. The solution of this question appears to me to rest solely on the construction to be put upon the Will. If that Will contains

(2) I. L. R. 12 Cal. 165 (1888).
(10) I. L. R. 18 Bom. 597 (1893).
(11) I. L. R. 17 All. 174 (1895).
(12) 3 Kay and J 280 (1857).
(13) 30 Ch. D. 507 (1885).
(14) 34 Ch. D. 716 (1887).
(6) 4 C. L. J. 74 (1906).

POORENDRA NATH SEN v. SRIMATI HEMANGINI DASSEE.

an express gift of Baikanto Nath Sen's property to his sons, then the right of the widow to a share on the partition is defeated [See, *Debendra Kumar Roy Chowdhury* v. *Brojendra Kumar Roy Chowdhury* (1)], and she takes only the share inherited from her son Jagatpati, *i.e.*, $\frac{1}{8}$th. If, on the other hand, the Will merely operates to postpone the partition and the sons take the property as on an intestacy, it appears clear from the texts and the authorities that the widow is not deprived of her share, as such, by reason of her having inherited a share from a deceased son; that is to say, in that case she would take $\frac{2}{7}$ths.

Baikanto Nath Sen died on the 16th April 1905 and his Will, which was made in the year 1890, was duly proved by his widow, the sole executrix. The Will directed that the property should be divided among his sons, in equal shares, when his youngest son Jagatpati attained the age of 21 years. This happened on 1st August 1906. In 1895, the present Plaintiffs filed a suit (No. 692 of 1895) in this Court claiming (as they now do) partition of the property. That suit was heard by Ameer Ali, J, who decided that there was an absolute gift of the income of the whole estate to the executrix to be applied by her, at her sole discretion, up to the date fixed by the testator for division among his sons; that the postponement of their enjoyment was, therefore, valid; and that that suit was premature. It was accordingly dismissed. The learned Judge also held that there was no gift whatsoever to the sons but merely a postponement of the partition. It would seem, however, that the decision of this last question was not absolutely necessary for the determination of that suit, and it cannot, therefore, be regarded in any way as *res judicata* between the parties. An issue was also raised in that suit, but not decided, whether the widow, would be entitled to a share on partition. The translation of the Will which was made for the purposes of Probate appears to be wanting in accuracy. Counsel on both sides had objection to take to it, Mr. Chakarvarti criticising the translation of cl. 1, and the Advocate-General that of cls. 4, 6 and 7. With their assistance and that of my interpreter, I have had no difficulty in ascertaining the true meaning.

Cl. 1 should run: Upon my demise my moveable and immoveable properties shall vest (विन्यस्त) and all affairs in connection therewith shall be performed according to the provisions hereof.

Cl. 4. The said executrix shall, regard being had to the condition of my property, defray the necessary expenses &c., &c.

Cl. 6. The Government securities which I have made to stand in the name of my wife,—Srimati Hemangini Dassi—my sons shall have no right thereto.

Cl. 7. On my youngest son Sriman Jagatpati Sen attaining the age of 21 years, the said executrix shall divide my properties among my sons in equal shares (तुल्यांश बिभाग करिया दिवेन).

The opinion expressed by Ameer Ali, J., is not binding upon me but it is entitled to weight and I should not venture to differ from it unless I was compelled.

After giving the Will my best consideration, however, I have arrived at the

(1) I. L. R. 17 Cal. 886 (1890).

POORENDRA NATH SEN *v.* SRIMATI HEMANGINI DASSEE.

same conclusion, namely that it contains no gift to the sons, but merely operates to postpone partition to a particular date, with directions as to management in the meantime, the property being vested in the executrix for the latter purpose. I can find in the Will no words of gift or words that can be interpreted as such. The sons take as the law prescribes and not by any bequest of their father. In this respect, the case appears to me to be not distinguishable from the case of *Kishori Mohan Ghose* v. *Moni Mohan Ghose* (2). It is true that, in that case, there was no intermediate gift, though the testator directed that the executors should manage the estate until his youngest son attained majority. The direction there also was to "divide the estate amongst the sons in accordance with the *shastras*." I do not think that the addition of the words "in accordance with the *shastras*" can make any difference. In either case the sons would take according to the Hindu Law. There, as here, there was no bequest to the sons but merely directions as to management for a certain time and then partition. I cannot see that this ruling has been in any way affected by the case of *Sorolah Dassee* v. *Bhoobun Mohan Neoghy* (3), which decided that the mother's share is taken not from the father's estate by inheritance or by reason of survivorship, but from the sons, in lieu of or by way of providing for that maintenance to which she is entitled as against them.

If the mother is entitled, as I think she is, to a share on the partition, her right is not affected by the fact that she has already inherited a share from one of her sons. See, *Jago Mohan Halder* v. *Saroda Moyee Dassee* (4). That ruling of Kennedy, J., is founded on the text in the Dayabhaga, Chap. 3, sec. II, para. 31 and there appears to be no doubt as to its correctness. The only other matter which I need notice is one as to which there is no dispute. It is conceded that in estimating the share to which the widow is entitled on partition, credit must be given for any property which she has received as *stridhan* from her husband's estate, *e g.*, in this case, the Government securities mentioned in cl. 6 of the Will. The share which she takes as heiress of her son Jagatpati Sen is not *stridhan*. In that she has only a woman's estate.

As to setting off *stridhan* property which has come to her, see, *Jadoo Nath Dey Sircar* v. *Brojonath Dey Sircar* (5), and *Kishori Mohan Ghose* v. *Moni Mohan Ghose* (2).

In the view that I take of the case, it is unnecessary to discuss the question of the widow's right to maintenance. There will be a decree as follows: Declare —that, of the estate of Baikanto Nath Sen deceased, the Plaintiffs and the male Defendants are entitled each to $\frac{1}{7}$th absolutely and that Srimati Hemangini Dassee is entitled to $\frac{1}{7}$th plus $\frac{1}{7}$th as heiress of her deceased son Jagatpati Sen and the other $\frac{1}{7}$th in her right as a Hindu mother on partition. Enquire, of what that estate consisted (1) at the death of Baikanto Nath Sen, (2) at the date fixed by the testator for partition, *viz.*, 1st

(2) I. L. R. 12 Cal. 165 (1885).
(3) I. L. R. 15 Cal. 292 (1888).

(2) I. L. R. 12 Cal. 165 (1885).
(4) I. L. R. 3 Cal. 149 (1877).
(5) 12 B. L. R. 385 (1874).

POORENDRA NATH SEN v. SRIMATI HEMANGINI DASSEE.

August 1906. Hemangini Dassee to account for all receipts and disbursements subsequent to the last-mentioned date (This is consented to by the Advocate-General on her behalf). Inquire what *stridhan* property has come to Srimati Hemangini Dassee from her husband and take it into account in estimating the ¼th share which she takes as mother on the partition.

Costs of all parties of this suit, including reserved costs, to come out of the estate. Commissioner for partition to be named by the parties before the Registrar within a fortnight.

Commissioner to have power to make separate returns as to the moveable and immoveable properties respectively. Commissioner to have liberty to sell the properties. Executrix to divide the approximate net income in the meantime among the various beneficiaries.

Mr. Charu Chunder Bose, Attorney for the Plaintiffs.

Messrs. Bonnerjee and Haldar, Mr. Akhoy Kumar Thakur, Mr. Kumar Krishna Dutta and *Mr. Purna Chandra Law*, Attorneys for the Defendants.

P. R. C.

[MATRIMONIAL JURISDICTION.]

SUIT No. 10 OF 1908.

FLETCHER, J.
1908.
1, July.

ARABELLA CLARRESSA ELIZA MITTER
v.
JOHN CHARLES MITTER.

Practice—Petition, service of—Substituted service—Unreasonable delay—Indian Divorce Act (IV of 1869), secs. 14 and 50.

The practice of this Court, as to service of petition on the Respondent, is governed by what prevails in the Matrimonial Courts in England.

It is essential, in suits for dissolution of marriage, that the petition of the Plaintiff should be personally served under sec. 50 of the Indian Divorce Act on the Respondent or that sufficient notice of its contents should be given to him.

Unless satisfactory explanation is given for the long delay in presenting and prosecuting a petition, a Court is obliged to refuse a decree for dissolution of marriage, under sec. 14 of the Indian Divorce Act.

Undefended action.

The facts of the case appear from the judgment.

Mr. J. N. Banerjee for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a petition presented to this Court by Mrs. Arabella Clarressa Eliza Mitter, praying for a dissolution of her marriage with the Respondent on the ground of cruelty and adultery.

Now, it appears that the petition has not been personally served upon the Respondent. Service has been effected upon him, as appears from the return and affidavit of service, by the affixing of a copy of the citation or summons with a copy of the petition on the outer door of the lodging house in Kidderpore in which he was supposed to be ordinarily residing.

That is not the usual procedure for serving citation in matrimonial cases. The practice as to that in this Court is governed by what prevails in the Matrimonial Courts in England.

Sec. 50 of the Indian Divorce Act says that "every petition under this Act shall be served on the party to be

ARABELLA CLARRESSA ELIZA MITTER v. JOHN CHARLES MITTER.

affected thereby, either within or without British India, in such manner as the High Court (not the Civil Procedure Code) by general or special order from time to time directs."

In this case, no order for substituted service of the petition was obtained. It is essential, in suits for dissolution of marriage, that the petition of the Plaintiff should be served on the Respondent or that sufficient notice of its contents should be given to him. In this case that was not done. But, on that ground alone, I would not hold that the Petitioner is not entitled to the relief she asks for. There is another ground, however, on which, I think, the petition fails. The Petitioner left the Respondent for good as far back as the 25th March 1903 and this petition was not filed until the 7th March last, that is, a period of about five years. In my opinion, no satisfactory explanation has been given for this long delay.

Sec. 14 of the Divorce Act obliges me to refuse a decree for dissolution of marriage "if the Petitioner has in the opinion of the Court been guilty of unreasonable delay in presenting or prosecuting such petition." There is no discretion left in me but to find upon the evidence that the Petitioner has been guilty of unreasonable delay in presenting or prosecuting her petition.

It is, however, said that she is suing in *forma pauperis* and that she had no money to bring the suit earlier. That is not a good excuse as she could have filed her suit in *forma pauperis* long ago.

Therefore, on that ground and on the other ground that the Petitioner is not shown to have been served on the Respondent, I must dismiss the petition.

Mr. G. K. Ghosh, Attorney, for the Petitioner.

P. R. C. *Petition dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORIGINAL DECREE
No. 320 OF 1906.

COXE, J.
DOSS, J.
1908
Heard, 8 and 10, July.
Judgment, 20, July.

GOPAL CHANDRA BOSE, Plaintiff, Appellant,
v.
SURENDRA NATH DUTT, Defendant, Respondent.

Limitation Act (XV of 1877), Sch. II, Art. 49—Government promissory notes held by Defendant for Plaintiff—Wrongful disposal of notes—Pledge—Subsequent demand and refusal—Wrongful detention when commences.

The Defendant who held certain Government promissory notes in trust for the Plaintiff, pledged the same for his own purposes and later on when asked by the Plaintiff refused to deliver them up.

Held—*That a suit by the Plaintiff to recover the notes or their value from the Defendant was governed by Art. 49 of Sch. II of the Limitation Act and time commenced running from the date of refusal, notwithstanding that the Defendant had wrongfully parted with the notes before that date.*

The detention of the notes became wrongful from the date of refusal to deliver them up.

WILKINSON *v.* VERITY (1) *followed.*

This was an appeal preferred on the 20th of August 1906, against the decree of Babu Jogendra Nath Deb, Subor-

(1) L. R. 6 C. P. 206 (1871).

GOPAL CHANDRA BOSE v. SURENDRA NATH DUTT.

dinate Judge, 1st Court of Zillah 24-Pergunnahs, dated the 19th of June 1906.

The Plaintiff's case was that the Government securities were the property of one Kula Kaminy Dassi. That the Defendant for his own use and benefit took from the lady during her life-time Government securities of the nominal value of Rs. 3,500. That those securities were in fact deposited with the Defendant. That after the death of the lady the Defendant got possession of the remaining Government securities of the nominal value of Rs. 1,500. That the Defendant had on several occasions promised to return the Government securities to the Plaintiff but had failed to do so. That hence this suit.

The defense in respect of the claim under consideration was that the Plaintiff had no right to sue. That the claim was time-barred. That no portion of the Government securities for Rs. 1,500 was taken and used by the Defendant. That those securities along with other properties of the lady came into the hands of his son Prakash Nath Dutt who was the son-in-law of the Plaintiff. That at the request of the Plaintiff, his wife and their daughter the wife of Prakash Nath, the securities were mortgaged to one Kali Kumar Chakrabutty also called Kali Kumar Nandi to raise a loan to defend Prakash Nath in a heinous criminal case in which he was involved and was spent in the defence. That the Defendant was not therefore liable for any portion of those securities. That Kula Kaminy did not deposit the Government securities for Rs. 3,500 with the Defendant but lent them to him when he required money for his own purpose, on a contract to pay interest and that the Defendant repaid the loan to the lady.

The material issues were :—

"Is the claim barred?

"Were the Government securities for Rs. 1,500 mortgaged by Prakash Nath Dutt to Kali Kumar Chakraburtty and is the Plaintiff's claim in respect of it maintainable Is the Defendant liable for those securities and the interest due upon them?

"Has the Defendant paid up the Government securities for Rs. 3,500 which he borrowed from Kula Kaminy? For what amount in respect of those securities is the Defendant liable?"

On the 3rd issue the Subordinate Judge found that there was no satisfactory evidence to hold that the loan raised upon the securities was spent in defending Prakash Nath. This issue was decided in Plaintiff's favour.

Issue No. 4 was also decided against the Defendant.

On the question of limitation the learned Sub-Judge held that the securities in question were "specific moveables due to the estate of Kula Kaminy which the Defendant had taken wrongful possession of. Moveable property includes money but specific moveable does not include money, and the very case in *Kristo Kamini Dassi* v. *Administrator-General of Bengal* (2) relied on by the Plaintiff's pleader holds that Government securities are not money. I am of opinion that Art. 49 of the Limitation Act applies to the claim for the securities for Rs. 1,500 and the claim for them is barred. On the death of Kula Kaminy which happened in Bhadra

(2) 7 C. W. N. 476 (1903).

GOPAL CHANDRA BOSE *v.* SURENDRA NATH DUTT.

1305 that is sometime in July 1898 the Defendant wrongfully took possession of the securities. The claim in respect of them is beyond three years from that date or even from the 22nd Aghran 1305."

The learned Subordinate Judge decreed the Plaintiff's claim for Rs. 4,201 being the value of the securities for Rs. 3,000 and interest due thereon.

The Plaintiff appealed against the judgment of the Sub-Judge in so far as he dismissed the claim in respect of Government securities of the value of Rs. 1,500.

Babu Debendra Chandra Mullik for the Appellant.

No one appeared for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff in this case is the executor of the Will of one Kula Kamini Dassi, who died in July 1898. It is pleaded that before her death she deposited Government Promissory Notes for Rs. 3,500 with the Defendant, and that after her death similar notes for Rs. 1,500, belonging to her estate, came into the hands of the Defendant, who has been repeatedly requested to return them but in vain. This suit in the form that it ultimately took was one for the recovery of those notes or, in the alternative, for their value.

The Subordinate Judge has decreed the claim for the notes of Rs. 3,500, but has held that the claim with respect to the notes of Rs. 1,500 is barred by limitation. The Plaintiff appeals with respect to this portion of the suit.

It is first argued in appeal that the evidence shows that the notes for Rs. 1,500 were deposited with the Defendant by Kula Kamini Dassi before her death. It is sought to explain the allegation in the plaint that the notes came into the Defendant's hands after the death of the testatrix, by the assertion that the Plaintiff was a Subordinate Judge, who had to live at distant places, in the exercise of his duties, and was not in a position when he filed the plaint, to know the real facts. This excuse, however, is not convincing. The supposition that the notes were deposited before the death of Kula Kamini is based on a statement of the Plaintiff's daughter as to the circumstances under which the notes came into the Defendant's hands. The Plaintiff's daughter is married to the Defendant's son, but has been living for the last five years in her father's house and it is evident from the correspondence that has been produced that she usually lived with her father. In these circumstances it seems to us unreasonable to suppose that when he filed the plaint the Plaintiff should not have ascertained what took place in the presence of his daughter at the time of Kula Kamini's death six years before.

Nor does the statement on which the Appellant relies go very far. It is to the effect that 15 days before her death Kula Kamini made over the notes to the witness's husband who at the same time made them over to the Defendant. This statement may justify the inference that Kula Kamini probably was a party to the handing over of the notes to the Defendant, but a mere inference of probability will not avail against the positive statement in the plaint. Moreover it appears from Ex. 3, a letter written by

GOPAL CHANDRA BOSE v. SURENDRA NATH DUTT.

the Defendant to the Plaintiff in December 1898, that the notes were not a deposit by Kula Kamini. In that letter he says: "There are Government promissory notes for Rs. 1,500 only. I shall take with me the numbers when I go. And during her life-time I took from her Government promissory notes of the nominal value of Rs. 3,500." At that time the parties were on good terms and the Defendant had evidently not conceived the idea of misappropriating the money. If the notes for Rs. 1,500 had been a deposit, like the notes for Rs. 3,500 he would doubtless have said so. We are satisfied that these notes came to the Defendant's hand after the death of the testatrix, as is stated in the plaint, and were not deposited by her. Accordingly the Appellant's first contention fails.

Secondly, it is argued that the case falls under Art. 49 of the second schedule to the Limitation Act, 1877, being a suit for the recovery of specific moveable property wrongfully detained. We think that this contention should prevail. It appears that two years after Kula Kamini's death, the Defendant pledged these notes to a third person. The learned Subordinate Judge has held that this article applies, but that as the possession of the Defendant was unlawful from the time of Kula Kamini's death the suit is barred by time. It is argued that the time will run from the date when the Defendant refused to deliver the notes on the Plaintiff's demand, and that even the fact that the Defendant has unlawfully pledged the notes does not affect the Plaintiff's right to three years' time from the date on which delivery was refused. We think this view is correct and is in accordance with the decision in *Wilkinson* v. *Verity* (1). In that case goods were left in the possession of the Defendant and he sold them. And it was held that the Plaintiff was entitled to sue, at election, either for a wrongful parting with the property, or to wait until there was a breach of the Defendant's duty as bailee of the goods by refusal to deliver them up on request. This is exactly what has happened in this case except that here the goods were not sold, but only pledged and could have been redeemed and restored to the Plaintiff's possession at any time a circumstance which makes the present case stronger than the case referred to. The notes were left in the Defendant's possession by the Plaintiff's permission and his original possession was not unlawful. The evidence shows that he held possession of these notes in trust for the Plaintiff. His possession became unlawful when he detained them, that is to say, when he refused to deliver them up on request. And the fact that the Defendant has parted with the goods and cannot perhaps strictly be said to be detaining them himself is no answer to the suit, under the decision quoted above, in which the Court, approved of the principle that "a man entrusted with property for safe custody cannot better his position by wrongfully parting with possession of it, but must be answerable as if he retained the possession," according to the maxim "*qui dolo desierit possidere pro possidente damnatur.*"

Exs. 7 and 10 show that the Defendant denied liability on the 7th November

(1) L. R. 6 C. P. 206 (1871).

GOPAL CHANDRA BOSE *v.* SURENDRA NATH DUTT.

1902 and the correspondence generally shows that up to that date there was no definite refusal by the Defendant to return the notes. This date is well within three years of the institution of the suit.

We think therefore that the finding of the learned Subordinate Judge that this portion of the claim is barred by limitation cannot be sustained, and as he has found that the Defendant would certainly be liable if the claim were not barred by limitation, it follows that the Plaintiff is entitled to a decree for the whole sum of Rs. 5,000 with interest at the rate allowed by the Subordinate Judge and costs of both Courts. In this Court where the Respondent has not appeared we assess the costs at 150.

N. G. *Appeal allowed.*

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 788 OF 1908.

BRETT, J.
RYVES, J.
1908.
Heard,
13, July.
Judgment,
14, July.

PHANINDRA NATH MITRA, Petitioner,
v.
THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 208 and 347—Commitment to the Court of Sessions under sec. 347 not controlled by sec. 208—High Court's Criminal Appellate jurisdiction—Power to quash commitment to the High Court Sessions.

Sec. 347, Cr. P. C., is not to be read as subject to the provisions of sec. 208, Cr. P. C.; and it is not imperative on the Magistrate after the prosecution has closed its case and the Magistrate has decided to commit the accused for trial to the Court of Sessions in exercise of his powers under sec. 347, Cr. P. C., to allow the accused to cross-examine the witnesses for the prosecution or to call witnesses in his defence.

In re CLIVE DURANT (1) *followed.*

QUEEN-EMPRESS *v.* AHMADI (2), EMPRESS *v.* MUHAMMAD HADI (3) *not followed.*

QUEEN-EMPRESS *v.* SAGAL SAMBA SAJAO (4) *distinguished.*

Quære—*Whether the High Court in the exercise of its ordinary Criminal Appellate jurisdiction, has power to quash a commitment made to it for trial under its Ordinary Original Criminal jurisdiction.*

This was a rule granted on the 9th of July 1908, against the commitment to the High Court of the Petitioner by the Chief Presidency Magistrate of Calcutta for trial on a charge under sec. 124A, I. P. C.

The facts material to the report are briefly as follows:—

The Petitioner was the printer and publisher of a vernacular newspaper called *Jugantar.*

He was convicted by the Chief Presidency Magistrate under sec. 124A of the Indian Penal Code on the 26th day of May 1908 for having published writings in the said paper in its issue of the 9th May and was undergoing rigorous imprisonment for a period of one year and eleven months.

After the said conviction he was again placed before the said Presidency Magis-

(1) Unreported Criminal Cases, Bombay p. 975 (1898).
(2) I. L. R. 20 All. 264 (1898).
(3) I. L. R. 26 All. 177 (1903).
(4) I. L. R. 21 Cal. 642 (1893).

PHANINDRA NATH MITRA *v.* THE KING-EMPEROR.

trate to take his trial under sec. 124A of the Indian Penal Code for articles alleged to have been published and printed by him on the 9th day of May 1908.

The Petitioner alleged in his application to the High Court that being a poor man he could not engage the services of any lawyers from the commencement of his trial, but on the 23rd day of June 1908 after the examination in chief of all the prosecution witnesses had been finished and the prosecution had closed their case a vakil was instructed to appear for him and to ask for an opportunity to cross-examine the prosecution witnesses and also to call witnesses for the defence, 'if necessary,' and that the said vakil, according to instructions, put in a written petition to the above effect, but the Chief Presidency Magistrate summarily rejected the said application refusing to grant the Petitioner an opportunity to cross-examine the said prosecution witnesses or to call witnesses in his defence, and forthwith committed the Petitioner to take his trial at the ensuing Sessions.

Against the commitment order of the Chief Presidency Magistrate, the Petitioner moved the High Court and obtained the present rule.

Messrs. C. R. Das, S. N. Haldar and *Babu Narendra Nath Sett* for the Petitioner.

Mr. Gregory (Standing Counsel) for the Crown.

The JUDGMENT OF THE COURT was as follows:—

The present application is made to us under sec. 215, Cr. P. C., praying that we will quash the commitment made by the Chief Presidency Magistrate to the High Court of the Petitioner, Phanindra Nath Mitra, on a charge under sec. 124A, I. P. C. The grounds on which we are asked to quash the commitment are that the Presidency Magistrate refused to allow the Petitioner to cross-examine the witnesses examined for the prosecution or to cite and examine witnesses in his defence, it being contended that the provisions of sec. 208, Cr. P. C., are imperative and that the Magistrate was in law bound to allow the Petitioner these privileges. It seems that while the witnesses for the prosecution were being cited and examined no attempt was made by the accused to cross-examine them and that the application to cross-examine those witnesses and to cite witnesses for the defence was made to the Presidency Magistrate after the prosecution had closed its case and the Magistrate had decided to commit the Petitioner for trial to the High Court.

The present application is, so far as we are aware, the first of its kind which has been made to this Court in the exercise of its Ordinary Appellate Jurisdiction and it seemed doubtful (to one of us) whether in the exercise of that jurisdiction we had power to quash a commitment made to this Court for trial under its Ordinary Original Criminal Jurisdiction. The practice in somewhat similar cases has been to apply to the Judge exercising the Original Criminal Jurisdiction of the Court. The question of jurisdiction is one of considerable importance but, as the present application is urgent we do not propose to deal with it as we hold that the application must fail on the merits.

PHANINDRA NATH MITRA *v.* THE KING-EMPEROR.

The question which is raised by the application is whether sec. 347, Cr. P. C., is to be read as subject to the provisions of sec. 208, Cr. P. C., so as to render it imperative on a Magistrate after he has decided to commit an accused for trial to the High Court to allow him to cross-examine the witnesses for the prosecution and to call witnesses, in his defence. In our opinion the question must be answered in the negative, and in this view we are supported by a decision of the Judges of the Bombay High Court in the case, *In re Clive Durant* (1). Sec. 347 distinctly lays down that when a Magistrate has made up his mind to commit an accused for trial "he shall stop further proceedings." The section occurs in Chap. XXIV which lays down the general provisions as to inquiries and trials and its provisions cannot be held to be governed by the provisions of Chap. XVIII of the Code which lay down the procedure to be ordinarily followed up to the time when the Magistrate decides to commit.

The attention of the learned Judges of the Allahabad Court who decided the cases of *Queen-Empress* v. *Ahmadi* (2) and *Emperor* v. *Muhammad Hadi* (3), to which we have been referred, does not appear to have been invited to the provisions of sec. 347, Cr. P. C., and the case of *Queen-Empress* v. *Sajal Samba Sajao* (4) is clearly distinguishable from the present as in that case the point determined was that the depositions of witnesses, whom the accused had not been allowed to cross-examine before the committing Magistrate, were not admissible in evidence in the Sessions Court.

We therefore decline to interfere and dismiss the application.

B. C. *Rule discharged.*

(1) Unreported Criminal Cases, Bombay, p. 975 (1898).
(2) I. L. R. 20 All. 264 (1898).
(3) I. L. R. 26 All. 177 (1903).
(4) I. L. R. 21 Cal. 642 (1893).

CRIMINAL REVISIONAL JURISDICTION.

REV. No. 748 OF 1908.

BRETT, J.
RYVES, J.
1908.
24, July.

ISHWAR CHANDRA GHOSHAL, Petitioner,
v.
THE EMPEROR, Opposite Party.

Indian Penal Code (Act XLV of 1860), sec. 175—Omission to 'produce document' by an accused on trial—Criminal Procedure Code (Act V of 1898), sec. 94.

The provisions of sec. 94, Cr. P. C., cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document.

Where an accused, while on his trial for offences under secs. 471 and 193, I. P. C., being directed to produce a certain incriminating document, did not produce the document and in consequence the prosecution against him failed,

Held—*The accused could not be convicted under sec. 175, I. P. C., for his omission to produce the document.*

This was a rule granted on the 1st of July 1908, against an order of M. Yusuf Ali, Deputy Magistrate of Purulia, dated the 16th of June 1908, convicting the Petitioner under sec. 175, I. P. C., and sentencing him to undergo 2 months' simple imprisonment.

The material facts appear from the judgment.

THE
Calcutta Weekly Notes.

Vol. XII.] MONDAY, SEPTEMBER 7, 1908. [No. 43

Contents.

NOTES.

High Court Notice.

ORIGINAL SIDE.

The undermentioned principal officers will be on duty during the vacation.

Applications for special appointments for the hearing of urgent chamber applications throughout the vacation save between the 1st and 15th October next should be made in writing to the master.

Mr. J. H. Hechle,
2, Short Street.

Applications for special appointments for the hearing of urgent matters other than Chamber applications as abovementioned should be made in writing from 26th August up to Thursday the 3rd September next both days inclusive to

Mr. Maurice Remfrey.

From 4th September up to 18th September next both days inclusive to

Babu Gopal Chandra Dass,
13, Duff Street.

From 19th September up to the end of the vacation to

Mr. Maurice Remfrey,
5, Rawdon Street.

APPELLATE SIDE.

The following rules having been framed by the High Court of Judicature at Fort William in Bengal are published for general information.

By order of the High Court,
A. P. Muddiman,
Registrar.

High Court,
The 26th August 1908.

14th August 1908.—It is ordered that the following rule be inserted after Rule VII, Part II, Chap. XIII, p 85, of "The rules of the High Court, Calcutta, Appellate Side," published in part I, pp. 1523 to 1583 of the *Calcutta Gazette* of the 19th November 1902 :—

VIII. In cases in which an accused person makes an application to the High Court for the transfer of his case from one Court to another, the accused person, or the vakil or counsel acting on his behalf, shall file with the application a duplicate copy of the notice given to the Legal Remembrancer in accordance with the provisions of sec. 526, cl. (6) of the Code of Criminal Procedure, and such notice must bear the signature of a responsible officer in the office of the Legal Remembrancer, acknowledging receipt of the notice and noting the time of receipt.

17th June 1908 —It is ordered that the following rule be substituted for Rule V, Part II, Chap XIII, p. 85 of "The rules of the High Court, Calcutta, Appellate Side," published in Part I, pp 1523 to 1584 of the *Calcutta Gazette* of the 19th November 1902 :—

V. In cases in which the correctness, legality or propriety of the finding, sentence, or final order of a Criminal Court is under consideration by a Division Court for the purposes of Revision, no copy of the record of the evidence shall be made for the use of the Division Court, unless the Division Court shall specially direct this to be done.

We draw attention to the decision of the Privy Council in *Pandit Gaya Prosad Tewari* v. *Sardar Bhagat Singh* reported at p 1017 of this number. Their Lordships lay down that a person who gives information to the police which results in a prosecution cannot escape liability for damages for malicious prosecution by merely saying that the prosecution was started by the police and not by him, and that the real question in such cases is who was the prosecutor. Very recently we reported two decisions of the Calcutta High Court which lay down the law in almost identical terms. Vide *Hari Charan Sant* v. *Kailash Chandra Bhuyan*, 12 C. W. N. 313, *Bhul Chand Patro* v. *Palun Bis*, 12 C. W. N. 318.

In the case of *Phanindra Nath Mitra* v. *The King-Emperor*, a report of which appeared at p. 1014 of the current volume, their Lordships Brett and Ryves, JJ, held that the provisions of sec. 347 of the Criminal Procedure Code are not controlled by the provisions of sec. 208, Cr. P. C. The chief reason assigned for this view is that sec. 347 "occurs in Chap. XXIV which lays down the general provisions as to inquiries and trials and its provisions cannot be held to be governed by the provisions of Chap. XVIII of the Code which lay down the procedure to be ordinarily followed up to the time when the Magistrate decides to commit." It is difficult to follow the reasoning of the above observation. If their Lordships mean that the provisions of the sections in Chap. XXIV apply to all enquiries

and trials, whether the cases be summons cases or warrant cases or Sessions cases, or the trials be regular or summary, then it does not necessarily follow that the provisions of any of the sections in the chapter cannot be read with or subject to other sections in other chapters which specifically deal with procedures that have to be followed at particular stages of a trial. General provisions have to be read as subject to particular provisions unless there is something repugnant in the context.

SEC. 347 LAYS DOWN THAT WHEN AT ANY STAGE OF any enquiry or trial it appears to the Magistrate that the case is one which ought to be tried by the Court of Sessions or High Court, "he shall stop further proceedings and commit the accused under the *provisions hereinbefore contained.*" Their Lordships evidently overlook the words italicised by us and referring only to the words "he shall stop further proceedings," hold that as soon as it becomes apparent to the Magistrate that the case should be tried by the Court of Sessions or the High Court, the Magistrate ought to stay his hands and forthwith commit the accused. The fallacy of this view will be apparent if we take some specific cases. Suppose in a case which the Magistrate has begun to try in a summary manner, it appears to the Magistrate after the examination of the complainant that the offence disclosed is one which ought to be tried by a Court of Sessions or the High Court. What is the Magistrate to do then? Is he to commit the accused forthwith without following any part of the procedure laid down in the Code preliminary to commitment? We do not think that this was ever the intention of the Legislature. In fact the provision "commit the accused under the provisions hereinbefore contained" clearly indicates that the procedure laid down by the Legislature in Chap. XVIII, sec. 208, has got to be followed by the Magistrate.

WHEN THE MAGISTRATE *at or before* THE COMMENCEMENT of a trial is of opinion that the case ought to be tried by the Court of Sessions or High Court, he is bound to adopt the procedure laid down in sec. 208 and the following sections, *vide* sec. 207. But when after the commencement of a trial, it appears to the Magistrate at any stage of the case, be it even the very first stage, that the case is one which should be tried by a Court of Sessions or High Court, is it reasonable to suppose that it at once becomes incumbent upon the Magistrate to commit the accused. From sec. 207 and the following sections it is evident that the law provides various opportunities to the accused by the cross-examination of the prosecution witnesses and the examination of defence witnesses to show to the Magistrate that there is no case for commitment. Why should similar opportunities be denied to the accused when the Magistrate changes his mind in the course of the trial and proceeds to commit him to the Sessions. The fact that when the Magistrate commenced the trial, he was of a different opinion seems to be all the more reason why opportunity for cross-examination and examining witnesses should be given. The concluding words of sec. 347 (1), namely, "commit the accused under the provisions hereinbefore contained" seem to be conclusive that it is the intention of the Legislature that when the Magistrate wants to commit an accused under sec. 347, Cr. P. C., he must follow the procedure laid down in Chap. XVIII of the Code.

TWO BILLS, SAYS THE *Law Journal*, ARE BEFORE the House of Commons which, if passed, will make very great changes in the law as to homicide. The Law of Murder Amendment Bill makes the following proposals, said to be based on the report of the Capital Punishment Commission of 1866 and in accord with the legislation of many of the United States and some British possessions:—

1. To limit capital punishment to murder in the first degree, *i.e.*, committed 'with express malice aforethought,' and to amend sections 1 and 2 of the Offences Against the Person Act 1861, accordingly.

2. To punish murder in the second degree, *i.e.*, with implied malice aforethought, by penal servitude for life as a maximum.

CURRENT INDIAN CASES.

HAJI SAGAN *v.* N. C. MACLEOD, I. L. R. 32 Bom. 321. *Insolvency proceedings—Withdrawal of petition.*

Where a suit was brought by the official assignee when the insolvency proceedings were in force, *held* that an order subsequently allowing the withdrawal of the insolvents' petition has not the effect of divesting the official assignee and revesting the property in the insolvents.

MAHANT BIHARIDASJI *v.* PARSHOTAM DAS, I. L. R. 32 Bom. 345. *Civil Procedure Code, sec. 373.*

Where the Plaintiff did not ask for leave to withdraw from a suit unless accompanied with liberty to bring a fresh suit, *held* that if the Court considered that it ought not to give that liberty it ought to have simply dismissed the application.

DURBAR *v.* KHACHAR, I. L. R. 32 Bom. 348. *Mitakshara law—Decree against a father, when not enforceable against son.*

A decree against a Hindu father for damages to Plaintiffs' property caused by the erection of a dam was held not to be enforceable against the son when the estate came to his hand inasmuch as the action of the father was a wrongful one.

MAGNIRAM *v.* LAXMI NARAYEN, I. L. R. 32 Bom. 353. *Settlement of account.*

The following rule laid down by the Privy Council (*McKellar* v. *Wallace*, 8 M. I. A. 372 at p. 395) was followed in this case :—"If persons meet and agree, not to ascertain the exact balance; but agree to take a gross sum as the balance . . . . it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise."

LAKSHMANDAS *v.* AUNA, I. L. R. 32 Bom. 356. *Civil Procedure Code, sec. 586—Second appeal—Contract Act sec. 231.*

In a suit for specific performance of a contract of sale and for possession of a bungalow, or failing, a sum of Rs. 400 as damages, the first Court rejected the prayer for specific performance but awarded Plaintiff Rs. 400 as damages together with Rs. 50 earnest money deposited: *Held* that a second appeal lay.

Sec. 231 of the Contract Act must be interpreted in the light of the preceding and succeeding sections of the Act.

JANKI PRASAD *v.* BALDEO, I. L. R. 30 All. 169. *Contract Act, secs. 69, 70—Voluntary payment.*

Where Plaintiffs' purchase was held to be fictitious in a suit under sec. 283, C. P. C. and thereupon they paid the decretal amount, *held* that they were not entitled to recover the money from their vendors.

LACHMAN DAS *v.* APPRAKASH, I. L. R. 30 All. 169. *Arbitration—Reference.*

The omission to fix a day for the delivery of an award in an order of reference to arbitration made by a Court makes all subsequent proceedings invalid.

MUNIR-UN-NISSA *v.* AKBAR KHAN, I. L. R. 30 All. 172. *Limitation Act, Sch. II, Art. 132.*

Art. 132 of Sch. II of the Limitation Act applies to a suit for the enforcement of the payment of purchase-money by sale of the purchased property.

NITARAM *v.* THE SECRETARY OF STATE, I. L. R. 30 All. 176. *Land Acquisition Act I of 1894.*

"In our judgment land which is not a house, manufactory or building cannot be considered as a part of the 'house, manufactory or building' within the meaning of sec. 49 of Act No. I of 1894." (*Per* BANERJEE and RICHARD, JJ.)

SHEO PRASAD *v.* INDAR BHADUR, I. L. R. 30 All. 179. *Limitation Act, Sch II, Art. 179.*

Where process fees were paid but no application was made to the Court to do anything, *held* that that did not give a fresh start of limitation within the meaning of Art. 179 of Sch. II of the Limitation Act.

SHAHBAZ *v.* UMRAO, I. L. R. 30 All. 181. *Slaughter of kine.*

Slaughter of kine by Mahomedans is not illegal except under certain limitations.

Acts calculated to offend the sentiments of a class do not necessarily amount to a public nuisance.

THAKUR PRASAD *v.* GAURIPAT RAI, I. L. R. 30 All. 188. *Loan on behalf of a minor—Interest.*

A Judge in granting sanction to raise a loan on behalf of a minor should state in the sanction the rate of interest. If there is no mention of interest only reasonable interest can be allowed.

GULZARI *v.* KABIR-UN-NISSA, I. L. R. 30 All. 191. *Civil Procedure Code, sec. 562—Remand order—Appeal.*

Where a suit has been decided in compliance with an order of remand under sec. 562, C. P. C., no appeal lies against the order of remand.

Review.

THE CODE OF CIVIL PROCEDURE. Being Act No. V of 1908 with a commentary. *By J. O'Kinealy and R. F. Rampini, M. A., L. L. D. Revised and brought up-to-date by Harry Stokes, Barrister-at-law and Advocate, High Court, Bengal. Vol. I. New Edition, Calcutta S. K. Lahiri & Co., 54 College Street. 1908.*

Mr. Justice Rampini's edition of O'Kinealy's Code of Civil Procedure has for many years been the standard work of reference on the subject. The new Code will come into operation from the beginning of next year and we are glad to observe that the young and energetic editor and the enterprising publishers of this work are hard at work adapting the notes to suit the arrangement and amendments in the new Code. The present volume contains, the Statement of Objects and Seasons, Report of the Select Committee, comparative table of sections of old and new Codes, a plain copy of the new Code showing on the margin the corresponding sections of the old Code and the text of the section portion with commentaries. There are also the usual table of contents, table of cases and the subject index. In the commentaries, the references to the authorities have in this edition been separated from the text and relegated to the foot-notes. Endeavour has been made to split up the mass of notes into separate paragraphs. All these are innovations which will

surely facilitate reference. The references, we are assured, have also been checked and verified by Babu Digambar Chaturji, Vakil, High Court. The printing and the general get up of the work are excellent and altogether praise worthy. The notes we may add have been brought up-to-date, and at places re written. We trust the second volume will also be ready before the Act comes into force.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ CRIMINAL REVISION No 849 OF 1908. MADHO LAL, Petitioner, *v.* THE EMPEROR, Opposite Party. 20th August 1908.

Arms Act, sec 19, cl. (f)—Servant's possession of a master's gun—Whether an offence.

The Petitioner was found with a gun in a village K at 6 o'clock one morning and a head constable who went there on hearing the report of a gun found the Petitioner reloading the gun and he also found some powder, shot and caps by the side of the Petitioner. The defence of the Petitioner was that the gun belonged to his master and that the master was at that time in the village. But the lower Court found on evidence that the master was not in that village at all but in a different village and that the Petitioner was using the gun for his own purpose and that the gun had been lent to him by his master. The Petitioner was accordingly found guilty under sec. 19, cl. (*f*) of the Arms Act and fined Rs. 25 in a summary trial. He obtained the rule for setting aside the conviction and sentence.

Their Lordships observed :—

"In support of the rule it has been argued that the possession of the accused of the gun at that time, at that place was really a possession on behalf of his master and therefore no offence was committed and in support of this contention we have been referred to three cases."

Their Lordships distinguished the three cases reported in 3 C W. N. 394, I L. R. 35 Cal. 219 and I. L. R. 22 All. 118 and went on to observe: "He (the Petitioner) was himself in possession of the gun and was using it and he had no license for the same. The fact that his master had a license and the gun belonged to his master would not be sufficient to excuse the accused for the possession and use of the gun in the manner in which it is proved to have been used in this case."

Babu Atulya Charan Bose **for the Petitioner.**

Rule discharged.

CIVIL APPELLATE JURISDICTION. Before HOLMWOOD and SHARFUDDIN, JJ. APPEAL FROM APPELLATE DECREE No. 658 OF 1905. BANDHU ACHARJEE AND OTHERS, Appellants *v* NATTA BEHAR SINGH AND ORS, Respondents. 20th August 1908.

Regl. VII of 1822, sec. 10, cls. 3, 4 and 5 and cls. 7 and 8 difference between—Puttidari *and* bhayachary *tenure.*

On the 16th July 1894, the Plaintiff, Respondent purchased at a sale held by the Collector of Puri under Act, VIII of 1868 (B C) a *tanki* tenure, Trilochanpur, which bore Touzi No. 9 on the Collectorate Rolls of that district. On the 21st September 1900, the Plaintiff commenced the action out of which the appeal arose for ejectment of 168 persons upon the allegations that they were the defaulting *tankidars*, that their interest in the property had passed at the sale and that in spite of delivery of possession to the Plaintiff under sec. 29 of Act XI of 1859 they had not only continued in actual occupation but had in the course of the recent settlement proceedings got themselves registered as the persons in possession. The Defendants resisted the claim on various grounds amongst which they challenged the title of the Plaintiff, questioned the frame of the suit and denied that their own titles had been in any way affected by the sale. The Courts below over-ruled those objections and made a decree in favour of the Plaintiff The Defendants appealed to the High Court and on the 17th April 1907, the case was remanded for a finding after the taking of such further evidence as might be necessary as to whether the settlement of the *tanki* tenure in suit in 1841 was made under the provisions of cls. 3, 4, and 5 or under the provisions of cls. 7 and 8 of sec. 10 of Reg. VII of 1822.

Held—That in the case of a settlement under cls. 3, 4 and 5 the settlement is made with a Sudder Malguzar who represents all the persons interested in the property and his default makes the entire tenure liable to sale unless there is a provision to the contrary in the settlement. In the case of a settlement under cls. 7 and 8 there is a settlement with a selected person as Sudder Mulguzar, but his default does not make the entire tenure liable to sale unless there is a specific provision to the contrary in the settlement. Cls. 7 and 8 can only be used in the case of cultivating proprietors holding under a *puttidari* or *bhayachary* tenure or the like

Ram Govind Roy v. *Syed Kushuffudeza* (14 W. R. 1) referred to.

Babu Provas Chandra Mitra for the Appellants.

Babu Ram Chandra Mozumdar for the Respondents.

A. T. M. ***Appeal dismissed.***

ISHWAR CHANDRA GHOSHAL *v.* THE EMPEROR.

Babu Jyoti Prosad Sarbadhikari for the Petitioner.

No one showed cause against the Rule.

THE JUDGMENT OF THE COURT was as follows:—

No body appearing to oppose the rule, we think it must be made absolute.

It appears that the accused while on trial for offences under secs. 471 and 193 of the Indian Penal Code was directed to produce a certain rent receipt which had been filed in a Civil suit by him or on his behalf and which had been returned. The document was not produced and in consequence the prosecution against the accused for offences under secs. 193 and 471, I. P. C, was abandoned and the accused was discharged, as in the absence of the receipt there were no materials on which to prove the charges against him. Thereafter the case in respect of which the present rule was issued was instituted against the accused under sec. 175 of the Indian Penal Code for intentionally omitting to produce the receipt which he was legally bound to produce. The defence of the accused was that he had handed over the receipt to his muktear to produce it in Court but the muktear had suddenly died and the receipt could not be found. This story was disbelieved and the Magistrate convicted the accused of an offence under sec. 175, I. P. C., and sentenced him to two months' simple imprisonment.

This rule was subsequently obtained by the present Petitioner, the accused, calling upon the Deputy Commissioner to show cause why the conviction and sentence passed on the Petitioner under sec. 175, I. P. C., should not be set aside on the ground that the Magistrate erred in law in convicting the Petitioner under sec. 175 and that upon the facts proved, the conviction was not warranted by law.

In our opinion the conviction cannot stand. The provisions of sec. 94, Cr. P. C., cannot be taken to apply to the case of an accused person on his trial to whom a notice has been issued to produce an incriminating document.

The learned vakil who has appeared to support this rule contends that to hold otherwise would be to go contrary to the principles laid down in the Code of Criminal Precedure in secs. 342 and 343 amongst others. We think the contention is sound and are of opinion that the omission on the part of the accused, the present Petitioner, to produce the document, supposing that there was such as omission, was not an act sufficient to constitute an offence punishable under sec. 175, I. P. C.

We therefore make the rule absolute, set aside the conviction and sentence passed on the present Petitioner and against him and direct that he be discharged.

B. C.

PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.]

LORD ROBERTSON.	PANDIT GAYA
LORD ATKINSON.	PARSHAD TEWARI,
LORD COLLINS.	Appellant,
SIR ANDREW SCOBLE.	*v.*
SIR ARTHUR WILSON.	SARDAR BHAGAT
1908.	SINGH and another,
31, July.	Respondents.

Malicious prosecution, suit for—Information to police—Prosecution by police, insti-

gated and conducted by private individual—Real prosecutor liable—Question of fact—Malice.

A suit for damages for malicious prosecution may lie against a person who makes a false report which results in a prosecution or who instigates the police to send persons up for trial or who conducts the case against those persons when sent up for trial.

The question in all cases of this kind must be—who was the prosecutor? And the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion. The conduct of the complainant before and after making the charge must be taken into consideration. Nor is it enough to say that the prosecution was instituted and conducted by the police.

Whether or not in any case, the prosecution was instituted and conducted by the police is a question of fact.

The foundation of the action is malice and malice may be shown at any time in the course of the enquiry.

If a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution.

NARASINGA ROW v. MUTHAYA PILLAI (1) *considered.*

This was an appeal from a decree of W. F. Wells, Esq., of the Court of the Judicial Commissioner of Oudh, dated the 14th December 1905, which reversed a decree of the Court of S. Ahmad Husain, Esq., Subordinate Judge of Bahraich, dated the 31st July 1905.

The principal question involved in the appeal was whether, on the facts found, the Respondents were liable in law to an action for damages for malicious prosecution.

The circumstances under which the litigation arose are these: In the Kapurthala Estate is a village called Shukulpurwa. In the Rampur Mathura Estate is a village called Keora. Between these two villages flows the River Ghoora. The Respondent, Sardar Bhagat Singh, was the Munsarim, and the Respondent, Imamuddin Shah, was the Kanungo of the Boundi division of the Kapurthala Estate, in which the village of Shukulpurwa is situate. The Appellant was, in the year 1902, naib or manager of the Rampur Mathura Estate.

On the 28th October 1902, Imamuddin Shah reported to the Inspector of Boundi that on that day seven or eight hundred men of the Rampur Mathura Estate had entered the village of Shukulpurwa, cut and carried away the crops of certain lands and stolen other crops and property belonging to the tenants.

On the 29th October 1902, the Inspector made an order for Bhagat Singh to inquire and report. On the 30th October 1902, he submitted a report, upon which orders were passed that proceedings should be taken under sec. 145 of the Code of Criminal Procedure.

On the 2nd November 1902, an application was also made on behalf of the Kapurthala Estate under sec. 107 of the Code of Criminal Procedure to the

(1) I. L. R. 26 Mad. 362 (1902).

PANDIT GAYA PARSHAD TEWARI v. SARDAR BHAGAT SINGH.

Deputy Collector of Bahraich, who sent the application for inquiry by the Inspector of Police at Fakhrpur. Certain persons named in the petition were charged, and the Appellant's name was not mentioned. Before the Police, Bhagat Singh and Imamuddin conducted the prosecution with the result that the Inspector of Police sent the Appellant and the other accused persons for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a barrister instructed by Bhagat Singh and Imamuddin Shah. These proceedings terminated by an order made by the Magistrate on the 15th July 1903, acquitting the Appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the Respondents.

The Appellant on the 14th July 1904 instituted the present suit in the Court of the Subordinate Judge of Bahraich, claiming damages from the Respondents for malicious prosecution.

The written statement in defence resisted the claim on the following amongst other grounds:—(a) That Defendants did not institute any criminal prosecution, and were mere witnesses for the prosecution. (b) That Defendants as witnesses were justified in making the statements they did in the Criminal Court, and no suit can legally be brought against them. (c) That prosecution was not malicious and without reasonable and probable cause, nor did it arise from any illegitimate motive.

On the pleadings the Subordinate Judge fixed several issues of which the following only are material:—

"1. Was any report made to the police, or any complaint lodged by the Defendants against the Plaintiff, and did Defendants or any of them prosecute him on the charge of riot?

"2. Was the prosecution malicious?

"3. Was it without reasonable and probable cause?"

After recording evidence, both oral and documentary, the Subordinate Judge delivered judgment on the 31st July 1905. He decided that although the names of the Respondents did not appear on the face of the criminal proceedings, yet that in fact they were the prosecutors, that they had "concocted and fabricated false evidence to get the Appellant charged with rioting," that there was no reasonable and probable cause for the prosecution; and that the Respondents had acted maliciously. He accordingly made a decree in favour of the Appellant, awarding him the sum of Rs. 6,082-8-0 as damages, and the costs of the suit.

Against the said decree the Respondents appealed to the Court of the Judicial Commissioner of Oudh, and on the 14th December 1905, the second additional Judicial Commissioner delivered judgment in the said appeal. On the authority of the cases of *Narasinga Row* v. *Muthaya Pillai* (1) and *Dudh Nath Kandu* v. *Mathura Prasad* (3), he with hesitancy decided that no one but a person who has made a formal complaint or application for process to a Court can be sued for damages for malicious prosecution. On the merits he said: "I am disposed to believe that the Sub-Inspector did institute a charge under sec. 147 at the

(1) I. L. R. 26 Mad. 362 (1902)

(3) I. L. R. 24 All. 317 (1902).

PANDIT GAYA PARSHAD TEWARI v. SARDAR BHAGAT SINGH.

instigation of Bhagat Singh and not of his own motion, that the charge was found false by the Magistrate who tried the case, and that the evidence on the record produced by the Appellants is not such as to incline me to believe it to have been proved." He accordingly made a decree dismissing the suit, but without costs.

Special leave was granted to the Appellant by two Judges of the Court of the Judicial Commissioner (L. G. Evans, Esq., and E. Chamier, Esq.), under sec. 595; cl. (c) of the Code of Civil Procedure, on the ground of the importance of the question of law raised, and on the ground that the question of law had been wrongly decided, and that the decision was opposed to the authority of the Bombay High Court.

Mr. Leslie DeGruyther, K. C., for the Appellant argued that the judgment of the Court below could not be sustained and that the law as applied by that Court was wrong. On the facts found by both the Courts the judgment of the Subordinate Judge was good. He stated that the amount of damages was assessed on a novel principle. Only the actual costs incurred were allowed.

No one appeared for the Respondents.

THEIR LORDSHIPS' JUDGMENT was delivered by

SIR ANDREW SCOBLE.—This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the Plaintiff being manager of the Rampur Mathura estate, and the Defendants being respectively Munsarim and Kanungo of the Boundi division of the Kapurthala estate. The case arose out of a dispute regarding the ownership of some alluvial land lying between the two estates; and the charge was that the Plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902, but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all," and adding:

"I consider Kapurthala estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints."

The Plaintiff thereupon brought this action, claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by the evidence in the case, that the two Defendants have concocted and produced false evidence to get the Plaintiff charged with the crime," and he gave the Plaintiff a decree for Rs. 6,082 8 0 damages and the costs of the suit. The Judicial Commissioner on appeal, on the autority of the case of *Narasinga Row* v. *Muthaya Pillai* (1), dismissed the suit, holding that "if the police or magistracy decide to act on information given by a private individual without a formal complaint or application for process, the Crown becomes the prosecutor and not the individual"; but he added:

"I may say that, having studied the documentary evidence to which my attention was drawn, and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under sec. 147 at the instigation of Bhagat Singh and not of his own motion; that the charge was found false by the

(1) I. L. R. 26 Mad. 362 (1902).

Magistrate who tried the case; and that the evidence on the record produced by the Appellants is not such as to incline me to believe it to have been proved.'

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms:—

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first Defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the Plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the Plaintiff. The Defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be—Who was the prosecutor? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India, a private person may be allowed to conduct a prosecution under sec. 495 of the Criminal Procedure Code, which provides that "any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police . . . . . Any person conducting the prosecution may do so personally or by a pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry. As Bramwell, B., observes in *Fitz John* v. *Mackinder* (2):

"This action is not for damages, in respect of

(2) 9 C. B., N. S. 505 at p. 522 (1861).

PANDIT GAYA PARSHAD TEWARI *v.* SARDAR BHAGAT SINGH.

the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. . . . Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, Cockburn, C. J., says (at p. 531):

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bonâ fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November 1902 an application was made to the Deputy Collector of Bahraich for an investigation by the police of a charge of unlawful assembly against eight persons of whom the Plaintiff was not one. The investigation was entrusted to Izhar-ul-haq, a Sub-Inspector of Police, who says:

"I summoned the Plaintiff because Bhagat Singh gave me a list of accused persons containing Plaintiff's name. . . . When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Parshad's name. How was it that the Defendant had mentioned his name . . . ? And then Bhagat Singh said that the chief cause of riot was the Plaintiff; so he gave the Plaintiff's name in the list, and that he would be summoned."

This makes it clear that Bhagat Singh was directly responsible for any charge at all being made against the Plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the police and in the Magistrate's Court; and the learned Counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Parshad "joined the riot." As already mentioned, the Magistrate found that there was no riot at all, and that on the day on which it was alleged to have occurred, the Appellant was ill at Lucknow. The charge was a false one to the knowledge of the Respondents, and they must abide the consequences of their misconduct.

In granting leave to appeal to His Majesty in Council, the learned Judicial Commissioners say:

"It is difficult to overestimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who makes a false report which results in a prosecution, or who instigates the police to send persons up for trial under sec. 170 of the Code of Criminal Procedure, or who conducts the case against these persons when sent up for trial."

And they add:

"All these are circumstances which occur perhaps daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the ap-

Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh.

peal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed. The Repondents must pay the costs of the appeal.

Solicitors: *Messrs. Sanderson, Adkin, Lee & Eddis* for the Appellant.

Appeal allowed with costs.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

OLD EQUITY SUIT.

WOODROFFE, J. 1908. 8 & 22, June. } KRISTA CHANDRA GHOSE *v.* KRISTA SAKHA GHOSE.

*Receiver—Lease—Application to set aside—Summary jurisdiction—*Pro interesse suo *—Receiver's account—Action—Practice.*

No summary order can be passed to set aside a lease already executed and granted by a Receiver. The proper remedy of the aggrieved parties is to institute a regular suit to set aside the lease against the Receiver and also the lessee, if it is alleged that the lease was obtained by collusion.

SURENDRA KESHAB ROY v. DURGA SUNDARI DASSEE (1) *distinguished.*

No order can be made against a lessee from a Receiver for arrears of rent or interest in an application in a suit. A regular suit ought to be instituted to recover them.

The claims against a Receiver for giving up arrears of rent or interest due under a lease granted by him are matters which cannot be dealt with in an interlocutory application in the suit.

Quære, *whether the Court can go into such matters on the passing of the Receiver's accounts or the parties must file a suit in respect of them against the Receiver.*

(1) I. L. R. 15 Cal. 253 (1888).

Motion on notice.

Raja Raj Krista died on the 19th August 1823 leaving a Will whereof Krista Chandra Ghose and Krista Sakha Ghose were two of the executors. On the 22nd May 1834, Krista Chandra filed this suit against other executors and the heirs of Raja Raj Krista for administration and partition of the estate left by him, for appointment of a Receiver and other reliefs. By an order, dated the 16th September 1836, the then Receiver of the Supreme Court was appointed Receiver of the estate. Although, so far back as the 10th April 1838, a decree was made declaring the shares of the heirs of Raja Raj Krista and a commission of partition was directed to issue, a large portion of the estate, including a certain zemindari known as *Gangamandal*, still continued to be in the hands of the Receiver of the High Court, unpartitioned. These causes have, from time to time, as occasion arose, been revived in the names of the heirs or representatives of the parties who happened to die or relinquish their right, title or interest in favour of others. The present applicants were brought on the record in the place of their predecessors in title, who were parties to the suit, by an order dated the 12th November 1902.

By an order, dated the 5th March 1906, the Receiver was given liberty, *inter alia*, "from time to time, without further order of the Court, to lease the said estate, for a term not exceeding six years, on such terms as to such Receiver may seem reasonable."

KRISTA CHANDRA GHOSE v. KRISTA SAKHA GHOSE.

Under the above order, the Receiver granted, for a term of 6 years, a lease of *Gangamandal* at a yearly rental of Rs. 64,500 to Raja Benoy Krista, one of the parties to the suit, which was to expire on the 11th April 1908. Before the expiry of the term and sometime in the month of November 1907 the applicants offered to the Receiver to take a lease of *Gangamandal*, after the expiration of the then lease, at an enhanced rental and requested him not to lease the same out without notice to the parties to the suit. But, the Receiver, on the 7th January 1908, before the expiration of the existing lease, and without any notice to the other parties to these suits, by an indenture of lease, demised *Gangamandal* for a term of six years, the said period to run from the said 11th April 1908, *i.e.*, the expiration of the prior lease, at the same yearly rental of Rs. 64,500 to the same lessee Raja Benoy Krista.

Not being aware of the grant of this lease, the applicants on the 11th February 1908 wrote to the Receiver offering "to take the lease of *Gangamandal* for six years at an increase of Rs. 10,000 over the present yearly rent"—to which, after some correspondence, the Receiver on the 6th March 1908 replied informing the applicants that he was not in a position to accept their offer.

The applicants further charged the Receiver with having failed and neglected to enforce the terms of the old lease against Raja Benoy Krista in respect, specially, to realising from him the interest payable by him pursuant to the terms of the lease on the rent, when the same was not paid in on the due date of payment.

Thereupon the present application was made, upon notice to the parties, for an order :—

(*i*) That the lease of the 8th January 1908 granted by the Receiver to Raja Benoy Krista be held to be invalid as against the applicants and that a lease of *Gangamandal* be granted after due advertisement so as to secure larger rental in the interests of the estate ; and,

(*ii*) That the Receiver be directed to realise all sums due for interest from the said lessee Raja Benoy Krista or he do personally make good the losses sustained by the estate in that behalf.

The first part of the application came on for hearing on the 8th June 1908.

Mr. A. Chaudhuri for the Applicants.

Mr. B. Chakravarti for some of the parties, representing about half the estate, in support of the application wanted time to file affidavits.

The Advocate-General (*Mr. S. P. Sinha*) for the lessee, Raja Benoy Krista, raised the preliminary objection that the lease having already been completed, the contract must be taken to have been concluded and that the Court had no power to interfere in the summary procedure adopted by the applicants. A regular suit was the proper remedy.

Mr. Chakravarti, in reply. Cases of *pro interesse suo* are not cases of contract. All the parties, including the lessee, were before the Court. The property is under the control of the Court through its Receiver. He relied on, *Surendra Keshab Roy* v. *Durga Sundari Dassee* (1).

Mr. A. Chaudhuri in reply, referred to Woodroffe on Receivers, pp. 220 221.

(1) I. L. R. 15 Cal. 253 (1888).

KRISTA CHANDRA GHOSE *v.* KRISTA SAKHA GHOSE.

The Advocate-General cited, *De Winton* v. *Mayor of Breckon* (2).

Mr. Rasul, for some of the parties adopted the argument of the Advocate-General.

THE JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—The Advocate-General appears on behalf of the lessee Rajah Benoy Krista Deb to whom the Receiver has leased the property, the subject of this application, and takes a preliminary objection that this application cannot be entertained and that the lease having been already executed, no summary order can be passed such as is asked for here. On the other hand, reliance is placed upon cases in which the parties were allowed to appear *pro interesse suo*; but these cases do not apply, because, there the question arose on the application of third parties aggrieved by the Court's action through its Receiver and the Court grants such an application by reason of the control it necessarily has over its Receiver's action. This is not a case of that kind. I am not asked in this matter to control the action of the Receiver, because the Receiver has already done that which is complained of and has conveyed the property into the hands of the lessee, a third party, to whom the Receiver, under the order giving him authority to do so, granted a lease which has been completed and under which possession has been given. Admittedly, in this case, the lessee is also a party to the suit; but, although he is subject to the jurisdiction of the Court as a party, he is not subject to its jurisdiction as lessee. This is not a case in which the matter rests on an agreement which has not been carried out and in which the Court may interfere to prevent its Receiver giving effect to the proposed agreement. This is a case in which the matter has passed out of the stage of agreement and has resulted in a conveyance of the property to the lessee. As long as that lease stands, the property must be taken to be in the lessee and I do not think that I can, on this application, set aside that lease.

The course open to the applicant appears to me by proceeding by suit against the Receiver, and also, if it is alleged that the lease was granted and obtained by collusion, against the lessee. In the case cited in *Surendra Keshab Roy* v. *Durga Sundari Dassee* (1), the Court was asked to control the action of the Receiver and to enforce the applicant's right to have a lease for which a contract had been entered into; and in the English cases therein cited, the matter still rested in contract and an order was made directing enquiry as to damages against the lessee who had repudiated the contract, and, in the other case, the Receiver had parted with money without the authority of the Court and so was the Court's money ordered to be paid back. But here, unless the lease is set aside, the interest is not that of the Court or of the parties, but of the lessee.

Under these circumstances, the application appears to me to be not entertainable and must be dismissed.

I need only add that, had the preli-

(2) 28 Beav., 200, per Romilly, M. R., at p. 203 (1860).

(1) I. L. R. 15 Cal. 253 (1888).

minary point not prevailed, I should have been disposed to grant the adjournment asked for by Mr. Chaudhuri and by Mr. Chakravarti in order to put in further affidavits.

The second part of the application came on for hearing on the 22nd June 1908.

Parties represented as before.

The JUDGMENT OF THE COURT was as follows:—

WOODROFFE, J.—This is a part of an application which I dealt with on the 8th June 1908. On that date, I dealt with the question then raised as to whether the lease granted by the Receiver to Rajah Benoy Krista Deb Bahadur should not be set aside, which I then decided in the negative. Another part of the application asks that the Receiver may be directed, to realise all sums due for interest from the lessee or he do personally make good the losses sustained by the estate. As regards this application, a distinction must be drawn between the present and the late lease. As regards the present lease, it is clear, if the parties insist on it or any of them, that the terms of the lease must be strictly enforced and if the rent is in arrears, the lessee must pay interest; but on the other hand, the lessee is not bound to pay anything under the lease before it is due. Then the question arises, as to the late lease, whether an order can be made as to the interest on the arrears of rent which it is said amounts to a large sum of money—nearly Rs. 9,000—and which should, it is said, have been recovered by the Receiver from the lessee. There appears to me to be two objections to this part of the application. No order can be made against the lessee on the present application. If it can, it is said, the lessee holds a discharge from the Receiver for all the rent under the late lease. However that may be, it is sufficient to say, no order can be made against the Rajah on this application. Then, if the applicants have any remedy against the Receiver in respect of these moneys, the matter cannot be gone into on this application. It is a matter touching the Receiver's accounts. In so far as the Receiver's accounts have been passed, the matter may be taken to be concluded. So far as the accounts have not been passed, it is open to the parties to raise the question on the passing of the accounts. The answer of the Receiver as to the payment of interest or arrears of rent not being insisted on is given in the 4th para. of his affidavit sworn on the 11th June 1908 in which he states that the parties agreed to waive interest on arrears of rent because the lessee agreed to pay a monthly allowance of Rs. 3,000 in advance and Rs. 3,000 before the closing of the Court offices for the pujahs and this agreement was in consideration of the interest in respect of each instalment of rent not being insisted upon. As I have said, I desire to express no opinion on the merits of these contentions, because, in so far as they are against the lessee, they cannot be gone into in these proceedings; and as against the Receiver, they must be raised (if at all) on the passing of the Receiver's accounts and the Court can then determine whether the matter can then be gone into or whether it is

KRISTA CHANDRA GHOSE v. KRISTA SAKHA GHOSE.

one as to which the parties must file a suit against the Receiver. I express no opinion on the merits. The result is the application is dismissed, with costs.

Mr. Advocate-General.—Asks costs of a hearing.

THE COURT.—I make the ordinary order as to costs.

Mr. Charu Chandra Basu, Attorney for the Applicants.

Messrs. Morgan & Co., Attorneys for Raja Benoy Krista Deb.

Maharaj Coomar S. K. Deb, Messrs. Leslie & Hinds, Messrs. Watkins & Co., Messrs. B. N. Basu & Co., Mr. Charu Chunder Mitter and *Mr. Amar Nath Ghose*, Attorneys for various parties.

Application dismissed with costs.

P. R. C.

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM ORDER
No. 158 OF 1907.

MITRA, J.
CASPERSZ, J.
1908.
2, January.

GOBINDA CHANDRA CHANDA, Judgment-debtor, Appellant,
v.
ABHOY CHARAN BAGCHI, Auction-purchaser, and JOGENDRA KISHORE ROY CHOWDHURI, Decree-holder, Respondents.

Power of Court to correct its own mistake—Inherent power—Amendment of sale certificate—Sale certificate including a property not sold—Civil Procedure Code (Act XIV of 1882), sec. 244.

A Court committing a blunder has power to rectify it of its own motion.

Where two properties were advertised for sale and one property was sold but the sale certificate included both the properties and the purchaser got possession of both,

Held—That the Court had inherent power to rectify the mistake by amending the sale certificate and to direct that the delivery of possession of the second property be cancelled.

That the matter would also come under sec 244, C. P. C., the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree.

This was an appeal preferred on the 25th of April 1907, against the order of J. N. Roy, Esq., Additional District Judge of Zillah Mymensingh, dated the 22nd of January 1907, reversing the order of Babu Amrit Lal Palit, Munsif of Iswargunj, dated the 24th of November 1906.

The facts of the case are shortly these:—Out of two properties advertised for sale in execution of a decree, one only was sold and purchased by the first Respondent, who is described in the lower Appellate Court's judgment to be an employee of the decree-holder, Respondent No. 2. By mistake, however, both properties were included in the sale certificate and possession delivered to the auction-purchaser of both properties. The judgment-debtors having discovered the mistakes applied for rectification of the sale certificate. The application was allowed by the Munsif. But this order was on appeal reversed by the Additional District Judge. The judgment-debtor thereupon preferred this second appeal.

Babu Chandra Cant Ghose for the Appellant.

GOBINDA CHANDRA CHANDA v. ABHOY CHARAN BAGCHI.

The JUDGMENT OF THE COURT was as follows :—

This is a somewhat curious case. Two properties were advertised for sale. The properties were separate and the sale took place of only one of these properties. There was some mistake in the sale certificate as it included both the properties, whereas the second property was not sold at all. Possession was delivered of both the properties in accordance with the sale certificate, but the mistake was afterwards discovered.

An application was made to the Munsif in whose Court the proceeding was pending for the rectification of the error and he directed the rectification. He directed that the sale certificate be produced and amended and he also directed that the delivery of possession of the second property should be cancelled. This was a matter of which he could take cognizance of his own motion. It is an inherent power of a Court to rectify an apparent error. The matter would also come under sec. 244 of the Code, the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree.

The District Judge, however, took the view that sec. 244 of the Code did not cover a case like the present. He forgot that the case was one in which it was not necessary that an application under sec. 244 to set aside the sale should be made. Sec. 244 however would cover a proceeding like the present. The District Judge should also have remembered that the Court committing a blunder, as the Court of first instance did in this case, has power to rectify it of its own motion. We accordingly set aside the order of the District Judge and restore that of the Munsif with costs. We assess the hearing-fee in this Court at one gold mohur.

S. C. S. *Appeal allowed.*

CIVIL APPELLATE JURISDICTION.

APPEAL FROM ORDER

No. 1060 OF 1908.

MITRA, J. CASPERSZ, J. 1908 16, March.	CHARU CHANDRA MITTER and others Appellants, *v.* BHAGIRATH PERSAD and others, Respondents.

Court-fee—Mortgage suit—Compromise decree—Appeal from order refusing to make order absolute—Transfer of Property Act (IV of 1882), sec. 89—Ad valorem *Court-fee.*

Ad valorem *Court-fee on the value of the appeal should be paid on the memorandum of appeal from an order refusing an application for an order absolute under sec. 89 of the Transfer of Property Act.*

AKIKUNNISSA BIBI v. ROOP LAL (1) *referred to.*

The facts are as follows :—

In a mortgage suit, the parties entered into a compromise on the basis of which the Court made a decree under which the decretal debt was payable by instalments. The judgment-debtor made default in payment of certain instalments and the decree-holder thereupon applied for an order absolute under sec. 89 of the Transfer of Property Act. The Court dismissed the application being of opinion that the decree made in the suit was not a decree within the meaning

(1) I. L. R. 25 Cal. 133 (1897).

CHARU CHANDRA MITTER *v.* BHAGIRATH PERSAD.

of sec. 88 of the Transfer of Property Act. and therefore no order under sec. 89 as prayed could be made.

The decree-holder appealed as from an order under sec. 244, C. P. C., and paid a Court-fee stamp of Rs. 2 only on the memorandum of appeal.

The Deputy Registrar was of opinion that the appeal should be described as an Appeal from an Original Decree and *ad valorem* Court-fee should be paid on the memorandum of appeal. He observed as follows:—

"This appeal arises out of an application for making a mortgage decree absolute under sec. 89 of the Transfer of Property Act.

"In Appeal from Order No. 75 of 1902 which was an appeal against an order absolute for sale of the mortgaged properties it was held by the Chief Justice and Stevens, J., that as the question raised was a question which went to the validity of that order, 'such question is not one relating to the execution of the decree within the meaning of sec. 244, C. P. C.' See also the case of *Akikunnissa Bibi* v. *Roop Lal Das* (1).

"If the case is not appealable under sec. 244, C. P. C., it can only be appealable as an appeal from decree."

The matter was placed before the Court.

Babu Satish Chandra Ghosh for the Appellants.

The ORDER OF THE COURT was as follows:—

MITRA and CASPERSZ, JJ.—We are of opinion that this appeal should have been presented with *ad valorem* Court-fees according to the decision in *Akikunnissa Bibi v. Roop Lal* (1). That decision is consistent with the decision of a Full Bench of this Court with reference to proceedings in execution of mortgage-decrees and we cannot go against it. We are also of opinion that, in the present state of the law as administered in this Court, the Petitioner ought to have paid the *ad valorem* Court-fees on the value of the appeal. We allow the Petitioner to put in the *ad valorem* Court-fees within a week. If he fails to do so, the appeal will stand dismissed.

N. G.

(1) I. L. R. 25 Cal. 133 (1897).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1760 OF 1906.

BRETT, J.
COXE, J.
1908.
26, May.

WAHID ALI and ors., Defendants, Appellants,

RAHAT ALI, Plaintiff, Respondent.

Revenue Sale Law (Act XI of 1859), sec. 37, Exc. 4—Houses and tank built by incumbrancer—Suit to avoid incumbrance—Assignee from purchaser—Right of suit—Limitation Act (XV of 1877), Sch. II, Art. 121.

Where a person claims exemption from the provisions of the Revenue Sale Law which entitle a purchaser to annul incumbrances in respect of land in his possession the benefit of the 4th exception to sec. 37 of the Act must be limited only to such portions of land as are covered by buildings, tanks etc., and cannot be extended to cover those lands included in the lease on which buildings and tanks etc. have not been constructed.

(1) I. L. R. 25 Cal. 133 (1897).

WAHID ALI v. RAHAT ALI.

An assignee of a purchaser of an estate sold under the Revenue Sale Law is entitled to bring a suit to avoid incumbrances, Art. 121 of Sch. II of the Limitation Act applying to such a suit.

This was an appeal preferred on the 10th of November 1906, against the decree of Babu Promotha Nath Chatterjee, Subordinate Judge of Zillah Chittagong, dated the 24th of May 1906, reversing, that of Babu Annoda Prosad Mozumdar, Munsif of Hath Hazari, dated the 28th of July 1905.

Plaintiff sued for *khas* possession of certain plots of land after avoiding incumbrances. He claimed to be a *talukdar* under Defendant No. 14, the auction-purchaser, of an estate comprising the lands in dispute at a revenue sale. The fourth issue which is material was as follows:—Have Defendants protected interest in the plots in suit?

The lower Appellate Court decided this issue as follows:—

"It is admitted in the plaint that plots Nos. 10, 11 and 12 consist of homestead and tanks and it is satisfactorily proved that Defendants have their ancestral family dwelling-houses and orchards and tanks on these plots. Plaintiff is not entitled to eject the Defendants from these, but he is entitled to fair and equitable rent, in respect thereof. As the suit is framed and with the materials before the Court, such rent cannot be determined in this suit. Plaintiff may get such rent determined in a future suit. As regards the remaining plots, namely, Nos. 2, 5, 6 and 9, Defendants could not prove protected interest. Plaintiff shall recover *khas* possession thereof. Plaintiff's pleader cited *Asmat Ali* v. *Hasmat Khan.* (7) and *Makar Ali* v. *Shyama Charan* (3), and contended that Defendants were bound to prove that the dwelling-houses were of substantial nature and that the tanks were excavated by them. It is amply proved that Defendants' ancestors had been *talukdars*. It is clear that the dwelling-houses are of substantial nature as contemplated in the above ruling, and it is plain also that the tanks were excavated by the Defendants' ancestors. The decree of the lower Court is set aside, and this appeal is decreed in part, each party bearing his own costs. The suit is decreed declaring Plaintiff's title as *talukdar* to plots Nos. 2, 5, 6, 9, 10, 11 and 12 in suit and for recovery of *khas* possession in respect of plots Nos 2, 5, 6 and 9 together with *wasilat*, the amount whereof to be determined in execution, and declaring his title to recover fair and equitable rent in respect of plots Nos. 10, 11 and 12 in suit. The claim in respect of the remaining plots is dismissed."

The Defendants appealed.

Babu Dhirendra Lal Kastagir for the Appellants.

Babu Prea Sankar Mojumdar for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

In support of this appeal two points have been taken. The first is that on the findings of the lower Appellate Court that Defendants Nos. 1 and 2 held a *taluka* lease under the original zemindar and that plots Nos. 10, 11 and 12 out of the lands covered by that lease were

(3) 3 C. W. N. 212 (1898).
(7) 2 C. W. N. 412 (1897).

WAHID ALI v. RAHAT ALI.

protected from avoidance of the lease under the provisions of sec. 37, cl. (4) of Act XI of 1859, therefore the same protection would extend to all the other plots covered by the same lease and would accordingly cover plots Nos. 2, 5, 6 and 9 in respect of which the lower Appellate Court has held that the Defendants have failed to prove that they hold protected interests.

The learned vakil in support of this contention has relied on the decision of this Court in the case of *Kiran Chunder* v. *Naimuddi* (1). That case seems however to be distinguishable from the present case for in that the Defendant claimed protection in respect of two plots of land only, and it was held that he was entitled to the protection because the 2 plots were covered by one lease, and that on one of them a house, garden and tank had been constructed which was sufficient under the provisions of sec. 37 of Act XI of 1859 to save him from ejectment. The effect of that case has however been considered in the later case of *Najemoddin* v. *Syed Hassan* (2). The learned Judges in their judgment in that case point out that the current of the decisions of this Court has been in favour of the view that where a Defendant claims exemption from the provisions of the Bengal Sale Law which entitle a purchaser to annul incumbrances, in respect of lands in his possession the benefit of the 4th exception to sec. 37 of the Act must be limited only to such portions of land as are covered by buildings, tanks etc. and cannot be extended to cover those lands included in the lease on which buildings tanks etc. have not been constructed. This view was taken in a series of cases to which the learned Judges refer and was followed in the case of *Makar Ali* v. *Shyama Charan* (3). We are not prepared in the present case to differ from the course which has been adopted by this Court in a long series of decisions, and we are not prepared to accept the contention that the learned Judges in deciding the case of *Kiran Chunder* v. *Naimuddi* (1) intended to adopt any novel principle. We think therefore that the view which the lower Appellate Court has taken is correct under the law that the Defendants were entitled to claim exemption from annulment of their lease in respect of those plots on which the lower Appellate Court held that they had proved that their homestead, tank etc. had been constructed, these plots being plots Nos. 10, 11 and 12.

As regards plots Nos. 1, 3, 4, 7 and 8, the lower Appellate Court held for other reasons that the Plaintiff was not entitled to claim possession of them from the Defendants.

The second point which has been taken is that the Plaintiff as the assignee of a portion of the land which was purchased at the revenue sale was not legally entitled after the expiry of 5 years from the date of the sale to bring the present suit to avoid incumbrances. We find however that so long ago as 1874 in the case of *Koylash Chunder* v. *Jubur Ali* (4) it was held that an assignee was entitled to bring a suit to avoid incum

(1) I. L. R. 30 Cal. 498 (1903).
(2) 9 C. W. N. 852 (1905).
(3) 3 C. W. N. 212 (1898).
(4) 22 W. R. 29 (1874).

WAHID ALI *v.* RAHAT ALI.

brances and all that was laid down in that decision was that ordinarily the suit should be brought within a reasonable time. Since then the Indian Limitation Act has been passed which provides by Art. 121 of the second schedule, a limitation of 12 years for bringing such an action. The view taken by the learned Judges in the case of *Koylash Chunder* v. *Jubbur Ali* (4) has been followed by this Court in the later cases of *Shosi Bhusan* v. *Kramtullah* (5) and of *Narayan Chandra* v. *Kasiswar* (6).

We think therefore that there is no substance in either of the two points taken in support of the appeal and we dismiss the appeal with costs.

COXE, J.—I agree. It can never have been the intention of the Legislature in my opinion that when a tenant had a *taluk* of a whole village on a bigha of which he had excavated a tank or made a garden or house the whole village should be exempted from the operation of the sale law or that the garden or house standing on one corner of the land should protect all the remainder of the land covered by that lease. The original object of the fourth clause to sec. 37 appears to have been to protect leases of lands which were used exclusively for dwelling-houses, gardens, tanks, etc., but by a long string of decisions of this Court this clause has been construed in favour of the tenants in order to reduce the hardship caused by the operation of the sale law and protection has been given under it to lands on which gardens etc. stand even though those lands are held under leases which include several other lands in the village. I think that at this time of the day it is impossible to go against that string of decision and I agree accordingly that in a case like this where an original *talukdar* holds lands on a certain portion of which he has excavated a tank or made a garden, he should be entitled to the protection of that portion of the land which is covered by the tank or garden.

S. C. S. *Appeal dismissed.*

(4) 22 W. R. 29 (1874).
(5) 10 C. W. N. 148 (1905).
(6) 1 C. L. J. 579 (1902).

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1172 OF 1906.

MACLEAN, C. J. DOSS, J. 1908. Heard, 3 & 6, April. Judgment, 6, April.

JOGENDRA NATH ROY and others, Plaintiffs, Appellants, *v.* KRISHNA PROMODA DASSI, Defendant, Respondent.

Record-of-rights—Suit to correct or alter entries—Maintainability—Bengal Tenancy Act (VIII of 1885), secs. 10SB, 105, 106, 108.

No suit lies for the alteration or correction of entries made in the record-of-rights published under Ch. X of the Bengal Tenancy Act. Persons aggrieved by the entries should have recourse to the special remedy provided in that chapter.

This was an appeal preferred on the 7th of July 1906, against the decree of Babu Purna Chandra Ghose, Subordinate Judge of Zillah Khulna, dated the 29th of March 1906, confirming that of Babu Hem Chandra Mitter, Munsif of Satkhira, dated the 15th of August 1905.

This and six other analogous appeals

JOGENDRA NATH ROY v. KRISHNA PROMODA DASSI.

arose out of seven analogous suits which were tried together by the consent of the parties, the object of all these suits being the correction and alteration of entries made in a record-of-rights prepared under Chap. X of the Bengal Tenancy Act on establishment of Plaintiffs' lakhiraj and proprietary title.

It appears that, on the application of the *putnidar*, Krishna Promoda Dassi (Defendant No. 1 in all the suits), the local Government, by its Notification published in the *Calcutta Gazette* of 12th November 1902, directed, under sec. 101 (2) (*a*) of the Bengal Tenancy Act, that a survey be made and a record-of-rights prepared in respect of all lands situated in several villages appertaining to the estate bearing Towzi No. 72—1, Pergunnah Dantia, that in accordance therewith a survey was made and a record-of-rights prepared in respect of all lands situated in the aforesaid villages, by a duly appointed Settlement Officer; that during the settlement-proceedings, the Plaintiffs claimed certain lands situated in Mouzah Sarulla (one of the villages mentioned in the Notification), the subject-matter of the suits Nos. 184 to 189, to be held rent-free, but the Settlement Officer had entered them in the record as included in the *mal* lands of Defendant No. 1, that Plaintiffs' objection was heard and decided under sec. 103A by the Settlement Officer, who held that the Plaintiffs were not entitled to hold those lands rent-free and that they were liable to pay rent in respect thereof to Defendant No. 1; that entries were accordingly made in the finally published record; that Defendant No. 1 thereupon applied under sec. 105 of the Act for settlement of a fair and equitable rent in respect of those lands, and that the Settlement Officer accordingly settled a fair and equitable rent in respect of the said lands. Plaintiffs now sued for correction and alteration of the aforesaid entries, on establishment of their title to hold the lands rent-free.

In suit No. 190, Plaintiffs claimed certain lands to be included within their zemindari, which the Settlement Officer had entered as forming part of Defendant No. 1's zemindari of Kismat Sarulla; and Plaintiffs now sued for correction and alteration of the aforesaid entry, on establishment of their proprietary title thereto.

Defendant No. 1 contended *inter alia* that these suits were not maintainable in their present form, having regard to the provisions of secs. 109 and 111 of the Bengal Tenancy Act, and were barred by the principle of *res judicata*.

The following preliminary issue raised upon this contention :—

"Whether the suits are maintainable in their present forms, having regard to the provisions of secs. 109 and 111 of the Bengal Tenancy Act, and whether they are barred by the principle of *res judicata*."

All these suits were instituted some six months after the Defendant No. 1's applications under sec 105, Bengal Tenancy Act. The Plaintiffs put in petitions before the Settlement Officer asking him to stay proceedings till the disposal of the suits by the Court. But these applications were rejected.

The Munsif was of opinion that, if at all, a suit for a declaration of the Plaintiffs' rights might lie but no suit for

JOGENDRA NATH ROY *v.* KRISHNA PROMODA DASSI.

rectification or alterations of the entries. He held that the suits were not maintainable.

The Subordinate Judge on appeal agreed with the Munsif and further held that the proceedings already pending before the Settlement Officer under sec. 105 were being tried as suits and would result in decrees which would be binding on the parties as Civil Court decrees. The Plaintiffs' remedy lay in the Settlement Officer's Court and not in the Civil Court. He accordingly dismissed the Plaintiffs' appeals.

Plaintiffs preferred these second appeals.

Babu Surendra Chandra Sen for the Appellants.

Dr. Rash Behary Ghose, Babus Provas Chandra Mitter and *Atul Chandra Dutt* for the Respondent.

The JUDGMENT OF THE COURT was as follows :—

MACLEAN, C. J.—This is a suit for the alteration and correction of certain entries made in the record-of-rights published under Chap. X of the Bengal Tenancy Act. The real question is whether the Plaintiffs are entitled to maintain the suit. Both the Munsif and the Subordinate Judge have held that the suit is not maintainable and that the Plaintiffs should have pursued the special remedy which is given them either under sec. 106 or under sec. 108 of the Bengal Tenancy Act; they have not done so.

It appears that at the instance of Defendant No. 1 a survey was made and a record-of-rights prepared by a duly appointed Settlement Officer, in respect of all lands situated in village Sarulia. In the course of the settlement proceedings, the Plaintiffs claimed certain lands as rent-free and certain other lands as included in their zemindari which the Settlement Officer had recorded as forming part of Defendant No. 1's zemindari. Both these objections were heard by the Settlement Officer, and the Plaintiffs' claims were not successful. Entries were then made in the finally published record-of-rights, and Defendant No. 1 on the basis of such entries applied, within two months for the settlement of a fair and equitable rent. Then the Plaintiffs instituted the present suit. The question is whether the suit will or will not lie. The Bengal Tenancy Act was passed nearly a quarter of a century ago but no authority has been produced before us to show that the suit will lie. This portion of the Act deals with a special matter—the settlement by the revenue authority of the record-of-rights: and, a special procedure is provided for challenging the decision of the revenue officer. Presumably the proper course for the Plaintiffs would have been to have instituted a suit under sec. 106 and, under sec. 108, on their application, the revenue officer could have revised his decision under secs. 105, 106, 107 of the Act. But neither of these courses was taken. I agree with both Courts that the present suit does not lie: and I think that the appeals must be dismissed with costs.

DOSS, J.—I agree. I desire to add a few words. Sec. 106 of the Bengal Tenancy Act has been amended by Act III of 1898, and by that Act much wider powers have been conferred on the revenue officer than what he had under the

original section as it stood before its amendment. Under sec. 106 as amended, the revenue-officer has power to hear and decide, amongst several other things, any dispute between the landlords of neighbouring estates. That implies that the revenue officer has power to decide question relating to boundaries, for the purposes of preparing the record-of-rights. That being so, it is difficult to see how a regular suit can be brought in the Civil Court for the same purpose.

Moreover, the provision contained in the second paragraph of sec. 106 points to the same conclusion. It runs thus: "Provided that the revenue officer may, subject to such rules as the local Government may prescribe in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial." If, in addition to or in lieu of the special remedy prescribed by sec. 106, a regular suit may be brought in a Civil Court for the same purpose, it is difficult to appreciate the utility of a provision which empowers the revenue officer to transfer a case to a competent Civil Court for trial.

N. G. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEALS FROM APPELLATE DECREES Nos. 2091 AND 2092 OF 1906.

BRETT, J.
COXE, J.
1908.
12, June.

JATINDRA NARAIN ACHARYA CHOWDHURY, Plaintiff, Appellant,
v.
MOHARAM AKAND and others, Defendants, Respondents.

Suit for account—Officer employed by Receiver—Discharge of Receiver—Right of proprietor to sue for account—Agent and sub-agent.

Where a Receiver was appointed in respect of certain properties about which there was a litigation in which Plaintiff was found to be the proprietor,

Held—*That a suit for account at the instance of the Plaintiff does not lie against the* teshildars *employed under the Receiver as they were his sub agents and were not liable to render account to the Plaintiff.*

These were appeals preferred on the 21st of November 1906, against the decree of Babu A. N. Majumdar, Subordinate Judge of Zillah Mymensingh, dated the 20th of August 1906, confirming that of Babu Hari Churn Gangopadhya, Munsif of that district, dated the 7th of April 1906.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Taruk Nath Chuckerbutty* for the Appellant.

Babu Mukund Nath Roy for the Respondents.

Babu Biraj Mohan Majumdar for the Deputy Register representing a minor Respondent.

The JUDGMENT OF THE COURT was as follows :—

The present appeals arise out of two suits brought against the Defendants for accounts. The Defendants are said to have been Teshildars of certain Mouzahs which were in litigation and in respect of which a Receiver was appointed who acted from the 2nd June 1900 to 4th September 1902. The Defendants were admittedly appointed by the Receiver

JATINDRA NARAIN ACHARYA CHOWDHURY *v.* MOHARAM AKAND.

and were not appointed by the present Plaintiff. The suits were brought to recover from the Defendants in each case accounts and any sum due after balancing such accounts, from the 2nd June 1900 to 4th September 1902.

The present suits were instituted on the 25th August 1905, that is to say, a few days only less than 3 years from the date when the Receiver's appointment had terminated and the Defendants were discharged.

Both the lower Courts have held that as the Defendants in each case were not agents of the Plaintiff, therefore the Plaintiff was not entitled to bring the suits, against them for accounts, and on that ground have dismissed the suits.

The Plaintiff has appealed and the only contention which has been advanced before us is that the Receiver during his time of office was acting on behalf of the Plaintiff, who was subsequently found to be the proprietor of the properties, and therefore that the Teshildars who were working under the Receiver were bound to render accounts to the Plaintiff.

We do not think that this contention is sound. The Defendants in each case appear to have been in the position of sub agents under the Receiver, who may be regarded as having been the agent to the Plaintiff, and as sub-agents they were liable to render accounts to the Receiver and not to the present Plaintiff. We think therefore that the lower Courts are right in holding that the suits as framed must fail. Whether the Plaintiff could have brought suits to recover any sums due from the Defendants as sums received by them on his behalf, it is not necessary to consider, but we have only to observe that in the case of such suits the question would certainly arise whether they were not barred by limitation, the sums realised by the Defendants, if any, having apparently been realised before the 4th September 1902 when the Receiver was discharged from office.

The result therefore is that these two appeals are dismissed with costs.

S. C. S. *Appeals dismissed.*

[CIVIL APPELLATE JURISDICTION.]

APPEAL FROM APPELLATE DECREE No. 1701 OF 1906.

CASPERSZ, J. SHARFUDDIN, J. 1908. Heard, 1 and 2, June. Judgment, 10, June	PURKHIT PANDA, Defendant, Appellant, *v.* ANANDA GAONTIA Plaintiff, Respondent.

Central Provinces Land Revenue Act (XVIII of 1881), sec. 4 (8A) and Central Provinces Tenancy Act (XI of 1898)—Gaontia *in Sambalpore District—Suit for ejectment by—Jurisdiction of Civil Court—"Gaontia" if proprietor—*Gochar *land if "common land"—Recognition of Defendant's tenancy by settlement department after institution of suit.*

The Court will allow a question of jurisdiction to be raised for the first time in second appeal, but the contention must be substantiated or the facts already found, or else fail.

Gochar *lands are lands reserved for the proprietor of a Government village in the District of Sambalpore and cannot be classed in the same category as common lands which are the property of the general body of villagers.*

PUROHIT PANDA *v.* ANANDA GAONTIA.

For the purposes of a suit in ejectment brought by a gaontia *of a village, the* gaontia *must be taken to be a "proprietor" of the same as defined in sec. 4 (8A) of Act XVIII of 1881 and as such he is entitled to bring the suit.*

Civil Courts must adjudicate on the rights of the parties as they existed when the plaint was filed, and a recognition of the Defendant's tenancy by the Settlement department subsequent to the institution of an ejectment suit by the gaontia *is of no avail to the Defendant. Besides the entry in the settlement record is not conclusive. It is only a matter of presumption.*

"The holder of a survey number" mentioned in sec. 2 (10), Expl. II of the Central Provinces Tenancy Act XI of 1898 means the holder when proceedings are instituted in the Civil Court and a holder under a subsequent settlement cannot claim to be a tenant of the former or gaontia.

This was an appeal preferred on the 29th of October 1906, against the decree of Purna Chandra Mitra, Esq., District Judge of Zillah Sambalpur, dated the 25th of May 1906, affirming that of Babu N. Ghosh, Munsif of that place, dated the 13th of March 1906.

The facts of the case will appear from the judgment.

Babu Sarat Chandra Roy Chowdhury for the Appellant.

Babu Bipin Chandra Mallik for the Respondent.

The JUDGMENT OF THE COURT was as follows:—

The Plaintiff, as a *gaontia* of the village, sued to eject the Defendant from certain waste lands described as *gochar* lands on the ground that the Defendant was a trespasser. The Defendant pleaded adverse possession for upwards of 12 years, and set up a tenancy of the land in question under the Plaintiff. Both the Courts below have found in favour of the Plaintiff, and they have directed him to be put in *khas* possession of the plots in suit.

In second appeal, four contentions have been addressed to us on behalf of the Defendant-Appellant: *first*, that the Civil Court had no jurisdiction to entertain the suit; *secondly*, that a *gaontia* in the district of Sambalpur cannot eject an occupier of land through the Civil Court, but that he can do so through the agency of the Settlement department at the periodical quadrennial revisions of Settlement; *thirdly*, that whether the Defendant paid rent or not to the Plaintiff, he is a tenant of the land and cannot be ejected as being a trespasser; and, *fourthly*, that inasmuch as the Defendant was recorded and recognized by the Settlement Officer as raiyat at the recent settlement, he cannot be ejected in the suit of a *gaontia*.

The question of jurisdiction was not taken at any previous stage in this litigation. It is not referred to in any of the grounds of appeal, nor did it form the subject of any of the issues raised. But in accordance with settled law on the subject, we allow it to be taken in second appeal; though if that question depends for its determination upon facts, and those facts have not been found by the lower Appellate Court or the Court of first instance, an Appellant cannot ask this Court to find them; the Appel-

PURKHIT PANDA v. ANANDA GAONTIA.

lant must substantiate his contention, if he can, on the facts already found. If he is unable to point to any facts in support of his plea, that plea must necessarily fail. The learned vakil for the Defendant-Appellant relies on the provisions of sec. "152 of the Central Provinces Land Revenue Act XVIII of 1881. That section provides "(a) no Civil Court shall entertain any suit instituted, or application made to obtain a decision or order on any matter which the Governor-General in Council, the Chief Commissioner or a Revenue or Settlement officer is by this Act empowered to determine or dispose of; and in particular (b) no Civil Court shall exercise jurisdiction over any of the matters provided for in sec. 40, 41, 42 and 89 as to waste lands." He has also called our attention to sec. 77 (b) of the said Act which says "the Settlement officer may determine disputes regarding the rights of persons resident in the village or holding lands comprised in the mehal, in or to the common land of the mehal, and its produce and the village site." We are not aware whether the Settlement officer was empowered in the manner prescribed by the Act to determine or dispose of the precise question arising between the parties to the present litigation, nor are we aware of the precise meaning to be attached to the expression "common land." These are matters which ought to have been brought forward in the lower Courts in order that the necessary facts bearing upon the question of jurisdiction might have been decided so that the question of law might have been subsequently raised and determined in special appeal if not earlier.

On the facts as we find them in the judgment of lower Appellate Court, we do not see that there was any defect of jurisdiction. It admits of no doubt that the ordinary Civil Courts cannot be ousted of their jurisdiction in the absence of an express provision of law to that effect.

As a matter of construction we think that *gochar* lands cannot be classed in the same category as common lands. *Gochar* lands appear to be lands reserved for the proprietor of a Government village in the district of Sambalpur, while on the other hand 'common lands' appear to be the property of the general body of villagers.

The case of *Manbodh* v. *Asai* (1), although not precisely in point, shows that the Civil Courts cannot be ousted of their jurisdiction in the absence of specific notifications issued by the Chief Commissioner under the Land Revenue Act. We accordingly overrule the first contention in Bar.

Then with regard to the contention that a *gaontia* cannot eject an occupier of land through the Civil Court, it is urged that the *gaontia* is not in the position of a proprietor but that he is a mere farmer under the Government. This view does not derive support from sec. 4 (8A) of Act XVIII of 1881 where the word 'proprietor' is defined as including a *gaontia* of a Government village in the Sambalpur district except in sec. 4 cl. (b), and in secs. 61, 62, 63 and 69.

The excepted sections refer to allowances made to excluded proprietors and to the determination on record of *sir* land. For the purposes of the present

(1) 10 C. P. L. R. 17.

PURKHIT PANDA *v.* ANANDA GAONTIA.

suit, the Plaintiff as *gaontia* of the village must be taken to be a proprietor of the same and entitled to bring an action in ejectment.

On the third contention that whether the Defendant paid rent or not, he is a tenant on the land and cannot be ejected as a tresspasser, we cannot disturb the finding of the lower Appellate Court that the Defendant is a trespasser and that he has not succeeded in making out his tenancy. We have, however, thought it proper to consider the provisions of the Acts brought to our notice, although on the findings arrived at by the two lower Courts, it was not necessary to do so.

Lastly, the recognition of the Defendant's tenancy by the Settlement department took place after the institution of the suit giving rise to the present appeal, and the Civil Court must adjudicate on the rights of the parties as they existed when the plaint was filed and not on any title subsequently derived; see *Ramanathan Chetti* v. *Pulikutti Servai* (2). Moreover, the entry in the Settlement record is not conclusive; it is only a matter of presumption. Nor can the Defendant be regarded as a tenant within the meaning of sec. 2 (10), Explanation II of the Central Provinces Tenancy Act XI of 1898, whch says—"the holder of a Survey number in a village let in farm by Government, or held by a *gaontia* in the Sambalpur District is a tenant of the farmer or *gaontia* for the time being." The holding of a Survey number must, of course, have reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail the Defendant that in a subsequent Settlement he was recorded as a tenant He may be a tenant in the eye of the Settlement department, but for the purposes of the present litigation we cannot regard him as such.

In the result, the decision of the lower Appellate Court appears to be quite correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.

(2) I. L. R. 21 Mad. 288 (290) (1898).

[CIVIL REVISIONAL JURISDICTION.]

RULE 2511 OF 1908.

COXE, J.
BELL, J.
1908.
5, August.

GOBINDO RANI DASSI,
Petitioner,
v.
BRINDA RANI DASSI,
Opposite Party.

Land Acquisition Act (I of 1894), secs. 32, 54—Compensation money paid to Hindu widow—Reversioner's application for reference —Order by Judge on reference directing refund—Appeal—Revision—Civil Procedure Code (Act XIV of 1882), sec. 622.

Where a Land Acquisition Collector having awarded a certain sum as compensation for land acquired, paid it to, amongst others, a Hindu widow, and almost six months after the award her daughter asked for a reference to the Civil Court, and a reference having been made, the Judge ordered the lady to repay the amount withdrawn by her and the same to be dealt with according to the provisions of sec. 32 of the Land Acquisition Act,

Held—*That until money was deposited in Court by the Collector, the Court could not proceed to deal with it under sec. 32.*

That the Judge had no power to direct a refund of money already paid by the Collector.

GOBINDO RANI DASSI *v.* BRINDA RANI DASSI.

That the order was not one under sec. 32, Land Acquisition Act, as the Judge was not in a position to make such an order and so no appeal lay from it and the High Court could properly interfere under sec. 622, Civil Procedure Code.

This was a rule granted on the 13th of July 1908 against an order of Mr. E. G. Drake Brockman, District Judge of Zillah Dacca, dated the 25th of June 1908, passed on a reference made to him by the Land Acquisition Collector of Dacca.

The reference was made at the instance of Brinda Rani Dassi urging that the amount of compensation awarded by the Land Acquisition Collector to her mother, the Petitioner Gobinda Rani Dassi was not payable to her as she had no power to alienate the land and held merely a "widow's interest" in it and that under the provisions of cl. (2), sec. 31 of the Land Acquisition Act the Collector should have deposited the amount of compensation in this Court, but he had already erroneously paid it to Gobinda Rani. The Judge was of opinion that the procedure laid down in sec. 32 could not under the circumstances be followed. The question, he observed, was whether Gobinda Rani should be directed to refund the money or the Collector requested to conform with the law and deposit the amount. On this point after issuing a notice on the Collector, the Judge passed order on the 25th of June 1908 directing a refund of the money withdrawn by the Petitioner, the same to be dealt with under sec. 32 of the Land Acquisition Act. The Petitioner moved the High Court against this order and obtained this rule.

Babu Surendra Nath Guha for the Petitioner.

Babu Dhirendra Lal Kastagir for the Opposite party.

The JUDGMENT OF THE COURT was as follows:—

In this case the Land Acquisition Collector of Dacca awarded a certain sum as compensation for acquired land and paid it to the persons to whom compensation had been awarded; apparently having no reason to think that payment should be withheld by reason of any of the contingencies mentioned in cl. 2 of sec. 31 of the Land Acquisition Act, 1894. One of the persons to whom compensation was awarded was the present Petitioner who is a Hindu widow. Almost six months after the award her daughter applied for a reference to the Civil Court. The Collector made the reference accordingly and the District Judge found that the Petitioner was a Hindu widow, not competent to alienate the property, and so passed the following order: "I direct that the opposite party Gobinda Rani do repay the amount of compensation wrongfully taken by her and that it be dealt with according to the provisions of sec. 32 of the Land Acquisition Act."

The Petitioner has obtained this rule on the opposite party to show cause why this order should not be set aside as passed without jurisdiction.

An objection is taken that the Petitioner is not entitled to come under sec. 622, C. P. C., inasmuch as the order is open to appeal. It is argued on behalf of the opposite party that this is in effect an order under sec. 32 of the

GOBINDO RANI DASSI v. BRINDA RANI DASSI.

Land Acquisition Act and that the order that the Petitioner should repay the compensation which she had withdrawn, is merely subsidiary to, and must be taken as part of, the order under sec. 32.

We are unable to agree with this contention. The District Judge was not, and is not yet in a position to pass any order under sec. 32. That section prescribes how the Court shall deal with money deposited in Court by the Collector and it is perfectly clear that, until the money is in the custody of the Court, the Court cannot proceed to deal with it. In our opinion, the effectual part of the order against which this application has been made and a part which can be regarded as distinct and separable from the rest of the order and cannot be regarded as made under sec. 32 is the order that the Petitioner should repay the amount of compensation. The order under sec. 32 at present cannot be regarded as an effectual order at all and cannot come into operation until the money is in the custody of the Court. Taking the order then as being an order to repay the compensation we are unable to see how the District Judge can have jurisdiction to pass an order of this kind. It appears to us open to doubt whether sec. 18 which deals *inter alia* with objections as to the persons to whom compensation is payable, or sec. 30 which deals with disputes as to the persons to whom compensation is payable, can have any application after the money has actually been paid away. The rights of the real owner are sufficiently safeguarded by the last proviso to cl. (2) of sec. 31. But assuming, without admitting, that the reference was *intra vires*, we can find no authority for holding that the District Judge has power to order a refund of money paid under cl. (1) of sec. 32. A Court may have inherent power to order a refund of money which has been wrongfully obtained from it by any party by an abuse of its process but that principle does not authorise a District Judge to order a refund of money paid by a Collector under the Land Acquisition Act without any irregularity apparent at the time and without any order from the Civil Court. We think therefore that this rule should be made absolute and the order of the District Judge, dated the 25th June 1908, should be set aside.

The Petitioner will be entitled to her costs.

N. G. *Rule made absolute.*

[CRIMINAL REFERENCE.]

No. 145 OF 1908.

BRETT, J. RYVES, J. 1908. 31, July.	PHANINDRA NATH CHATTERJI and anr., Petitioners, *v.* THE EMPEROR, Opposite Party.

Summary trial—Jurisdiction of the Court to hold—How to be determined—Criminal Procedure Code (Act V of 1898), secs. 260 and 261.

In determining whether a case is triable summarily under the provisions of the Criminal Procedure Code, the facts stated in the petition of complaint as well as the sworn statements of the complainant must be taken into consideration.

BISHU SHAIK *v.* SABER MOLLAH (1) *referred to* and *explained.*

(1) I. L. R. 29 Cal. 409 (1902).

PHANINDRA NATH CHATTERJI *v.* THE EMPEROR.

This was a reference under sec. 438, Cr. P. C., made on the 9th of July 1908, by H. E. Ransom, Esq., Sessions Judge of Darbhanga, recommending that the order of the District Magistrate of Darbhanga, dated the 28th of April 1908, convicting accused under sec. 186, I. P. C., and sentencing the first to pay Rs. 50 and the second Rs. 20, be revised.

The facts material to the report appear from the following letter of reference by the Sessions Judge.

"On a petition filed by the Tax Daroga complaining that while he was engaged in making a distraint of the goods of Hari Dasi in default of payment of Municipal taxes, etc, the Petitioners resisted the distraint and criminally intimidated him and his men, the Deputy Magistrate held a summary trial in spite of the protest that the offence of criminal intimidation of a public servant was not triable summarily, and convicted the Petitioners under sec. 186, I. P. C., and sentenced them to a fine of Rs. 50 and 20 respectively.

"I do not think this order can be sustained. In addition to his statement in the petition of complaint that he had been criminally intimidated, the Tax Daroga in his examination by the Deputy Magistrate also said he had been intimidated by the Petitioners. At the subsequent trial he omitted all reference to any such offence and merely spoke of the distraint having been angrily resisted. The jurisdiction of the Court would appear to be determined as a matter of principle by the petition of complaint, unless possibly there may be anything in the examination of a complainant to show that the offence stated in the petition was not committed. The ruling in *Bishu Shaik v. Saber Mollah* (1) is an authority in support of this view. I lay stress upon this, as in a very recent reference, [*Emperor* v. *Ram Narain* (2)] where the examination of the complainant had not been properly recorded and where I did not quote this ruling, a Division Bench followed the complainant's sworn statement as determining jurisdiction, in preference to the petition of complaint itself, which recited an offence which was not triable summarily. I would ask for an authoritative ruling on this point, should it be considered that there is any material variation in this instance between the petition and the complainant's own examination.' A Municipal Tax Daroga is a public servant and the offence complained of fell properly under sec. 189, I. P. C., which is not triable summarily. It appears to me that the Deputy Magistrate in this acted without jurisdiction. Another defect in the proceedings is that the Daroga professed to act under a warrant issued under sec. 122, Bengal Municipal Act III of 1884. This authorised him to distrain the moveable property of Hari Dasi. In his evidence at the trial, he states that this was the name of a shop which, he was informed, was owned by Petitioner that the shop was closed and that he proceeded to another opened in the name of Minto Brothers which, he was informed, was owned by owners of the shop Hari Dasi and attached goods which the 1st Petitioner caused to be forcibly taken away by the 2nd Petitioner. It appears to me that in levying the distraint in the shop of

(1) I. L. R. 29 Cal. 409 (1902).

(2) Unreported.

PHANINDRA NATH CHATTERJI v. THE EMPEROR.

Minto Brothers, the Daroga exceeded his authority under the warrant. The warrant authorised the attachment of property of Hari Dasi relating to a particular holding and could not therefore be executed upon goods forming the ostensible property of other owners. If the offence fell under sec. 180 the Petitioners would be justified in resisting the attachment as the Daroga was not acting in the discharge of his public functions. The actual resistance complained of cannot, I think under such circumstances, be regarded as an excess of the Petitioners' private defence."

Babu Dwarka Nath Mitter for the Accused.

Mr. Orr for the Crown.

The JUDGMENT OF THE COURT was as follows.

This is a reference by the learned Sessions Judge of Darbhanga forwarding the case of Phanindra Nath Chatterjee and Chandoo Khan who were convicted by a Deputy Magistrate under sec. 186 of the Indian Penal Code and sentenced to pay a fine of Rs. 50 and Rs. 20 respectively, with a recommendation that the conviction and sentences should be set aside.

Two grounds have been suggested for the interference of this Court. First, that the Magistrate had no jurisdiction to try the case summarily inasmuch as the complaint filed by the complainant discloses an offence punishable under sec. 189 of the Indian Penal Code which is not triable summarily, and, secondly, that the warrant of distraint made over to the complainant authorised him to distrain the properties of the defaulters named therein found in certain premises described in the warrant. It has been found that the goods which had been placed in the premises named in the warrant had a short time previously been removed to another shop which was fictitiously opened under the style of "Minto Brothers," but which was really in the same ownership as the old shop.

It is contended that the Tax Daroga under this warrant had no right to seize the properties in the shop owned by the Minto Brothers.

On the first point the learned Sessions Judge relies on the case of *Bishu Shaik* v. *Saber Mollah* (1) as an authority for showing that the jurisdiction of a Magistrate to try a case summarily depends on the wording of the complaint. That case however does not lay down any such proposition. It was there held that "on the facts before the Magistrate the offences complained of were not triable summarily. The petition of complaint discloses the commission of a much more serious offence than the offence for which the Magistrate has held a summary trial. The examination of the complainant, which has not been properly recorded, does not show that the offence so complained of was not committed." It is clear in this case both from the complaint and from the sworn statements of the complainant that the facts stated do not amount to anything more than an offence which is covered by sec. 186, I. P. C. We therefore think that the Deputy Magistrate had jurisdiction to try the case summarily.

On the second point also we are unable to agree with the learned Sessions Judge

(1) I. L. R. 29 Cal. 409 (1902).

PHANINDRA NATH CHATTERJI *v.* THE EMPEROR.

The form of the warrant authorized the Tax Daroga "to distrain the moveable properties of the said defaulters wherever they may be found within the Municipality or any other moveable properties which may be found within the holding specified in the margin to the amount of the said sum." Once it is established by evidence that the goods, which were sought to be distrained, belonged in fact to the defaulters and were within the limits of the municipality, the Tax Daroga had complete jurisdiction to distrain them under this warrant for the amount specified therein.

For these reasons we decline to interfere and direct the record to be sent down.

B. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. No. 805 OF 1908.

HOLMWOOD, J.
RYVES, J.
1908.
12, August.

LEONG MOW and ors., Petitioners,
v.
TCHUN CHUN, Opposite Party.

Breach of the peace, apprehended—Power of a Criminal Court to take property in dispute into custody—Proceeding under sec. 144, Criminal Procedure Code (Act V of 1898)—High Court's power to interfere—Restoration of matters to the original condition.

Where disputes and differences having arisen between head members of a Church and its secretary, the Magistrate drew up a proceeding under sec. 144, Cr. P. C., and passed an order forbidding anything that might tend to disturb public tranquility and at the same time directed with the consent of both parties that certain articles concerning which the parties were in dispute be removed into the custody of the Court and should remain there for two months or until the decision of a Civil suit regarding the same which was then pending before the High Court,

Held—*That the Court's custody of the articles was wholly without jurisdiction and the High Court has power to order that matters should be restored to exactly the same condition as the Magistrate found them in before he passed the order removing them into Court's custody.*

This was a rule granted on the 13th of July 1908, against an order of T. Thornhill, Esq., Chief Presidency Magistrate of Calcutta, dated the 8th of June 1908.

The Petitioners were the head members of Sea Voi church in Calcutta and the opposite party Tchun Chun was the secretary thereof.

The facts material to the report are briefly as follows:—

About 5 years ago Tchun Chun was appointed Secretary of the church.

In November 1906 disputes and differences arose among the members in consequence of the Petitioners having discovered that the Secretary had misappropriated large sums of money belonging to the church. The majority of the members held a meeting in December 1906 at which a resolution was passed by which Tchun Chun was removed from the office of Secretary.

The Secretary refused to give up possession of the money and properties belonging to the church and to render account of his dealings therewith.

The Petitioners put padlocks on the door of the room in which the money etc., belonging to the church were kept to prevent the Secretary from having

LEONG MOW *v.* TCHUN CHUN.

access to the same. A suit was instituted by the Petitioners against Tchun Chun in the Original Side of the High Court with a view that the Secretary might be ordered to make over to the Petitioners all money, books, keys, etc., then in possession of the Secretary.

Disputes and differences gave rise to several criminal proceedings.

While the suit was pending it having been found necessary to pass some order for the protection and safeguarding of the money, etc., Mr. R. A. N. Singh, 3rd Presidency Magistrate of Calcutta, purporting to act under sec. 144, Cr. P. C, with the consent of both the parties passed the following order on 27th March 1907.

"Both parties agreed that the room be opened out in presence of both parties and the iron safe be also opened in presence of both the parties and their respective advocates and a list made out thereof also of account books and papers found in the room. The contents of the safe and accounts will be removed to the Court. I forbid all to do any unlawful act that may tend to cause disturbance of public tranquillity under sec. 144. This order will remain in force for two months or until the decision of the suit before the High Court."

In pursuance of the order the safe was opened by the Bench Clerk and contents removed to the Court.

On the 7th June 1908 Tchun Chun made an *ex parte* application to the Chief Presidency Magistrate, who, on the 8th June 1908 without any notice to the Petitioners, passed an order which ran thus:—The three safes to be placed in the room at complainant's (Tchun Chun) expense from which they were taken and the keys to be handed over to Tchun Chun, and a joint receipt taken from Tchun Chun, Chung Young and Vang Sang.

The Petitioners came to know of this order after the safes had been brought to the church and through Counsel obtained from the Presidency Magistrate an order on the local Police to take charge of the safes etc.

The local Police visited the church and sealed the safes and put a padlock on the door and posted a guard at the door of the room.

On 13th June 1908 the Chief Presidency Magistrate heard Counsel for both parties and passed this order:

"The two safes to be again taken charge of and to remain in charge of this Court. I have given notice to both parties that safes will be placed in the room from where they were taken and keys handed over to secretary.'

Against the order of the 8th June the Petitioners moved this Court and obtained this rule.

Mr. A. Chaudhuri and *Babu Manindra Nath Bhuttacharya* for the Petitioners.

Mr. S. P. Sinha and *Babu Ratan Chand Boral* for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

This was a rule calling upon the Chief Presidency Magistrate to show cause why his order directing the return of the two safes with money to Tchun Chun should not be set aside and an order passed directing that the money and the safe should remain in custody of the Magistrate pending the disposal of appeal in the civil suit between the Petitioner and the

LEONG MOW v. TCHUN CHUN.

opposite party or why such other order should not be passed as to this Court may seem fit, on the ground that the order passed by the Presidency Magistrate does not appear to be one which he was empowered to pass under the law.

Now it is perfectly clear that the present custody of these articles is with the Criminal Court owing to a mistake. The property was brought in the possession of the Criminal Court on the 27th March 1907 by an order purporting to be made under sec. 144, Cr. P. C., although it was really made by consent of parties and that order was that the room be opened out in presence of both parties and the iron safes be also opened out in presence of both the parties and a list made of the contents thereof and also of books and papers found, the contents of the safes and accounts be removed to the Court to remain in the custody of the Court. There was a further order forbidding anything that might tend to cause disturbance of public tranquility under sec. 144, Cr. P. C. That was the only order that could be passed under sec. 144, Cr. P. C., but the other order, by which we understand the consent order, was directed to remain in force for 2 months or until the decision of the suit pending before the Honourable High Court. Owing to a series of misunderstandings and to the fact that the civil litigation is still pending, these safes are still found in the custody of the Criminal Court and the keys which were received from various individuals are also in the custody of the Court. This custody is wholly without jurisdiction and the only order that we have power to make in this case is that matters should be restored to exactly the same condition as the Magistrate found them in before he passed the order on the 27th March 1907. What that condition is appears to be disputed. In paragraph 7 of the petition of the party who obtained the rule certain facts are stated as to the padlocks on the door of the room and four padlocks on one of the safes and as to the padlocks on a smaller safe. There is an affidavit of the other side partially traversing these facts. But we are unable to go into any question of fact or into any question of the right or title between the parties. We can only direct the Chief Presidency Magistrate to put things back in the position they were in on the day he passed the order and how that position affects the rights of either party we are not concerned.

The rule will therefore be made absolute in these terms—that the Presidency Magistrate do proceed forthwith—after such enquiry as may be necessary as to the persons who had the keys to put back the safes locked in the same manner as they were locked in the 27th March 1907 into the room in the church where they were found and, that the room be locked in the same manner as it was on that day and that the keys be given to the persons from whom the Court received them.

If there are any expenses incurred in the removal of the safes they will be borne by both the parties.

B. C.

[CRIMINAL REVISIONAL JURISDICTION.]

REV. NO. 723 OF 1908.

BRETT, J.
RYVES, J.
1908.
24, July.

SHIB CHANDRA GOSSAIN, Petitioner,
v.
HRIDAY CHANDRA DASS, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 133, 138, 140 and 141—Jury failing to return the verdict—Appointment of a fresh jury—Magistrate's discretion.

Where in a proceeding under sec. 133, Cr. P. C., the jury appointed under sec. 138 failing to return the verdict on account of certain causes, the Petitioner appeared before the Magistrate and prayed for the appointment of a fresh jury, but the Magistrate refused the prayer and proceeding under sec 141, Cr. P. C., made his original order absolute,

Held—*That the Magistrate in so doing did not exercise a proper discretion. He ought to have in the exercise of his discretion appointed a fresh jury in compliance with the prayer of the Petitioner.*

This was a rule granted on the 23rd of June 1908, against an order of the Joint Magistrate of Kishoregunge, dated the 3rd of June 1908, making absolute the conditional order passed by him on the 8th January 1908, and directing the Petitioner to remove the posts planted by him on a public path by 16th of March 1908.

The facts material to the report are briefly these:—

"In a proceeding under sec. 133, the Petitioner appearing to show cause prayed for the appointment of a jury and a jury was appointed. But on the day fixed for the meeting of the jurors, two of them failed to attend. Afterwards the foreman of the jury returned the papers of the case to the Magistrate saying that as he was leaving home for about a month, another foreman might be appointed. The Petitioner also appeared before the Magistrate about the same time and prayed that a fresh jury might be appointed. The Magistrate however refused to accede to the prayer and proceeding under sec. 141, Cr. P. C., made his original order absolute with the following remarks:

"Foreman reports that two of the jurors have failed to attend and that he himself is going away. I have seen the place and find that the place is a public path and has been obstructed by the posts planted by the 2nd party. As the jury have failed to return a verdict within the time fixed, I proceed under sec. 141, Cr. P. C., and declare the order absolute. Issue order under sec. 140, Cr. P. C., on the 2nd party to remove the posts by 16th March 1908."

The Petitioner then moved the High Court and obtained the present rule.

Babus Amulya Churn Bose and *Bir Bhusan Dutt* for the Petitioner.

No one appeared for the Opposite Party.

The JUDGMENT OF THE COURT was as follows:—

In this case the Magistrate appears to have passed an order under sec. 133 of the Criminal Procedure Code against the Petitioner directing him to remove an obstruction from what is alleged to be a public path or road, to appear and show cause why the obstruction should not be removed. The Petitioner who appeared to show cause prayed for the appointment of a jury and a jury was accordingly appointed.

SHIB CHANDRA GOSSAIN v. HRIDAY CHANDRA DASS.

It appears that on the day fixed for the meeting of the jurors, two of them failed to attend. Afterwards the foreman of the jury had to leave home for about a month and he therefore returned the papers of the case to the Magistrate with a request that another foreman might be appointed in his place. The Petitioner seems also to have appeared at the same time and to have asked that a fresh jury might be appointed. The Magistrate proceeding, however, strictly under the provisions of sec. 1?1, Cr. P. C., refused any further adjournment and made his original order absolute. We think that in so doing the Magistrate did not exercise a wise descretion. There was on the part of the Petitioner a denial that the road was a public road and after what had occurred we think that the Magistrate in the exercise of his discretion should have appointed a fresh jury in compliance with the application of the Petitioner to decide whether in fact the trees etc., planted by the Petitioner which are said to have caused the obstruction on the public road in fact had caused such obstruction.

We therefore make the rule absolute, set aside the order of the Magistrate under sec 140, Cr. P. C., and direct that the case be sent back to him in order that he may dispose of it according to law.

B. C. *Rule made absolute.*

THE

Calcutta Weekly Notes.

Vol. XII.] MONDAY, SEPTEMBER 14, 1908. [No. 44

Contents.

NOTES.

High Court Notices.

To

THE DISTRICT MAGISTRATE OF

Dated Calcutta, the 27th August 1908.

SIR,

1. I am directed to forward for your information and guidance, and for communication to the Subordinate Criminal Courts of your district copies of the rules which have been framed by this Court regarding Muktars' clerks.

2. The attention of the Court has recently been drawn to the unsatisfactory condition of affairs which has resulted in certain instances from an excessive number of persons attending the local Courts, under the pretext that they are Mukhtars' clerks. It has also been brought to the notice of the Court that the powers of District Magistrates in regard to the control of this nuisance are not as clearly defined as is desirable. The Court trust that the rules now issued will be sufficient to meet the evil.

3. I am to request that you will be so good as to state in your next Annual Report, the way in which the rules have worked during the period they have been in force in your district.

I have the honour to be,
SIR,
Your most obedient servant,
A. P. MUDDIMAN,
Registrar

Rules regarding Mukhtars' clerks.

1. The District Magistrate at head-quarter stations and such Court at out stations as the District Magistrate may direct, shall maintain a register of all clerks employed by the Mukhtars practising at those places, showing their names, residences and the date on which they were registered as clerks of the Mukhtar by whom they are now emp'oyed

2. On or before the date on which these rules come into force, all Mukhtars practising in the subordinate Courts shall file a statement of the names and addresses of the clerks employed by them and shall report any changes as they occur. The certificates required by rule 4 shall be furnished in regard to the persons whose names are reported for registration under this rule.

3. No Mukhtar shall employ more than one clerk at one and the same time, without the express permission of the District Magistrate, or such officer as the District Magistrate, shall authorise to grant such permission.

4. A Mukhtar, desiring to employ as a clerk any person not in his employ at the date these rules come into force shall state in his application that such person is a fit and proper person to be so employed, and that he will be employed *bonâ fide*, in his own service, for the purposes of his legal business.

5. These rules will come into force on the first of November 1908.—*Calcutta Gazette, dated 2nd September 1908.*

The following rule amending the Rules as to the qualifications, admissions, &c., of Pleaders and Mukhtars in Courts subordinate to the High Court, having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the power vested in it by sec 6 of the Legal Practitioners' Act, XVIII of 1879, is published for general information.

By order of the High Court,
A. P. MUDDIMAN,
Registrar.

HIGH COURT,
ENGLISH DEPARTMENT,
CIVIL.
The 27th August 1908.

Rule No. of 1908

Cancel clause (a) of Rule 6 as amended by Rule No. 1 of 1908, Chapter XI, page 263 of the High Court's General Rules and Circular Orders, Civil, and *substitute* therefor the following.—

(a) Such lectures must be attended either at one of the colleges affiliated in Law to the Calcutta University, or at such other centres as the High Court may prescribe, or in the case of candidates who are natives of the Assam Valley or of the Surma Valley and Hill districts divisions, or of the Garo Hills, and who are restricted to practising within the Garo Hill districts or the Commissionerships of the Assam Valley and the Surma Valley and Hill districts, at one of such colleges or at the regular course of lectures delivered by the Lecturer in Law specially appointed by the Lieutenant-Governor of Eastern Bengal and Assam for the purpose of delivering lectures to Pleadership candidates and the attendance must be for a period of not less than two academical years: in the case of such last-mentioned candidates after passing the Entrance Examination of the University of Calcutta, Madras, Bombay, the Punjab or Allahabad, and in the case of all other candidates, after passing any one of the other examinations referred to in clause (a) of Rule 5.—*Calcutta Gazette, dated 2nd September 1908.*

SCIENTIFIC RESEARCH IN ANCIENT HINDU LAW as in other branches of Ancient Hindu Literature has no doubt been initiated by European scholarship, but the result so far has not been altogether satisfactory. The difficulties in the way of a European scholar prosecuting such research are immense and it is no wonder therefore that not a few of the erroneous notions concerning Hindu law which have gained currency with lawyers and judges and have been embedded in the law reports are traceable to the failure on the part of European scholars to regard questions of Hindu Law from the stand point of Hindu jurists and their attempt to interpret such

questions according to their preconceived notions. It is with great pleasure, therefore, that we note that the University of Calcutta has selected a Hindu Scholar of the ability of Dr. Priya Nath Sen as the Tagore Professor of Law and has entrusted him with the task of elucidating the principles of Hindu Jurisprudence.

SO FAR AS CAN BE JUDGED FROM THE SYNOPSIS presented to the University, his lectures promise to be a most interesting and highly instructive contribution to the literature of comparative jurisprudence. We are completely in agreement with Dr. Sen when he says that one great difficulty which lies at the threshold of such investigation arises from the fact that the science of jurisprudence as we know it has had its foundation in Roman law and that whatever may be the system of law which furnishes the materials, there is inevitably the tendency to start with "certain preconceived ideas about and a prearranged scheme of classification for juristic conceptions borrowed from the Roman Law." This tendency the learned Doctor very rightly deprecates and observes that in order to be properly appreciated and understood, Hindu Law "must be studied from within with such light as it itself affords and under such guidance as we may receive from a study of analytical and comparative jurisprudence."

DR. SEN DOES NOT BELIEVE IN THE RESULT OF THE so-called re-searches of modern antiquarians in regard to Hindu chronology. The only safe course, he thinks, is to apply the critical method of enquiry upon materials furnished by the lawgivers with a view to discover the onward march of juridical ideas along the line of progressive evolution. And he says, "in pursuing this enquiry we should avoid the error of extremes; on the one hand we should not rashly rush into conjectures which are not fully warranted by the evidence available to us, and on the other hand, we should not allow ourselves to be overawed by the phantoms of superstition which may stand in our way, under various subtle disguises, and endeavour to keep us fastened to the prejudices of the past."

CONSIDERATIONS OF SPACE FORBID OUR MAKING further quotations from the learned author's very suggestive Introductory lecture. We will only notice the distinction which he draws between the Hindu and the Austinian view of law and which ought to furnish the key to many of the peculiar phenomena of Hindu legal history. According to Austin, law in its normal form consists of commands issuing from the King and the duty of enforcing the same is a self-imposed one, whilst according to the Hindu view, the law issues from a source superior to the King and the duty of enforcing the same is regarded as a religious duty and the infliction of punishment itself is a *dharma*. Dr. Sen also vigorously combats the notion, as fallacious as it is widespread and based as it is on high European authority, that the main function of Oriental Empires was the gathering of taxes and levying of armies and that they seldom concerned themselves with the enforcing of legal rules. So far as India is concerned, nothing, in his opinion, is further from truth. The mistake probably arises from the fact that there was very little need for legislation by the King except in minor matters of local or temporary importance, the general body of the law being contained in the *shastras* and their exposition being entrusted to learned Brahmins. Dr. Sen does not pause to consider how far this bifurcation was conducive to the welfare of the community, but he says "it certainly kept up the idea of the sacredness which the Hindu attached to their law as emanating from a higher wisdom and not originating in the royal will."

FROM THE INTRODUCTORY LECTURE AND THE SYNOPSIS we have come to entertain very high hopes regarding the issue of the learned Doctor's labours. We cannot better close this notice than by presenting to our readers the concluding lines of the Introductory lecture which, though bold, is yet full of promise. "I do not . . . mean to assert that the Hindu Jurisprudence was in all respects as perfect as one could desire, but I hope to be able to show that, in the main, it will not compare unfavourably with even the most developed system of ancient Jurisprudence, the Roman. The assertion may seem to be somewhat too bold but I do not see any intrinsic improbability about it, and I hope that those who know anything about the contributions of the Hindu mind in other departments of knowledge will not meet it with irrational scepticism. As regards those who go into raptures at the bare mention of the twelve tables but shake their heads at the bare mention of the name of Manu, and talk about feeble, civilisation and 'cruel absurdities' without feeling the absurdity of criticising a subject which they had no opportunity to study I am content to leave them to their conviction and to the satisfaction which they derive from the same."

Reviews.

INSANITY IN INDIA. Its Symptoms and Diagnosis with reference to the relation of Crime and Insanity. *By G. F. W. Ewens, M. D., Dip. Pub. Health, Major, Indian Medical Service; Superintendent, Punjab Lunatic Asylum, Lahore. Calcutta, Thacker, Spink and Co. 1908.*

The author of this work has turned to good account his seven years' experience as Superintendent

of the Punjab Asylum, and has recorded within the compass of 300 and odd pages, a mass of materials which will be found to be of the greatest use to those who will have occasion to deal with the subject of insanity in India generally, or with the diagnosis of forms of insanity peculiar to this country. The author does not discuss the pathology of the various forms of the disease and contents himself with recording and classifying the cases according to their symptoms as they presented themselves before him. The author is, however, careful to note that, the cases of insanity which find their way into Government Asylums in India are ordinarily too dangerous and troublesome to be left in charge of their relatives or to be allowed to go about freely. A complete account, therefore, of all forms of insanity prevailing in India is not to be looked for in this work. So far as this work goes, however, the author has dealt with the subject in a thorough and conscientious manner. Some idea of the labour involved may be formed from the fact that the subject has been divided into 47 chapters. Chapter XXXIX and onward are of special interest and constitute to our mind the most valuable portion of the work, as embodying the author's personal observations of lunatics under his charge. These deal with crimes amongst insanes and they include Homicide, Suicide, Theft, Arson and Sexual Crimes. At the end of each chapter is appended a summary of the cases with the observations made from time to time by the Asylum authorities, and in this way over 250 cases are recorded. They are not pleasant reading but they bear out the conclusion which has been forcing itself on the thoughtful that criminality goes with defective mental constitution, and is more akin to insanity than it is ordinarily believed to be; that in fact, the majority of persons committing crimes are predisposed to do so by the heredity of physical (and along with it mental) configuration or the effect upon it of training and environment; and that on that account they are less blameworthy than is usually supposed.

In an appendix is given an account of "a race of idiots found in the Punjab, commonly known as 'Shah Daula's mice.'"

The book seems to us to be the first of its kind by an Anglo-Indian author and we may safely say that its intrinsic merits as a book of reference will secure for it the appreciation of all who may consult it professionally in dealing with criminal lunatics in this country, be they doctors or lawyers.

THE LAW OF ARBITRATION IN INDIA with Appendices of Statutes. *By Durga Charan Banerjee, Advocate, High Court, N.-W. P., Allahabad. H. Liddel, Printer. 1908.*

This book, even if it had not been as well-written as we find it to be, would have been welcomed by the profession as the first work in India in which a systematic endeavour has been made to discuss the subject of arbitration in all its bearings with reference to Indian Statutes and Indian case-law. It is divided into 14 chapters the first two of which are devoted to a short historical review of the growth of the law of arbitration to its latest developments in this country.

In the appendix are collected the relevant sections of the new and the old Civil Procedure Codes, the texts of the Indian and the English Arbitration Acts and the relevant provisions of the Companies Act and the N.-W. P., and Oudh and the Punjab Land Revenue Acts. Nor is the index of cases to be overlooked because it appears at the end of the book and after the subject index. As we have already noted the author does not merely record and classify the rulings but discusses them, offering to the reviewer a refreshing change from the usual run of law books in this country which seldom rise above the level of case-noted editions of Indian Statute law.

BUTTERWORTH'S TEN YEARS' DIGEST OF REPORTED CASES. 1898-1907. *Vols. I—IV. London Butterworth & Co, 11 & 12, Bell Yard, Temple Bar. Law Publishers. 1908.*

The task of a digest maker to-day is not by any means an easy or a pleasant one. To make a good digest requires a good lawyer. A single case is often the meeting point of the most opposite principles of law inextricably mixed together. It may again take its peculiar colour from the peculiar facts of the case which may mark it out from other cases of its class for special treatment. The selection of the main headings and cross-references is in most cases a matter for most anxious consideration. And paradoxical as it may appear to the stranger, the strictly logical arrangement of subjects is not always the best suited for a digest, though of course logical considerations must predominate in the disposition of titles as a whole. For instance it may not be permissible to a digest-maker to give under the heading "Cabinet Minister" the suggestive cross-reference "See Burglary," or under "Clergyman," "See Bigamy." Though we are not sure that some digest-makers do not go this length, there are others who try to dispense with cross-references to an extent that makes their digest of little value to the busy practitioners.

Judged by such practical tests as experience suggests, we find the arrangement of titles and cross-references in the work under review follow the golden mean in this respect and that it is as scientific as the nature of the subject admits. **A tendency noticeable in older digests to multiply the number of independent headings made it at times difficult to find out the cases wanted without searching unsuccessfully under several titles. This may be obviated by the selection of more comprehen-**

sive titles embracing within it a number of correlated sub-titles. This has been sought to be done in the present digest and in this respect the compilers have found a reliable model in the arrangement followed in Lord Halsbury's "Laws of England." But the digest maker who has to deal with cases and not with legal principles in the abstract, cannot help specialising and the main titles selected in the digest are necessarily more numerous than in the "Laws of England."

Certain headings, such for instance, as "Estoppel," "Evidence," "Mistake" or "Fraud" forcibly illustrate the peculiar difficulties of the compiler of a digest as compared with the compiler of a code of laws. In dealing with such abstract and elusive titles he has to be content as a rule with giving cross-references to other more particular titles, there being very few cases dealing with abstract principles of law, and each case taking its peculiar colour and importance from the special facts of the case.

We have nothing but praise for the work as a whole and as worked out in its details. There is an interesting group of cases under the heading "Dependencies, Colonies and India." The Indian cases are all taken from the Times Law Reports. References to the Law Reports, Indian Appeals Series, should have been given as well. Lawyers in India seldom refer to the Times Law Reports as the Indian cases decided by the Judicial Committee are more fully reported in the Law Reports Series which are also much more readily accessible in India.

The last volume gives lists of cases digested, overruled or considered and a list of words, terms and phrases which have been judicially interpreted. The references to cases cited also appear in the body of the digest under each case noted. We note further that in the list of cases, the dates of the decisions digested or cited are also given, which is a very useful innovation. Lawyers in India will find this digest very useful in their search for English case-law on any legal question.

SOHONI'S CODE OF CRIMINAL PROCEDURE. Sixth Edition. *By S. Swaminadhan, M. A., L. L. B. and B. Sc., Ph. D., Barrister-at-law. Printed by Adison & Co., Madras, for the Deccan Book Agency, Poona City. 1908.*

Mr. Sohoni's editions of the Criminal Procedure Code, owing to their intrinsic merit, were greatly prized by the profession. It was therefore a matter for great regret to those who were familiar with this work when owing to the death of the learned author, new editions of the work ceased appearing. To them and to all who have to practise before Criminal Courts, the present edition of this well known work will be very welcome. The work has undergone careful revision in the hands of the present editor and is thoroughly up-to-date. The voluminous accumulation of case-law under such sections as sec. 145, or sec. 195, or sec. 537 for instance has been analysed and arranged in a manner which deserves the greatest credit. The work is, in fact, a marvel of industry and analysis. The analysis of notes under sec. 195 for instance shows as many as 34 headings. The cases under each heading are further grouped under sub headings selected with reference rather to the nature of the subject-matter than to the words and phrases used in the sections. In an appendix are collected allied statutes such as the Extradition Act, Whipping Act, Reformatory Schools Act, Coroners Act, Prisoners Act, Oaths Act. There is, moreover, an elaborate subject index of nearly 100 pages. In the list of cases the cases are arranged not alphabetically, according to their names but according to the volumes and pages of Reports in which they appear. The book is a bulky one and covers over 1,500 pages. Nevertheless it is pleasing to the eye and easy to handle by reason of its excellent printing and get up which reflect credit on the printers and publishers.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ. CRIMINAL REVISION No. 809 OF 1908. SHARAFAT, 2nd Party, Petitioner *v.* HIRA DHAR, Opposite Party. 25th August 1908.

Criminal Procedure Code, sec. 145—Order passed without taking any evidence—Remand of the case by the High Court.

This was a rule to set aside an order of the Magistrate under sec. 145, Cr. P. C., on the ground that the order passed was without jurisdiction as it was made without taking any evidence.

Their Lordships observed:—

"We think that the rule must be made absolute and the order of the Sub divisional Magistrate passed under sec. 145, Cr. P. C., set aside on the ground that he had no jurisdiction to pass that order without taking any evidence at all.

"We therefore direct that the case be sent back to that Court with directions to the Magistrate to proceed with the case from the stage which it had reached when the order was passed and to dispose of it according to law."

Babu Rajendra Chandra Guha for the Petitioner.

Babu Naresh Chandra Sen for the Opposite Party.

B. C.

PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

LORD ROBERTSON.
LORD ATKINSON.
LORD COLLINS.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
1908.
16, July.

ATAR SINGH and others, v. THAKAR SINGH.

Hindu Law—Husband's estate in possession of widow—Sale by reversioner—Suit by his sons to set aside sale of lands as ancestral—Onus of proof—Conjectures and proof.

Where the Plaintiffs, who were Hindus, sued to set aside a deed of sale executed by their deceased father on the allegation that the lands sold were ancestral and that the sale was not necessary and was for a fictitious consideration and in fraud of the rights of the Plaintiffs' father as next heir and reversioner on the death of the widow of the deceased owner;

Held—*That the onus was on the Plaintiffs to show that the lands were not self-acquired lands in the hands of the deceased owner.*

There was evidence to show that the deceased owner acquired some lands by purchase and there was a probability that other lands came to him as ancestral, but Plaintiffs failed to prove which portion was self-acquired and which ancestral,

Held—*That a solemn deed executed by the Plaintiffs' father could not be set aside upon mere conjectures, and the Plaintiffs' suit must fail.*

Appeal by five out of eight Defendants from a decree of the Chief Court of the Punjab (Anderson and Robertson, JJ.), dated the 25th May 1903 which reversed a decree, dated the 30th 1899, passed by the District Judge of Amritsar (Mr. Harris) who had dismissed Plaintiffs' suit but had ordered each party to pay its own costs.

The suit was brought to have it declared that at a certain deed of sale, dated the 7th May 1894, excuted by the Plaintiffs' father Dyal Singh (the 8th Defendant on the record) was an invalid deed and praying that if the deed was held to be partially invalid they should be allowed on payment of such sums out of the consideration-money as were paid for legal necessity to take possession of the properties.

The sale related to certain landed property consisting of land and a house situate in the village of Tungbala and houses in the city of Amritsar but the Amritsar houses were not the subjects of this appeal.

It appears that one Sirdar Dhanna Singh was the original owner of the property in dispute and when he died his widows succeeded to the usual widow's interest for life in his property. One of these widows, Rajind Koer, on the 13th October 1891, made a gift of the properties in suit to one Gurdit Singh, the son of her daughter Khem Koer. Thereupon the said Dyal Singh who was the next reversioner to Dhanna Singh's estate on the death of Rajind Koer and who had no money and was unable to take any action to establish his rights in connection with the above and other alienations of Dhanna Singh's estate made by the widows, after various efforts, ending in failure, to obtain funds by sharing the property with the lender, on the 27th October 1891, entered into an agreement with the Appellants, Man Singh, Kharak Singh and Harnam

ATAR SINGH v. THAKAR SINGH.

Singh, by which he agreed to give them $\frac{6}{16}$th share of each and every alienated property for cancellation of the alienations of which a decree might be passed by the Courts concerned, in lieu of the expenses which would be incurred by the said persons in Courts, the help which they might give and the labour and the time which they might expend in the prosecution of the case relating to the said alienation.

The expenses to be paid were not to include pleaders' fees, as to which Dyal Singh on the same date entered into a separate agreement with the Appellant, Atar Singh, by which he contracted to give Atar Singh a $\frac{3}{16}$th share in each property recovered by the exertions of the pleader, in lieu of any payment for his services.

In pursuance of the said agreements, a suit was at once brought against Gurdit Singh, and on the 26th April 1893 a final decree was made by the Chief Court of the Punjab declaring that the deed of gift, dated the 15th October 1891, was inoperative after the death of Rajind Koer.

The said lady died on the 27th April 1894, and on the 7th May 1894 Dyal Singh executed a deed of sale conveying a $\frac{27}{64}$th share in the properties in suit, to the Appellants and certain other members of their family.

The present suit was instituted on the 16th October 1897 by the mother acting as guardian for and on behalf of the two sons (both minors) of the said Dyal Singh. One of the said minors died *pendente lite* and the other Thakar Singh was now the sole Respondent.

Five issues were fixed by the District Judge of which only two are now material :—

(1) Was the property in dispute the ancestral property of Defendant No. 8 and of Plaintiffs ?

(2) If it was, was the alienation for full consideration and legal necessity, and are the Plaintiffs bound by the agreement of the 27th October 1891, and is the same for the benefit of Defendant No. 8 and of Plaintiffs ?

The District Judge after giving a history of the village decided the first issue as follows :—

"The present tenure of the village is bhayachara. The whole of the village of Tunghala belonged to Tung Jats, the descendants of Dulmi, and at the first settlement of 1852 the only proprietors were the widows and collaterals of Sardar Dhanna Singh and such other persons as had purchased land from the widows. The whole village, therefore, practically in Sardar Dhanna Singh's time, must have belonged solely to him, with the exception of 120 ghumaos belonging to his collaterals. I have no doubt that Sardar Dhanna Singh must have had some land descending to him from Ghaur Singh, (?) the common ancestor of Dyal Singh and of Sardar Dhanna Singh, but there is no means of ascertaining how much this was exactly. If, however, Dyal Singh's 30 ghumaos represents the correct ancestral share, then Sardar Dhanna Singh's must have been the same. This land could rightly be termed ancestral, so far as Thakar Singh, Plaintiff, is concerned.

"Again, on the principle of the *Punjab Record No. 31 of 1894*, land that Sardar Dhanna Singh got of his collaterals, who were absentees, would be governed by

ATAR SINGH v. THAKAR SINGH.

the same rules as ancestral land, and might, therefore, be classed as ancestral, it must be held that the land that the Sardar got of his collaterals, who were absentees, was ancestral; but unfortunately there are no records to show what was the quantity of the land, or where that land is, and so this course of reasoning, though correct, leads to no practical result as to deciding how much land is to be held as ancestral.

"A very difficult task was laid on Plaintiff to perform, *viz.*, to prove positively that the land in suit was ancestral. The Plaintiff had conjectures to help him, as I have already described, and very reasonable conjectures, too—but after all, only conjectures—whereas absolute certainty was demanded. The nature of the Sardar's rights in the village was decidedly peculiar; *primâ facie*, they were acquired rights, that is, by self-acquisition; for all individual rights were lost by the confiscation by the Sikh Raj, and had it not been for the Sardar, the lands then taken would have still formed part of Rakh Shikargah, as the other lands of other villages then included. Under these circumstances I have come to the conclusion that Plaintiff has failed to establish affirmatively that the land in suit is ancestral. I have come to this conclusion the more readily, as the Sardar had 1,197 ghumaos of land, and all the land has been sold by his widows, so that what the Sardar got from the common ancestor, Ghaur Singh, and from his collaterals, they well be regarded as included in that sold by the widows, and that the land now in dispute is self-acquired. It is said, with some show of reason, that the original land of the old village of Tung is that included in Chhambwala well where all the Tung Jats have proprietary rights, so it might reasonably be supposed that the Sardar's ancestral lands were also in the lands of this well, and, if so, no part of the lands of this well is in dispute.")

In the Court of Appeal, the above finding of the District Judge was reversed by the Chief Court (Anderson and Robertson, JJ)..

That Court held that as regards the lands in suit which originally and still belonged to Tungbala the Defendants had failed to show that the plots, if any, were acquired by purchase, that the property was ancestral and could only be charged with sums found to be taken for legal necessity. It was further held that the total sum to be so charged was Rs. 3,480.

Mr. DeGruyther for the Appellants after commenting on the utter absence of maps, plans, etc., urged that the property was not ancestral. He urged that as in other parts of India the property descended from allotments was not regarded as ancestral; further that the two agreements of 27th October 1891 were binding on Dyal Singh and as Thakar Singh was born after these agreements the Appellants' deed of sale was not affected by his subsequent birth and in any case the amount allowed for legal necessity was far too low and the Chief Court ought to have allowed a larger sum if it was held that the property was ancestral.

No one appeared for the Respondent.

Their Lordships at the conclusion of the learned counsel's address said they would deliver judgment on another date.

ATAR SINGH *v.* THAKAR SINGH.

Their LORDSHIPS' JUDGMENT was delivered by—

LORD COLLINS.—This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakar Singh and his brother, Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May 1894 by their father Dyal Singh to the Appellants and certain other persons as purchasers, on the ground that the lands, the subject-matter of the sale, were, in the view of the Hindu law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the Plaintiffs' father Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died while the suit was pending. The only question in dispute on this appeal is whether the lands were ancestral. The District Judge has held that they were not, the Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the Plaintiffs', and it is because in the opinion of the District Judge they failed to discharge this onus that the suit was dismissed.

It is through their father, as heir of the above named Dhanna Singh, that the Plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the Plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the Plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons who may have been collateral, and, in that way, may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed, the learned Judges of the Chief Court themselves say: "It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased." But it is by reason of this impossibility that the Plaintiffs failed to prove their case. The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively self-acquired lands. Their Lordships agree that, when the onus lies, as it does in this case, on the Plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships

ATAR SINGH v. THAKAR SINGH.

agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The Respondent must pay the costs of this appeal, except so far as they may have been increased by the delay which has taken place in the prosecution of the appeal.

Solicitors: *Messrs. Watkins & Lempriere* for the Appellants.

J. H. W. A. *Appeal allowed.*

PRIVY COUNCIL.

[APPEAL FROM AUSTRALIA.]

THE LORD CHANCELLOR. LORD ASHBOURNE. LORD MACNAGHTEN. LORD ROBERTSON. LORD ATKINSON. LORD COLLINS. 1908, 3, June.	MACINTOSH and another, Plaintiffs, Appellants, *v.* DUN and others, Defendants, Respondents.

Libel—Privilege—Trade protective society—Information as to position of business men, supplied to subscribers for consideration—Volunteering of information—Welfare of society not served by such business—American authorities, value of.

The Defendants carried on the business of a trade protective society, their business consisting in obtaining information with reference to the commercial standing and position of persons in the State of New South Wales and elsewhere and in communicating such information confidentially to subscribers to the agency in response to specific and confidential enquiry on their part,

Held—*That the Defendants are really to be regarded as volunteers in supplying the information which they profess to have at their disposal, and their motive in carrying on the business is self-interest.*

That having regard to the methods which will be naturally adopted in carrying on such a business it is not for the welfare of society that the protection which the law throws around communications made in legitimate self-defence or from a bonâ fide *sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people.*

In cases which are near the line and in cases which may give rise to a difference of opinion, the circumstance that information is volunteered is an important element for consideration.

Held, *in an action for libel brought against the Defendants by a firm in respect of whom the Defendants had made communications to a subscriber, that the same were not made on a privileged occasion.*

American authorities not followed.

TOOGOOD *v.* SPYRING (1), PEARSE *v.* PEARSE (4) *relied on.*

This was an appeal from a judgment of the High Court of Australia, dated the 7th of May 1906, whereby a judgment which the Appellants had obtained against the Respondents for £800 as damages for libel was set aside. The only question before their Lordships in the Privy Council was whether the libels complained of were privileged communication or not.

The Appellants carry on business in

(1) 1 C. M. and R. 181 at p. 193 (1834).
(4) 1 De G. and S. 13 at p. 28 (1846).

MACINTOSH *v.* DUN.

partnership as ironmongers under the style of John Mackintosh and Sons at Sydney, New South Wales.

The Respondents carry on business in partnership under the style of the Mercantile Agency, R. G. Dun & Co.

The Respondents' agency was first started in 1841 since which date the Respondents and their predecessors have carried on and extended the said business and at the present time the said agency has branches in the United Kingdom, the Colonies and throughout the Empires, and States of Europe, the United States of America and in almost all parts of the world and in particular a branch of such agency exists and is carried on at No. 51, York Street, Sydney, New South Wales, which branch is called the Sydney office.

The business of the Respondents consists in obtaining information with reference to the commercial standing and position of persons carrying on business in the places where the Respondents' agency is carried on and in communicating such information confidentially to their subscribers for business purposes in response to specific and confidential inquiry and request made by the subscriber, as and when the subscriber has occasion to require information.

The circumstances leading up to and attending the publication of the alleged libel are shortly these :—

In the month of October 1903 an old and well-established firm in Sydney known as Dean & Sons suddenly failed and this firm called a meeting of its creditors about the middle of such month. This failure came as a shock to the mercantile community in Sydney, and gave rise to general uneasiness; and rumours affecting the standing of several business houses including the Appellants, arose at this time and as a consequence a great deal of financial investigation was made by mercantile houses as to persons with whom they did business, and amongst other business firms concerning whose standing inquiry was made by mercantile houses was the Appellants' firm.

A firm of Holdsworth Macpherson & Co., who had carried on business as ironmongers in Sydney and had done business with the Appellants' firm for many years were at the time in question and had been since 1902 subscribers to the Respondents' agency.

On or about the 3rd of December 1903 the said firm of Holdsworth Macpherson & Co. made inquiry in writing of the Respondents' agency at their Sydney office concerning the Appellants.

In response to such written request by the said firm of Holdsworth Macpherson & Co., the reports in question respectively, dated the 13th of November 1903 and the 10th of December 1903, were issued by one Green on behalf of the Respondents at the Respondents' Sydney office and sent in confidence to the said firm of Holdsworth Macpherson & Co.

The statements complained of were as follows :—

"Whilst John Macintosh Senior (meaning the father of the Appellants) (who is regarded as a wealthy man and who in the past served the City of Sydney well both as Alderman and M. P.) was connected with the firm (meaning the Appellants' firm) they (meaning the Ap-

MACINTOSH v. DUN.

pellants' father and the Appellants) were, always in good credit, but, when the present constitution (meaning the retirement of the Appellants' father from the Appellants' firm) became known it is thought their (meaning the Appellants') credit will be materially effected, the reasons given being the reported extravagant tastes and habits of the managing partner (meaning the Appellant James Macintosh) and the lack of personal supervision . . . Their (meaning the Appellants') stock, although fairly heavy is varied and old and to a great extent second-hand and in some quarters it is considered that if subjected to a forced realisation it would not bring in more than 10s. in the £." (Report, dated 13th November 1903).

Again

"It is reported that they (meaning the Appellants) have a considerable overdraft at Bank; in some quarters reputed upwards of £40,000 to £50,000 but they (meaning the Appellants) have been very long-winded in their payments and a certain amount of uneasiness has been felt in connection with the account. . . . The sons (meaning the Appellants) do not appear to possess much if any tangible responsibility, and the concern (meaning the Appellants' business) has heretofore been credited on the believed entire responsibility of the father (meaning the aforesaid John Macintosh Senior). They (meaning the Appellants) have a large stock but as mentioned in previous reports same is very badly kept and would suffer a considerable depreciation at forced realization." . . . "Probably like others they (meaning the Appellants) have felt the effects of the long continued drought and the present depression in trade, are presumably solvent, yet prudent dispensers of credit are advised to have a clear understanding with the firm (meaning the Appellants' said firm) as to their exact position." (Report, dated 10th December 1903).

The High Court of Australia as stated above decided against the Appellants and set aside the verdict for £800 which the Appellants had obtained as damages against Respondents for libel.

Mr. Dickens, K. C., and *Mr. I. A. Simon* for the Appellants contended that the High Court of Australia was wrong in holding that the libels were privileged and relied on the following authorities:— *Harrison* v. *Bush* (5), *Toogood* v. *Spyring* (1), *Hebditch* v. *MacIlwaine* (6), *Waller* v. *Loch* (7), *Robshaw* v. *Smith* (8), *Stuart* v. *Bell* (2), *Southam* v. *Allen* (9), *King* v. *Watts* (10), *Coxhead* v. *Richards* (11), *Bennett* v. *Deacon* (12), *Fleming* v. *Newton* (13), *Lord Annaly* v. *Trade Auxiliary Co.* (14), *Williams* v. *Smith* (15), *Searles* v. *Scarlett* (16), *Reis* v. *Perry* (17), *Saunders* v. *The Seyd and Kelly's Credit Index Co.* (18), *Cohen* v.

(1) 1 C. M and R. 181 (1834).
(2) [1891] 2 Q. B. 341 at p. 346.
(5) 5 E. and B. 344 (1855).
(6) L. R. (1894) 2 Q. B. 54.
(7) 7 Q. B. D. 619 (1881).
(8) 38 L. T. 423.
(9) 1 T. Raym 231.
(10) 8 C. and P. 614 (1838).
(11) 2 C. B. 569 (1846).
(12) 2 C. B. 628 (1846).
(13) 1 H. L. C. 363 (1848).
(14) 26 L. R. Ir. 394.
(15) 22 Q. B. D. 134 (1888).
(16) (1892) 2 Q. B. 56.
(17) 64 L. J. Q. B. 566.
(18) 75 L. T. Rep. 193.

MACINTOSH *v.* DUN.

Merchants and Traders Association (19), *MacNally* v. *Oldham* (20), *Pullman* v. *Hill* (21), *Foley* v. *Hall* (22).

Sir R. B. Finlay, K. C., Mr. R. R. Wise and *Mr. Frank Glover* for the Respondents relied on the cases cited below:— *Homer* v. *Taunton* (23), *Amann* v. *Damm* (24), *Davies* v. *Snead* (25), *Jenoure* v. *Delmege* (26), *Bromage* v. *Prosser* (27), *Usil* v. *Hales* (28), *Stuart* v. *Bell* (2), *Fleming* v. *Newton* (13), *Williams* v. *Smith* (15), *Searles* v. *Scarlett* (16), *Reis* v. *Perry* (17), *Saunders* v. *The Seyd and Kelly's Credit Index Co.* (18), *Foley* v. *Hall* (22) cited by the Appellants, also the following American and Colonial cases: *Ormsby* v. *Douglass* (29), *Sunderlin Broclstreet Co.* (30), *Erber* v. *Dun* (31), *Loche* v. *Broclstreet Co.* (32), *King* v. *Patterson* (33), *Douglass* v. *Daisley* (34), *Robinson* v. *Dun* (35), *Todd* v. *Dun* (36), *Davies* v. *Hall* (37).

(2) [1891] 2 Q. B. 341 at p. 346.
(13) 1 H. L. C. 363 (1848).
(15) 22 Q. B. D. 134 (1888).
(16) (1892) 2 Q. B. 56.
(17) 64 L. J. Q. B. 566.
(18) 75 L. T. Rep. 193.
(19) 21 New South Wales Law Rep. 241.
(20) 16 Irish C. L. Rep. 298.
(21) (1891) 1 Q. B. 524 (1890).
(22) 12 New South Wales Law Rep. 175.
(23) 29 L. J. Exch. 318 (1860).
(24) 8 C. B. N. S. 597 (1860).
(25) L. R. 5 Q. B. 608 (1870).
(26) (1891) 1 A. C. 73 (1890).
(27) 1 C. and P. 475: 4 B. and C. 247 (1824).
(28) 3 C. P. D. 206 (1878).
(29) 37 N. York (W. Tiffany) 477.
(30) 46 N. York (1 Lichel) 188.
(31) 12 Fed. Rep. 526.
(32) 22 Fed Rep. 771.
(33) 60 American Rep. 622.
(34) 114 Fed. Rep. 628.
(35) 24 Upper Canada App. Cas. 287.
(36) 15 Ontario App. Cas 85.
(37) 2 Angus Rep. 115 Australian.

THEIR LORDSHIPS' JUDGMENT was delivered by

LORD MACNAGHTEN.—This is an appeal from a decision of the High Court of Australia pronounced on cross-appeals from two orders of the Full Court of New South Wales.

The action was an action for libel. It was tried before Cohen, J., and a jury. The Plaintiffs obtained a verdict for 800*l.* The Full Court set the verdict aside, but directed a new trial. The High Court entered judgment for the Defendants.

The question, and the only question on the present appeal, is whether the occasion on which the libels were published was or was not a privileged occasion.

The Plaintiffs are wholesale and retail ironmongers in Sydney. The Defendants (as their acting manager in Sydney stated in an affidavit filed in the action) carry on the business of a trade protective society "in almost all parts of the civilized world" under the name of "The Mercantile Agency." That business, as the acting manager explained, "consists in obtaining information with reference to the commercial standing and position of persons" in the State of New South Wales "and elsewhere and in communicating such information confidentially to subscribers to the Agency in response to specific and confidential inquiry on their part." He stated further that all requests for information directed to the Agency by their subscribers are in the following form:—

Subscriber's Ticket.
The Mercantile Agency.
R. G. Dun and Co.
Established 1841.

MACINTOSH v. DUN.

Give us in confidence and for our exclusive use and benefit in our business, viz., that of aiding us to determine the propriety of giving credit, whatever information you have respecting the standing, responsibility, &c., of—

Name.........................

Business.....................

Town.........................

Street address...............

State........................

Subscribers to sign the above themselves

....

Subscriber

Sydney, per......

190 .

No.

The law with regard to the publication of information injurious to the character of another is well settled. The difficulty lies in applying the law to the circumstances of the particular case under consideration. In *Toogood* v. *Spyring* (1), Parke, B., delivering the judgment of the Court of Exchequer, says :—

The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

That passage which, as Lindley, L. J, observes [*Stuart* v. *Bell* (2)] is frequently cited "and "always with approval," not only defines the occasion that protects a communication otherwise actionable, but enunciates the principle on which the protection is founded. The underlying principle is "the common convenience and welfare of society"—not the convenience of individuals or the convenience of a class—but [to use the words of Erle, C. J., in *Whiteley* v. *Adams* (3)] "the general interest of society."

Communications injurious to the character of another may be made in answer to enquiry or may be volunteered. If the communication be made in the legitimate defence of a person's own interest, or plainly under a sense of duty such as would be "recognized by English people of ordinary intelligence and moral principle" [to borrow again the language of Lindley, L. J., *Stuart* v. *Bell* (2)], it cannot matter whether it is volunteered or brought out in answer to an inquiry. But in cases which are near the line, and in cases which may give rise to a difference of opinion, the circumstance that the information is volunteered is an element for consideration certainly not without some importance.

In deference, therefore, to the views of the learned Judges of the High Court, the first question would seem to be, under which category does the communication now in question properly fall? No doubt there was a specific request. In response to that request the communication was made. That much is clear. But it is equally clear that the Defendants set themselves in motion and formulated and invited the request in answer to which the information complained of was produced. The Defendants, in fact, hold themselves out as

(1) 1 C. M. and R. 181 at p. 193 (1834).

(2) [1891] 2 Q. B. 341 at p. 346.

(2) [1891] 2 Q. B. 341 at p. 346.

(3) 15 C. B. (N. S.) 392 at p. 418 (1863)

MACINTOSH v. DUN.

collectors of information about other people which they are ready to sell to their customers. It cannot matter whether the customer deals across the counter, so to speak, just as and when the occasion arises, or whether he enjoys the privilege of being enrolled as a subscriber and pays the fee in advance.

If, then, the proprietors of the Mercantile Agency are to be regarded as volunteers in supplying the information which they profess to have at their disposal, what is their motive? Is it a sense of duty? Certainly not. It is a matter of business with them. Their motive is self interest. They carry on their trade, just as other traders do, in the hope and expectation of making a profit.

Then comes the real question: Is it in the interest of the community, is it for the welfare of society, that the protection which the law throws around communications made in legitimate self-defence or from a *bonâ fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people? The trade is a peculiar one; still there seems to be much competition for it; and in this trade, as in most others, success will attend the exertions of those who give the best value for money, and probe most thoroughly the matter placed in their hands. There is no reason to suppose that the Defendants generally have acted otherwise than cautiously and discreetly. But information such as that which they offer for sale may be obtained in many ways, not all of them deserving of commendation. It may be extorted from the person whose character is in question through fear of misrepresentation or misconstruction if he remains silent. It may be gathered from gossip. It may be picked up from discharged servants. It may be betrayed by disloyal employés. It is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law.

It may not be out of place to recall the striking language of Knight Bruce, V. C., [*Pearse* v. *Pearse* (4)] in reference to a somewhat similar subject. The question before him was the propriety of enforcing disclosure of communications between a client and his legal advisers. "The discovery and vindication and establishment of truth," his Honour says:—

are main purposes certainly of the existence of courts of justice; still, for the obtaining of these objects which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them * * * Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."

And then he points out that the meanness and mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great a price to pay for "truth itself."

It seems to their Lordships, following out this train of thought, that, however convenient it may be to a trader to know all the secrets of his neighbour's position, his "standing," his "responsibility," and whatever else may be comprehended under the expression "et cetera," yet

(4) 1 De G. and S. 13 at p. 28 (1846).

MACINTOSH v. DUN.

even so, accuracy of information may be bought too dearly—at least for the good of society in general.

It is admitted that in this country there is no authority directly in point. There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned Judges of the High Court their Lordships are of opinion that the decision under appeal is not in accordance with that principle.

Their Lordships will therefore humbly advise His Majesty that the Orders appealed from should be discharged and the judgments of the Full Court reversed, with costs in both Courts, including the costs of the cross-appeals and that any costs already paid by the Appellants to the Respondents should be repaid by the latter.

The Respondents will pay the costs of the appeal.

Appeal allowed with costs.

J. W. H. A.

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 375 OF 1908.

FLETCHER, J.
1908.
Heard, 30 and 31, July.
Judgment, 31, July.

ADOLPHE SHRAGER
v.
EMMA PRICE.

*Landlord and tenant—Ejectment—Notice to quit—*Interesse termini, *persons having rights of—Form of notice—Damages—Acceptance of rent after expiry of notice to quit if waiver.*

An interesse termini *is an existing real right which gives the owner thereof an immediate right of entry and, consequently, entitles him to serve a notice to quit to the tenant in possession.*

The Plaintiff who had an interesse termini *gave notice to quit, through his attorneys, to the Defendant, a tenant in possession, in the following terms:—*
" * * We give you notice that our client will require you to vacate and give up possession of the premises on the 29th February now next, and that, should you fail to comply with the request, our client will take proceedings against you to eject you from the premises and he will charge you the sum of Rs. 350 per mensem as damages sustained by him during such period as you continue in possession after the 29th proximo;"*

Held, *it was good clear notice to quit and the addition of the second portion of the notice did not vitiate it.*

AHEARN v. BELLMAN (2) *followed.*

BRADLEY v. ATKINSON (1) *dissented from.*

(1) I. L. R. 7 All. 899 (1885).
(2) 4 Ex. D. 201 (1879).

ADOLPHE SHRAGER *v.* EMMA PRICE.

DOE *v.* JACKSON (3) *referred to.*

The Defendant began to occupy the tenement from the 1st april 1904 and submitted that the notice to quit ought to have been made to expire on the 1st March and not the 29th February,

Held, *the notice to expire on the 29th February was good, although it would be more usual to make the notice expire on the 1st March.*

SIDEBOTHAM *v.* HOLLAND (4) *followed.*

A Plaintiff, who has an interesse termini, *may, if his right to immediate entry is interfered with, maintain an action for damages.*

GILLARD *v* CHESHIRE LINES COMMITTEE (5) *followed.*

Suit instituted on the 5th May 1908 for a decree directing the Defendant to vacate premises No. 145, Dharamtollah Street in Calcutta; for the recovery of Rs. 280 for arrears of rent for January and February 1908; for recovery, by way of mesne profits or damages, for use and occupation of the said premises, at the rate of Rs. 350 per mensem from the 1st March 1908, until delivery of the said premises is made over to the Plaintiff; and, for costs of suit.

The premises belonged to the estate of one Sattya Doyal Banerjee and, on partition of the estate, they fell to the share of his son, Sattya Bhupal Banerjee who on the 27th September 1907, granted a lease thereof to the Plaintiff for a term of 20 years, commencing from the 1st September 1907. At that time, the Defendant was in possession of the said premises. On the 28th September 1907, the Plaintiff gave the Defendant notice to quit, and a further formal notice was given through his attorneys on the 16th February 1908 requiring the Defendant to vacate on the 29th February 1908, which ran as follows:—

"We are informed by Mr. Shrager that the owner of the premises No. 145 Dhurrumtollah Street, now occupied by you, has granted him a lease of the same for a period of 20 years and that, on our client seeing you and requesting you to vacate the premises and make over possession to him, you informed him that you had a lease of the premises. The landlord denies ever having given you any such lease as you represent you hold, and, under the circumstances, we must call upon you to allow us inspection of the lease alleged by you. We further give you notice that our client will require you to vacate and give up possession of the premises to him on the 29th February now next, and that, should you fail to comply with this request, our client will take proceedings against you to eject you from the premises and he will charge you the sum of Rs. 350 per mensem as damages sustained by him during such period as you continue in possession after the 29th proximo."

The Defendant in her written statement, amongst other things, stated that, after negotiations in February and March 1904, it was agreed between her and the said Sattya Bhupal that the property should be leased to the Defendant for 5 years from the 1st April 1904 to 31st March 1909 at a monthly rental of Rs. 140; that thereafter, she continued to live in the said premises as she had done for several years; that the terms and conditions were embodied in writing and submitted to the said Sattya Bhupal, who accepted the same on the 9th May 1904; that the document was then engrossed on stamp-paper and duly executed and registered on the 1st

(3) 1 Douglas, 175 (1779).
(4) [1895] 1 Q. B. 378 (1894).
(5) 32 W. R. (Eng.) 943 (1884).

ADOLPHE SHRAGER *v.* EMMA PRICE.

October 1904 by the Defendant and her former husband Mr. V. Jacob; that the Defendant had since been in occupation of the said premises by paying Rs. 140 as rent per month; and that, in terms of the Defendant's said kabuliyat or lease, she was in lawful possession of and was entitled to hold on to the said permises until the 31st March 1909. A further objection was taken by the Defendant that Sattya Bhupal, who was one of the executors of Sattya Doyal, could not, independent of his co-executors, grant a lease of the premises. The landlord denied having ever accepted the draft as stated by the Defendant.

The Plaintiff, without prejudice, received from the Defendant rent upto March 1908.

Mr. L. P. E. Pugh (with *Mr. Harry Stokes*) for the Plaintiff.

Mr. Buckland (with *Mr. S. C. Gupta*) for the Defendant.

Mr. Pugh:—The argument that Sattya Bhupal, as one of the executors of his father Sattya Doyal, could not grant the lease he purported to give me is not sound. In this case, there having been a partition of the estate and the leasehold premises in suit having been allotted to Sattya Bhupal, the question regarding the right of one of the executors to grant lease of the properties belonging to the estate of the testator does not arise. But, as a proposition of law, I submit, that one of the executors is, independently of his colleagues, entitled to grant such a lease. [See, Foa on Landlord and Tenant (4th Ed., 1907), p. 58, also sec. 271 of the Indian Succession Act (X of 1865)] *Doe* v. *Hayes* (6).

(6) 7 Taunt 217, (1816).

Mr. Buckland:—I submit the notice given by the Plaintiff in this suit is bad in law, because,

(*i*) Having only a *interesse termini*, the Plaintiff, who may be entitled to sue in ejectment, is not entitled to give notice to quit.

[THE COURT.—But, the Plaintiff purported to give the notice as the agent of the landlord.]

If he did so, he must show that he was authorized by the landlord in that behalf. [See, Cole on Ejectment (1857), p. 42].

(*ii*) The notice was not clear as it contained a further clause imposing certain penalties in case of continuance after the expiry of the notice. *Bradley* v. *Atkinson* (1).

(*iii*) The notice purported to terminate the lease on the 29th February, while it ought to have been made to expire on the 1st March, the Defendant having entered into possession on the 1st of a month. [See, Gour on Law of Transfer (2nd Ed., 1906), p. 1222]. *Ackland* v. *Lutley* (7).

Mr. Pugh in reply on the point of notice, submitted it was a clear notice to quit. [See, Cole on Ejectment (1857), pp. 30, 31] *Poole* v. *Warran* (8), *Sidebotham* v. *Holland* (4). Besides, a demand on his part for possession was sufficient [*vide, ibid* pp. 58, 59].

[THE COURT—You have not made an entry: there cannot be two leases of the same property at the same time: your right is contractual until you have made an entry].

Then I am entitled to sue without a

(1) I. L. R. 7 All. 899 (1885).
(4) [1895] 1 Q. B. 378 (1894).
(7) 9 Ad. and El. 879 (1839).
(8) 8 Ad. and El. 582 (1838).

ADOLPHE SHRAGER v. EMMA PRICE.

notice to quit being given. Furthermore, I show that the notice to quit or to pay increased rent by way of damages was good. *Gangadus Sil* v. *Captain A. Peperno* (9). Ejectment suit is maintainable by the owner of an *interesse termini*. *Bhutia Dhandu* v. *Ambo* (10).

[The Defendant was then called upon by the Court and she adduced evidence to prove the lease under which she purported to hold the premises. Thereafter, *Mr. Stokes*, applied for leave to adduce rebutting evidence regarding the lease set up by the Defendant, in case the Court was of opinion that she had made out a *primâ facie* case of title to entitle her to hold on. This application was granted.]

Mr. Buckland summed up. The fact that the kabuliyat or lease, under which I hold the premises, does not purport to be signed and registered by the Plaintiff, but only by myself and my former husband, does not in any way make the same any the less binding on the Plaintiff. [See, *Ambalavana Pandaram* v. *Vaguram* (11)]. A landlord who, during the currency of a tenancy, grants another lease of the same premises, cannot, during the continuance of such term, give notice to quit. *Wordsley Brewery Co.* v. *Halford* (12). If the landlord could not give such notice, I submit, his agents could not either. By accepting rent after the expiry of the notice to quit, the Plaintiff ought to be taken to have waived the notice.

Mr. Stokes in reply. Regarding the question of registration of leases, referred to *Hurjivan Virji* v. *Jamsetji Nowraji* (13); submitted that the Defendant could not enforce the specific performance of the agreement because of the lease to us. [See, Fry on Specific Performance (4th Ed., 1903) § 990, p. 429; also see, Art. 113 of the Limitation Act (XV of 1877)]. *Caballero* v. *Henty* (14). A person entitled to *interesse termini* is entitled to maintain an action and recover damages for injury done to the premises or the enjoyment thereof. *Gillard* v. *Cheshire Lines Committee* (5). Then I show that if during the currency of a tenancy the landlord grant a lease for years, as he did to me in this case, the lease operates as an assignment of the reversion to the lessee, and he is the proper person to give notice to the original tenant. [See, Woodfall on Landlord and Tenant (18th Ed, 1908), p. 399]. *Wordsley Brewery Co.* v. *Halford* (12). I am the proper person to give notice and sue in ejectment. I show that the only object of the Defendant in having the letter (which is signed by her and her former husband in favour of the Plaintiff) registered was for the purpose of creating evidence, having regard to the class of cases laying down the rule as to inadmissibility in evidence of unregistered documents which have created an interest in land, *e.g.*, *Dwarkanath Mitter* v. *Sarat Kumari Dassee* (15), *Mattongeney Dassee* v. *Ramnarain Sadkhan* (16). Lastly, I submit, the acceptance of the rent, being without prejudice to my rights, was not a waiver of notice to quit.

(9) 12 C. W. N. (notes) cc (1908).
(10) I. L. R. 13 Bom 294 (1888).
(11) I. L. R. 19 Mad. 52 (1895).
(12) 90 L. T. 89 (1903).

(5) 32 W. R. (Eng.) 943 (1884).
(12) 90 L. T. 89 (1903).
(13) I. L. R. 9 Bom. 63 (1884).
(14) 9 Ch. 447 (1874).
(15) 7 B. L. R. 55 (1871).
(16) I. L. R. 4 Cal. 83 (1878).

ADOLPHE SHRAGER v. EMMA PRICE.

The JUDGMENT OF THE COURT was as follows:—

FLETCHER, J.—This is a suit in ejectment. The Plaintiff claims under a lease executed on the 17th September 1907 for a term of twenty years, and granted to him by one Satya Bhupal Banerjee.

He sets out in his plaint that the Defendant who is in occupation of the premises, is there as a monthly tenant and that he has given her notice to quit.

The Defendant sets up a separate title in her written statement, namely, that she is in possession under an unexpired lease for a term of five years, granted prior to the lease of the Plaintiff.

As regards the case set up by the Plaintiff, the following objections are raised by learned counsel for the Defendant:—

First, the lease granted to the Plaintiff has never been completed by an entry and, therefore, operates only to grant to the Plaintiff an *interesse termini* and that a person who has an *interesse termini* is not competent to give notice to quit. In my opinion that is not so; an *interesse termini* is an existing real right vested in the Plaintiff which gives him an immediate right of entry, and that being so, the person entitled to make an immediate entry is entitled to serve notice to quit.

The second point set up against the Plaintiff's case is that the notice to quit is bad, and reliance is placed on the case of *Bradley* v. *Atkinson* (1). In my opinion that case is not the same as this case. The notice in this case cannot be distinguished from the notice in the case of *Ahearn* v. *Bellman* (2). Notice in that case was as follows:—

"I hereby give you notice to quit and deliver up possession of the shop-premises and show rooms situate at and being 20 Moss Street, Liverpool, and now held by you as tenant from me on or before the 1st day of May 1878 and I hereby further give you notice that should you retain possession of the premises after the date before-mentioned, the annual rental of the premises now held by you from me will be £160 payable quarterly in advance."

The majority of the members of the Court of Appeal held that it was a perfectly good notice, because it was a clear notice to quit and it was not vitiated by the terms in the second portion of the notice, which only laid down what would happen, if the Defendant failed to quit. In that case, the Court distinguished the case of *Doe* v. *Jackson* (3), which is the decision relied upon in the case in *Bradley* v. *Atkinson* (1). Sitting here as a single Judge and being free to follow the decision in either of those cases, I prefer to follow the decision of the English Court of Appeal. The notice in the case of *Ahearn* v. *Bellman* (2) is not distinguishable from the notice in the present case. I, therefore, hold that the notice to quit is a good notice.

The next point of objection is that the notice is bad as it is made to expire on the 29th February. It is said it ought to expire on the 1st March instead of the 29th February. There is how-

(1) I. L. R. 7 All. 899 (1885).

(1) I. L. R. 7 All. 899 (1885).
(2) 4 Exch. D. 201 (1879).
(3) 1 Douglas 175 (1779).

ADOLPHE SHRAGER *v.* EMMA PRICE.

ever distinct authority that, although it would be more usual to make the notice to expire on the 1st March, yet, if it is given to expire on the 29th February, the notice is good. See, *Sidebotham* v. *Holland* (4). That being so, unless the Defendant can establish the lease she sets up, I am of opinion that the Plaintiff is entitled to succeed.

Now, how does the evidence relating to the lease set up by the Defendant stand? The defendant has been in possession of these premises for a considerable number of years and she says in the third paragraph of her written statement this:—

"After considerable negotiation in the months of February and March 1904, between the Plaintiff (it ought to be the Defendant), on the one hand and the said Satya Bhupal Banerjee on the other, it was agreed by and between them that the property No 145 Dhurrumtolla Street should be leased to the Defendant for a period of five years commencing from the 1st April 1904, to the 31st March 1909, at a monthly rental of Rs. 140 and thereupon the Plaintiff (should be the Defendant), with her husband and children, who had been living in the said premises from 1903, continued to live in and occupy the same on and from the 1st April 1904, under the said lease. The terms and conditions of the Plaintiff's lease or *kabuliyat* having been embodied in writing on paper, the same was duly submitted to the said Satya Bhupal Banerjee who signed and accepted the paper-writing aforesaid on the 9th May 1904 which the Defendant holds and thereafter a fair-copy of the said document, having been prepared on stamped paper, was duly executed and then registered on the 1st October 1904 by the Defendant and her former husband V. Jacob, since deceased, and the Defendant has been ever since in occupation of the said property paying the said sum of Rs. 140 as monthly rent to the said Satya Bhupal Banerjee."

Now, the draft of this lease has been put in before me. On the evidence, I am not satisfied that Mr. Banerjee ever assented to this lease. The evidence on this point is not at all satisfactory. The only evidence that there was an agreement on which the parties agreed to take the lease is this:—The Defendant and her husband executed a counterpart or *kabuliyat* in terms of that agreement and they took it to the registration office and registered it there. It is said that a certain man appeared there on behalf of Mr. Banerjee and witnessed the registration. I am not satisfied that he did. It is very unusual for the lessee to register the counterpart of the lease; it would be the duty of the lessor to do that.

Moreover, on the 28th May 1907. Mr. Banerjee served the Defendant with a notice to quit. No doubt nothing was done pursuant to that notice but that was because Mr. Banerjee shortly afterwards leased the property to the Plaintiff.

In my opinion, the Defendant has failed to prove that she had got a lease of the premises. That being so, the Defendant must give up possession of the premises to the Plaintiff.

The only question remaining to be dealt with is what amount ought to be awarded to the Plaintiff for rental value

(4) [1895] 1 Q. B. 378 (1894)

ADOLPHE SHRAGER v. EMMA PRICE.

of the premises during the time the Defendant remained in possession after the expiration of the notice to quit. It was pointed out by Mr. Stokes that the case of *Gillard* v. *Cheshire Lines Committee* (5) establishes that a Plaintiff who has an *interesse termini* and therefore has a right to make an immediate entry may, if his right is interfered with, maintain an action for damages. The Defendant by her action has prevented the Plaintiff from making an entry on the premises. The Plaintiff gave her notice that if she prevented him from making the entry, she would have to pay rent at the rate of Rs. 350 a month. In my opinion, the Plaintiff is entitled to recover against the Defendant arrears of rent at the rate of Rs. 350 a month, as from the date of expiration of notice to quit, until she gives up possession.

There remains only one matter which I have omitted to mention and that is as to the form of one of the rent receipts given after the expiration of the notice to quit. I am satisfied on the evidence that that receipt was given by a mistake. The Defendant, however, says that if there was an acceptance of rent, after the notice to quit, it amounted to conclusive evidence of a waiver of the notice to quit. But that is not so. The question whether the acceptance of rent after the expiration of the notice to quit is a waiver of the notice to quit is a matter for the jury. Sitting here and exercising the functions of a jury, I have no hesitation in holding that, even if the sum in question was paid as rent, it was never intended between the parties that it should operate as a waiver of the notice to quit.

The Defendant having failed in the suit, she must pay the Plaintiff's costs of suit on Scale No. 2.

Messrs. Leslie & Hinds, Attorneys for the Plaintiff.

Mr. P. N. Sen, Attorney for the Defendant.

P. R. C. *Decree for possession and damages and costs.*

(5) 32 W. R. (Eng.) 943 (1884).

[ORDINARY ORIGINAL CIVIL JURISDICTION.]

SUIT No. 641 OF 1908.

WOODROFFE, J. 1908. Heard, 3, 19, 20 & 21, August. Judgment, 24, August.	GANADA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA and others.

Trespass—Court of Wards, what estate can be taken possession of by—"Proprietor," meaning of—Infant beneficiary, if proprietor, when estate vested in executrix—Residuary legatee, when estate vests in—Court of Wards Act (IX of 1879, B. C.)—Notice of suit, when necessary—Code of Civil Procedure (Act XIV of 1882), sec. 424—Injunction, suit for, if notice required for—Jurisdiction—Cause of action—Immoveable property within jurisdiction—Acquisition by executrix—Mal-administration, who to determine—Trespass, under order of higher official, who liable for—Power of Court of Wards to override wishes of testators—Possession, disturbance of—Remedy, injunction or ejectment-action.

The Court of Wards can take possession only of an estate of a minor, if he can be said to be the proprietor thereof within the meaning of the Court of Wards Act and has no right to take over an estate

GANADA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA.

from an executrix in whom the estate is vested in law, until the infant beneficiary becomes the proprietor.

A residuary legatee does not become the "proprietor" of the estate until the administration has been completed and the residue ascertained and made over by the executrix to him.

The Court of Wards Act was never intended to and the language thereof does not warrant the construction that it should have power to override private rights, such as the wishes of testators and proprietors generally in desiring and directing that their estate should vest in and be managed by an executor or in creating a trust inter vivos *for the benefit of an infant.*

When public officers are sued not in their admitted official capacity but as individual trespassers, no notice under sec. 424 of the Code of Civil Procedure is necessary.

Even in a case where such a notice would be otherwise necessary, so far as the suit sought relief by an injunction to restrain the commission of an act, no notice under that section would be necessary.

An acquisition by an executrix for an estate, out of the assets of the estate, is a part thereof, even if the acquisition has taken place after a declaration by the Court of Wards taking over the management of the estate.

The High Court may entertain an action in respect of immoveable property, provided that a portion of such property is within the jurisdiction.

Where, although but a portion of the estate regarding which certain declarations and injunction are sought in an action is within its jurisdiction, the High Court has power to grant the same declarations and injunction as regards the whole estate.

Where there had been undoubted disturbance of Plaintiff's possession, some rents having been collected and appropriated by the Defendant and the Plaintiff's establishment directed to obey the order of the Defendant, but, no mutation of names having been effected, the rents had been collected and money orders cashed in the name of the Plaintiff and her establishment taken over by the Defendant in the Plaintiff's absence and without her consent, to which the Plaintiff at once protested, and she also made certain collections on her own behalf;

Held; *that the possession of the estate had really remained in the Plaintiff; and, there had been a continuing trespass, for which the Plaintiff was entitled to have an injunction and it was not necessary for her to institute an action in ejectment against the Defendant.*

It is not for the Court of Wards to determine whether there has been mal-administration of an estate by an executrix, and on its own determination, take possession thereof on behalf of an infant residuary legatee, before the administration is complete.

It is not essential that the Defendants should all actually commit trespass to be liable to the Plaintiff: a trespass committed by a subordinate officer under orders from the superior officers is in substance the act of them all and both the subordinate as well as the superior officers are liable to the Plaintiff as trespassers.

Hearing of rule *nisi* and suit.

Mahim Chandra Roy Chaudhuri, Zemin-

GANADA SUNDARI CHAUDHURANI v. NALINI RANJAN RAHA.

dar of Atharabari, Mymensing, died in January 1895 having left a registered Bengali Will executed on the 2nd October 1890. By the Will, he appointed his son, if any, natural or adopted, to be his executor. In default of son, his wife was to be the executrix. On her default or if she be unwilling to act as executrix, his elder son-in-law was appointed executor, and in his default, the younger son-in-law. The Will further provided that, in case the executor or administrator be anyone other than his son, he will continue to remain as executor or administrator till the testator's son, natural or adopted, attained his majority; and that on attaining his majority, the son will take the properties left by the testator, subject to the conditions in the Will.

The testator died leaving him surviving the Plaintiff his sole widow and two married daughters. On the 8th May 1895, the widow as such executrix applied to the District Court of Mymensing and obtained Probate of the Will. Thereupon, she entered into and remained in possession of the estate left by the testator, including premises No. 6, Bechoo Chatterjee's Street in the town of Calcutta, which was acquired by her lately, out of the funds of the estate.

Prior to his death, and on the 6th February 1884, by a registered deed, the testator gave to the Plaintiff power to adopt a son, in pursuance of which, in May 1899, she adopted a son to her husband and named him Premode Chandra Roy, who was, at the time of the institution of this suit, a minor of the age of 11 years or thereabouts. In the general register of estates in the Collectorate, however, the estate of the testator continued to be represented by the Plaintiff as the executrix, under Act VII of 1876 (B. C.).

On the 3rd June 1908, the Court of Wards of the Government of Eastern Bengal and Assam, by a notification in that behalf, in that Government's *Gazette*, declared the minor adopted son to be a ward of Court under sec. 6 (*b*) of the Bengal Court of Wards Act (IX of 1879, B. C.). Previous to the above notification, and on the 23rd March 1908, the Board of Revenue of the E. B. & A. Government, by an *ex parte* order, declared the Court of Wards' determination "to take under its charge the property of the minor above-named" and directed possession to be taken of such property on behalf of the Court. By a further order of the Board, bearing the same date, addressed to the Commissioner of the Dacca Division, the Court of Wards appointed the Commissioner and the Collector of Mymensing to be the "Managing Commissioner" and "Managing Collector" respectively of the estates, and among other things, intimated that "for the present, a Deputy Collector may be put in charge as Manager." On the 2nd June 1908, the Defendant Nalini Ranjan Raha was appointed Manager under the Court of Wards of the estate. These orders were not known to the Plaintiff until after the institution of the suit.

Under instructions of the Collector, and on the 8th June 1908, the Defendant Nalini Ranjan Raha proceeded to Atharabari and took charge of certain jewellery and other articles and all the documents of title, books of account and papers relating to the said estate.

Thereupon, this suit was instituted by

the Plaintiff for a declaration that the Plaintiff was entitled to the immediate possession of the estate, including the said premises No. 6, Bechoo Chatterjee's Street; for an injunction forthwith restraining the Defendants, their servants and agents from interfering with the Plaintiff's rights or management of the said estate; for similar perpetual injunction; and for costs of suit.

On the 13th July 1908, the Plaintiff obtained a Rule calling upon the Defendants to show cause "why an injunction should not be awarded against them restraining them, their servants and agents, until the final determination of the suit or until the further orders of this Court, from interfering in any way whatsoever with the management and possession of the estate of Mahim Chandra Roy deceased by the Plaintiff or otherwise meddling therewith and from further proceeding with the application for substitution of names in the place of the Plaintiff in suit No. 38 of 1908 now pending in the Court of the third Munsif of Mymensing or with any similar application for substitution that may have been made in any other Civil Court and from making any such applications and also from further proceeding with the application for registration of names under Act VII of 1876 (B. C.) in the Collectorate of Mymensing and also from making similar application for registration in the Collectorate of Mymensing or other district in respect of any revenue-paying property belonging to the said estate and why they should not pay to the Plaintiff the costs of and incidental to this application."

The Rule came on for hearing on the 3rd August 1908 before his Lordship Woodroffe, J., when, after some arguments at the Bar, the hearing of the rule was adjourned until the hearing of the suit, which was expedited and came on for hearing on the 19th August 1908.

The Advocate-General (*Mr. S. P. Sinha*, with the *Standing Counsel, Mr. W. Gregory*, and *Mr. A. Eggar*) for the Defendants, showed cause against the rule This is really an action against the executive department of the Government and so is not maintainable, at any rate, in the absence of a notice being served on the Defendants under sec. 424 of the Code of Civil Procedure. Having regard to the course of action alleged by the Plaintiff, her proper remedy is under sec. 45 of the Specific Relief Act (I of 1877). This Court has no jurisdiction to entertain this suit, as no part of the cause of action arose within its jurisdiction. The Court of Wards have not, and could not, take possession of the premises No. 6, Bechoo Chatterjee's Street. As a matter of fact, the Court of Wards of the Eastern Bengal and Assam Government have no jurisdiction to take possession of properties outside its jurisdiction, without special sanction of the Government. [*Vide*, sec. 7 of the Court of Wards Act (IX of 1879, B. C.)]. Then I submit that the executrix is not the proprietor of the estate. The infant is the person who is beneficially interested and ought to be considered as the proprietor. *Taran Singh Hazari* v. *Ramratan Tewari* (1). Besides, the Calcutta property, having been purchased only recently by the executrix, long after the death of the testator,

(1) I. L. R. 31 Cal. 69 (1903).

GAMADA SUNDARI CHAUDHURANI v. NALINI RANJAN RAHA.

cannot be considered as a part and parcel of the testator's estate. No acquisition by an executor becomes a part of the estate until the beneficiary accepts the conversion. Then again, the direction in the Will appointing the Plaintiff as the executrix must be construed to mean that the Plaintiff, during the minority of the son, was to act as a manager or guardian for and on behalf of the infant. Except paying debts and legacies directed to be paid by the Will, the Plaintiff acts merely as manager or guardian. *Josephine Rose Harriss* v. *Edward Brown* (2), *Musst. Dat Koer* v. *Musst. Panbas Koer* (3).

Mr. B. Chakravarti (with *Messrs. B. C. Mitter*, *B. K. Lahiri* and *D. N. Basu*) for the Plaintiff, in support of the rule: The Defendants are sued in their private individual capacity and not as public servants, for threatening to disturb the Plaintiff's lawful possession of the estate as the executrix. I submit no notice is, therefore, necessary in this case. There cannot be any statutory defence pleaded to this suit apart from that under the general law. *Raleigh* v. *Goschen* (4), *Bainbridge* v. *The Post-Master-General* (5).

Then again, I show that, this being a suit for injunction, and not for damages, the notice under sec. 424 of the Code of Civil Procedure is not necessary. That section only applies to acts already done, but this is a suit to prevent Defendants from doing certain acts threatened to be done. If, in suits for injunction, the notice was obligatory, the very object of the suit would be frustrated entirely, for the Defendants, by the time, the notice expired, would commit the very acts, the commission of which was, by the institution of the suit, sought to be prevented. *Fowler* v. *Local Board of Low Leyton* (6). [See also, Public Authorities' Protection Act, 1893, (56 and 57 Vict., c. 61), sec. 1].

I submit that the principle on which a notice is required to be given to a public servant is that, if any loss has been occasioned by the action of a public officer, whose initial jurisdiction to do the act is not denied, but that the loss has been due to some irregularity or inadvertence, he ought to be given an opportunity to rectify such error by paying some compensation for the act done, without the annoyance and expense of a litigation. I contend that the provisions of sec. 424 of the Code of Civil Procedure is confined to this class of cases only. *Chandra Sikhur Bundopadhya* v. *Obhoy Charan Bagchi* (7), *Sahebzadee Shahunshah Begum* v. *Fergusson* (8), *Secretary of State for India* v. *Rajlucki Debi* (9).

The case in I. L. R. 25 Cal. 239 (*q. v. Supra*) goes the furthest with regard to the necessity of giving notice and has been considered as being open to criticism. *Manindra Chandra Nandi* v. *Secretary of State for India* (10). In a proper case, a suit for injunction is maintainable without notice under sec. 424

(2) 5 C. W. N. 729, per Sir Richard Couch at p. 737 (1901).
(3) 8 C. W. N. 658 at p. 660 (1904)
(4) [1898] 1 Ch. D. 73 (1897).
(5) [1906] 1 K. B. 178 at p. 192 (1905

(6) 5 Ch. D. 347 (1877).
(7) I. L. R. 6 Cal. 8 (1880).
(8) I. L. R. 7 Cal. 499 (1881).
(9) I. L. R. 25 Cal. 239, per Maclean, C. J., at p. 244 (1897).
(10) I. L. R. 34 Cal. 257, per Mookerjee J., at pp. 281-282 (1907).

GANADA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA.

of the Code of Civil Procedure. *Hari v. Secretary of State for India* (11).

The Bombay High Court cases are all in our favour, although they construe similar words in another statute being the Bombay District Municipal Act (II of 1884, Bom. C). *Sardarsingji* v. *Ganpatsingji* (12), *Shidmallappa* v. *The Gokak Municipality* (13), *Municipality of Parola* v. *Lakshman Das* (14), *Dewakabai* v. *Municipal Commissioner of Bombay* (15). In these circumstances, I submit that the suit is, therefore, not bad for want of notice.

Then, with regard to the point that has been raised as to the Court of Wards' want of jurisdiction to take possession of Calcutta property, I submit that that Courts' jurisdiction is personal and residence confers jurisdiction. Furthermore, the jurisdiction of the Court of Wards is based on the doctrine of *parens patriæ* which again shows that the jurisdiction is personal. Moreover, sec. 7 of the Court of Wards Act (IX of 1879, B. C.) as well as the rule in p. 50 of the Ward's Manual refer to "all" property and there is no provision in the Act or in the rules to indicate how any portion of the estate outside the jurisdiction of the Court of Wards taking over charge thereof, is to be dealt with. But then, in *Lachmi Narain* v. *Fateh Bahadur Singh* (16), properties outside jurisdiction of a Court of Wards belonging to a disqualified proprietor and not actually taken possession of by the Court, were held to be inalienable on account of the disqualification.

Then I submit that, until the estate is fully administered, the residue ascertained and made over to the infant, it cannot be said that there is any property which belongs to the infant. *Ganjessur Kber* v. *The Collector of Patna* (17), *Taran Singh Hazari* v. *Ramratan Tewari* (1), *Chatterput Singh* v. *Maharaj Bahadur Singh* (18), *Giridhari Lal Roy* v. *Dhirendra Kristo Mukerjee* (19).

Lastly, I submit that the present case is one of continuing trespass and I am entitled to the declaration and injunction prayed for. [See, Kerr on Injunction (4th Ed., 1903), p. 84]. *Goodson* v. *Richardson* (20), *Eardley* v. *Granville* (21), *Allen* v. *Martin* (22), *Harrison* v. *Duke of Rutland* (23), *Battersea Vestry* v. *County of London and Brush Provincial Electric Lighting Co. Ld.* (24).

And the statement of the Defendants how that they have no intention of taking over possession of the Calcutta property appertaining to the estate does

(11) I. L. R. 27 Bom. 424, per Jenkins, C. J., at p. 450 (1903).
(12) I. L. R. 14 Bom. 395 (1889).
(13) I. L. R. 22 Bom. 605 (1897).
(14) I. L. R. 25 Bom. 142 (1900).
(15) 6 Bom. Law Rep. 1028 at p. 1030 (1904).
(16) I. L. R. 25 All. 195 (1902).

(1) I. L. R. 31 Cal. 89 at p. 93 (1903).
(17) I. L. R. 25 Cal. 795 at p. 797 (1898).
(18) I. L. R. 32 Cal. 198, per Lord Davey at p. 218 (1904).
(19) I. L. R. 34 Cal. 427 at p. 430 (1906).
(20) 9 Ch. App. 221, per Sir W. M. James, L. J., at p. 227 (1874).
(21) 3 Ch. D. 826, per Jessel, M. R., at p. 832 (1876).
(22) 20 Eq., 462, per Sir Charles Hall, V. C., at p. 467 (1875).
(23) [1893] 1 Q. B. 142, per Lopes, L. J., at p. 154 (1892).
(24) [1899] 1 Ch. 474, per Lindley, M. R., at pp. 480-481.

GANADA SUNDARI CHAUDHURANI v. NALINI RANJAN RAHA.

not alter or affect the position. *Hext* v. *Gill* (25).

Cur. adv. vult.

THE JUDGMENT OF THE COURT was as follows :—

WOODROFFE, J.—The Plaintiff is the widow of Mohim Chandra Ray Chaudhury, Zemindar of Atharabari, who was possessed of extensive zemindaries in Mymensingh. He died thirteen years ago in January 1895, leaving a Will of which he appointed the Plaintiff executrix. The latter obtained probate on the 8th May 1895. Prior to his death, he gave power to adopt and the Plaintiff has adopted a son to him, Promode Chunder Ray, now about 11 years old. The estate was at the testator's death and now is in debt and certain directions of the testator have not yet been carried out. The Plaintiff says that she, in May, 1908, came to learn that the Court of Wards of Eastern Bengal intended to take possession of the estate. On the 7th June 1908, that Court issued a notification assuming charge of the estate in suit which was described to be the property of the minor. It is of this order that the Plaintiff complains. She says that the estate is vested in her as executrix and it is not the property of the minor so as to enable it to be taken possession of under the Court of Wards Act. She seeks to avoid a threatened interference with her possession. The suit is not against the Court of Wards but against those Defendants who are sued in their individual capacity. The first Defendant is a Deputy Collector at present on deputation as Manager under the Court of Wards of the estate in suit. The second Defendant is the Collector and District Magistrate of Mymensingh and is managing Collector. The third Defendant is the Commissioner of the Dacca Division and is managing Commissioner. As I have said, the suit is not against them in their official capacity but in their private individual capacity as alleged trespassers. They are sued not because of, but in despite of the fact that they are public officers. The suit as originally framed proceeded on the assumption that the Plaintiff was in possession. It asked for retention in and maintenance of possession and for an injunction restraining interference with such alleged possession. At the trial, counsel for the Plaintiff asked to amend the plaint so as to ask for recovery of possession should the Court hold (which is not admitted) that the Plaintiff was not in possession of the estate or some part of it. No notice of suit has been given. All the estate is without the jurisdiction with the exception of a small parcel which is stated to belong to it and which was purchased for Rs. 10,000 out of funds belonging to the estate some short time ago, namely, a house in Calcutta—6, Bechoo Chatterjee's Street.

The first objection taken is that the suit is bad, because no notice has been given, and it is contended that notice is necessary under sec. 424 of the Civil Procedure Code. It is argued, however, that sec. 424 has no application as the Defendants are not sued in an admitted official capacity, but as individual trespassers. I think this con-

(25) L. R. Ch. App. 699, per Sir G. Mellish, L. J., at p. 711 (1872).

GANADA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA.

tention is correct. But apart from this and assuming that the section was otherwise applicable, it would not, I think, apply so as to render notice necessary so far as the suit seeks relief by injunction. The section doubtless says "no suit," but it also speaks of an act "done" and would not, therefore, apply to prohibit a suit for an injunction to restrain the commission of an act not done, but threatened to be done. And it has been so held. Were this not so, a party would be deprived of relief as the threatened act might and probably would take place before the expiry of the period of two months. I hold, therefore, that no notice is necessary.

The second preliminary objection is that, even if notice is not necessary, the Court has no jurisdiction to entertain the suit. In my opinion, it has. This is not a case in which jurisdiction is sought to be founded on the fact that a portion of the cause of action arose within the jurisdiction, in which case it might be necessary to prove that the threatened disturbance of possession took place within the local limits. Evidence has been tendered to meet the denial of the Defendants that they are threatening to obtain possession of the Calcutta house and their allegation that the Court of Wards of Eastern Bengal have in fact no power to take charge of the house in this province except through the intervention of the Bengal Government—a matter, I may here interpose, of mere machinery. It is in fact charged that the allegation in the 13th paragraph of the plaint was made only with a view to give this Court jurisdiction to entertain the suit. The Plaintiff has, on the other hand, sought to prove that the Defendants have attempted to interfere with the Plaintiff's possession of the Calcutta house.

It is said that the first Defendant asked Kedar Nath Roy, an employee of the Atharabari estate, to write to ascertain the rent paid for the Calcutta house and to demand payment of the rent. This is denied. A letter was then written by the Naib, Krishna Das Chowdhury, to the tenant of the Calcutta house. This man was formerly in the service of the estate and was, with other servants, continued by the Court of Wards. This letter purports to be written on behalf of the Court of Wards and claims payment of rent. This was followed by a letter from the tenant to the Plaintiff in which he writes that he owes rent but that, as he has received a letter directing him to pay to the Court of Wards Manager, he says "I cannot decide whether I should send rent to the said Babu." I have not heard the Plaintiff's counsel's argument as to this part of the case and I express no opinion on it so far as it consists of the evidence of the Plaintiff's witnesses, as in my opinion, a finding on it is immaterial, the Court possessing jurisdiction for the reasons to be stated. I may, however, in passing, point out that apart from this evidence, Exhibit I. constitutes a threat against the Calcutta property, which the first Defendant, appears to have been desirous of dealing with as also the second Defendant, the direction of the latter to wait having, I think, been given in order that mutation of names might be first effected.

It is well-settled that this Court may

GANADA SUNDARI CHAUDHURANI v. NALINI RANJAN KAHA.

entertain an action in respect of immoveable property provided that a portion of such property is within the jurisdiction. This, no doubt, is contested on the ground that, though there is a house in Calcutta, it was purchased after the Court of Wards' declaration and does not, it is said, belong to the estate. This contention, however, is, in my opinion, not, well-founded. The assets with which it was purchased form part of the estate and that into which the assets were converted, whether before or after the declaration, equally belongs to the estate. An acquisition by the executrix for the estate is part of it. And, this is so as regards the Defendants none the less that, as between the executrix and the ultimate beneficiary, the latter might, for one reason or other, challenge or refuse to adopt the conversion effected.

This being so, a portion of the estate is in Calcutta. This suit seeks first a declaration, and as portion of the estate in respect of which that declaration is sought is within the local limits, this Court can grant a declaration as regards the whole estate. And for the same reason, it may grant an injunction. A distinct threat has been made and attempted to be given effect to in respect of the estate without the jurisdiction, that is against an estate a portion of which is within the local limits. It is not necessary, as I have said, that that threat should either have been made or attempted to be given effect to within the local limits or specifically with reference to property within those limits. I hold, therefore, that this Court has jurisdiction to entertain the suit. But then, it is said that relief should be by ejectment, it being contended that the Court of Wards have already taken possession and the amendment which I allowed being the subject of objection. Undoubtedly, there has been a disturbance of possession. Some rents and other monies have been collected and appropriated and the Plaintiff's establishment directed to obey the order of the Defendant appointed Manager. But the rents have been collected in the name of the Plaintiff and necessarily so, until mutation of names has been effected, which has not yet been done. The money-orders cashed were in the Plaintiff's name and the establishment was taken over in the Plaintiff's absence and without her consent. Indeed, she protested at once and has since made certain collections on her own behalf. Since the Rule, all collections on either side have stopped. There has been, therefore, in my opinion no such possession as would disentitle the Plaintiff to an injunction and necessitate resort to an action of ejectment. I am of opinion that possession has really remained with the Plaintiff, though there has been a continuing trespass against which she is entitled to relief by way of injunction.

I now come to the merits, and as regards these, the Plaintiff has, in my opinion, a very clear case. The Court of Wards can only take possession of the estate if the Plaintiff's minor adopted son can be said to be its "proprietor" within the meaning of the Court of Wards Act. That term is not defined and it is, therefore, necessary to ascertain its meaning in this connection. It is contended for the Defendants that the executrix is not the proprietor. But this

is not the proper form of the question, which rather is—is the minor the proprietor? If he is not, the Court of Wards have clearly no right to take it from the Plaintiff in whom, as executrix, it is vested in law. It is contended further that the position created for the Plaintiff by the Will, is that merely of a manager for the infant proprietor. But, however, this may be, we must look at the grant of probate. Under that grant, the Plaintiff is the representative of the testator and the estate vests in her as such. But then, it is said that, even assuming this to be so, 'proprietor' in the Act does not mean a person representatively entitled but the beneficiary and that as the minor is the ultimate beneficiary, the property is his, notwithstanding that the estate has admittedly not yet been administered. I cannot, however, accept this contention. If it were sound, the Court of Wards would be entitled to override the wishes of testators and proprietors generally. A person may desire and direct that his estate should vest in and be managed by an executor. The Court of Wards can, it is suggested, at any time, override this direction, and notwithstanding the grant of probate, take the estate out of his hands (notwithstanding, moreover, that as Court of Wards, it has no power of administration). Or a trust might be created *inter vivos* for the benefit of an infant and the Court of Wards might, according to the argument, come in, with or witout any pretext, and dispossess the trustee. It can never have been intended that the Court of Wards Act was to have power to override private rights in this way and the language of the Act does not warrant this construction. The residuary legatee does not become "proprietor" until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of the other trusts contained in the Will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts, but he is not proprietor except when a residue has been ascertained, which, on completion of administration, is made over to him by the executrix. It is admitted that the estate is unadministered. But it is said that the testator died 13 years ago and there has been mal-administration. If this be so, it may be ground for an action for administration on behalf of the minor but it is no ground for taking possession by the Court of Wards. The argument even goes the length of asserting that the Court of Wards may determine whether there has been mal-administration, and on its own determination, take possession of property vested in the executrix. No authority has been cited for any of these propositions, which appear to be clearly unsustainable. In my opinion, the minor is not the proprietor of the estate so as to enable the Court of Wards to take possession of it. The Plaintiff is thus entitled to a declaration in terms of clause (3) of the prayer of the plaint, and to the injunction sought in clauses (4) to (6) of the same. The Plaintiff is entitled to relief against all the Defendants. The document and evidence show that the Defendant Mr. Nathan directed the Defendant Mr. Blackwood to assume charge of the Atharabari estate and that the latter, by an

GANADA SUNDARI CHAUDHURANI *v.* NALINI RANJAN RAHA.

order, directed the first Defendant to carry this out which he has attempted to do. It is not necessary that all the Defendants should actually commit the trespass and a trespass committed by order of a higher official is in substance the act of that official who can be sued as a trespasser.

The Rule is, therefore, made absolute with costs and the suit is decreed in the term stated as against all the Defendants with costs on Scale No. 2.

Messrs. B. N. Bose & Co., Attorneys for the Plaintiff.

Mr. Eggar, Attorney for the Defendant.

Rule made absolute
P. R. C. *and suit decreed with costs.*

CRIMINAL REVISIONAL JURISDICTION.]

REV. NOS. 70 AND 554 OF 1908.

STEPHEN, J. HOLMWOOD, J. 1908. Heard, 16 and 17 June. Judgment, 30, June.	RASH BEHARI LAL MONDAL, Petitioner, *v* THE KING-EMPEROR, Opposite Party.

Criminal Procedure Code (Act V of 1898), secs. 94, 96, 190 (c), 537—Search warrant, under sec. 96—Magistrate's jurisdiction to issue—Cognizance of an offence under sec. 190 (c)—Information, nature of, upon which cognizance could be taken—Record of the information—How much should be recorded.

The District Magistrate on receiving information of the commission of an offence cannot issue a search warrant under sec. 96, para. (1), Cr. P. C., before he has acted judicially upon the information so received.

In re HARI LAL BUCE (1) *followed.*

To justify a Magistrate in taking cognizance of an offence under sec. 190 (c), Cr. P. C., upon information received from any person other than a police officer, the information need not contain all the allegations necessary to be proved to establish the offence; it is sufficient if enough is alleged to justify the Magistrate in dealing judicially with the matter.

What allegations or how much of the information should be recorded by the Magistrate in such a case it is difficult to lay down in general terms; but when it is found that the recorded information is sufficient to justify the Magistrate in considering that a primâ facie *case has been made out the High Court will not interfere with the Magistrate's action in taking cognizance under sec. 190 (c).*

Sec. 537, Cr. P. C., cannot give legal effect to a defective warrant.

These were rules issued by the High Court upon F. F. Lyall, Esq., the Magistrate of the District of Bhagalpur.

The facts material to the report as they appear from the verified petition of the Petitioner are briefly as follows:—

One Tupani lodged a complaint on the 17th January 1908 in the Court of the Sub-divisional Magistrate of Madhipura against the Petitioner and his servants charging them with having on the 4th January 1908 committed offences under secs. 342 and 330, I. P. C., and the Sub divisional Magistrate after having examined the complainant on oath ordered the case to be sent to the Sub-Inspector

(1) I. L. R. 22 Bom. at p. 949 (1898).

RASH BEHARI LAL MONDAL v. THE KING-EMPEROR.

in charge of the Madhipura Police station for inquiry and report. The Petitioner applied to the Sub-divisional Magistrate praying that the enquiry might be made by any person other than the Police of Madhipura on the allegation that the Police of Madhipura were inimically disposed towards him. But the application of the Petitioner was not listened to either by the Sub-divisional Magistrate or by the District Magistrate on appeal. On the 17th January the complainant Tupani wanted to withdraw the case but he was not permitted to do so. Ultimately the Police submitted a report charging the Petitioner and his servants with the offences complained of. Thereafter while the Petitioner was at Bhagalpur in connection with some civil cases, the District Magistrate of Bhagalpur who was then encamped at a place about 2 miles off from the house of the Petitioner caused a search to be made of his houses including zenana apartments through the Police of Madhipura on the 14th February 1908 and almost all the papers connected with the Petitioner's zemindaries, including bonds, hand-notes, decrees and other documents were taken away by the Police in 2 or 3 carts. As regards Tupani's complaint, the Petitioner got a rule from the High Court for its transfer to some other district, but although the Petitioner's muktear filed before the Sub-divisional Magistrate the telegram which he had received from the Petitioner's vakil in the High Court regarding the issue of the rule, the Sub-divisional Magistrate issued a warrant against the Petitioner, but subsequently on receiving the High Court's order issuing the rule, the said Magistrate stayed further proceedings in the case.

On the 28th February 1908, the Petitioner applied to the District Magistrate for the return of the papers taken away from his house, but the District Magistrate ordered the return of some of the papers on the Petitioner complying with certain conditions. The Petitioner declined to take back the papers on those conditions and he prayed by a petition to the Sub-divisional Magistrate that the papers might be returned to him unconditionally, but the Sub-divisional Magistrate did not accede to this prayer of the Petitioner. The Petitioner then served a notice through his solicitors upon the District Magistrate under sec. 424, C. P. C., intimating that he would sue him (the District Magistrate) for damages on account of his wrongful acts in searching the Petitioner's houses and taking away and detaining his zemindari papers. The Magistrate then issued notices upon the Petitioner's muktear to take back the papers. The papers were accordingly made over to the muktear on taking a receipt of acknowledgment from him but before the muktear had taken actual possession of the papers, the Deputy Magistrate, Babu Surendra Nath Mozumdar, read out 7 warrants purporting to be search warrants issued by the District Magistrate authorising the Inspector of Police to produce before the said District Magistrate documents specified in these warrants for the purposes of enquiry into certain offences alleged to have been disclosed in some information received by the District Magistrate from certain persons and the Inspector of Police immediately seized the

papers and put them into certain boxes brought for the purpose which were left at the Petitioner's *dai waza* under a strong Police guard.

Afterwards some papers out of these papers were taken away by the Deputy Magistrate and the rest were left at the Petitioner's house.

The Petitioner was served with seven summonses in seven cases which were taken cognizance of by the District Magistrate under sec. 190, cl. (c) The Petitioner applied for copies of the information on which the District Magistrate had acted, the statements of the complainants, if any, and the order sheets in these cases. But the Petitioner was given copies of certain papers which purported to be order sheets in those cases. One of the copies which were all similar in nature runs thus:—

"Order-sheet for Magistrate's records.

C. O. No. 6 of 18th November 1901.

District Bhagalpur.

In the Court of the District Magistrate of.

No. of 190

Crown on the information and statement of *Hansi* v. *Rash Behary Mondal*.

Sec. 420.

Serial No. Date Order Signature.

28-4-1908.

On information received from Hansi Mondal on the 14th February an extract of which is filed with this I take cognizance under sec. 190 (c) of the Cr. P. Code of an offence under sec. 420 of the I. P. C. alleged by Hansi Mondal to have been committed by Rash Behari Mondal and order that a summons under this section issue against him for the 9th May 1908.

As I have also reason to believe that Rash Behary Mondal will not produce the document alleged to have been executed by Hansi, I order that a search warrant for its arrest issue."

Sd. F. F. LYALL,

Magistrate.

The Petitioner also made various other allegations in his petition to the High Court for the purpose of shewing that he could not expect a fair trial in the District of Bhagalpur and stated that the prosecution started against him in the seven cases was not *bonâ fide*. He prayed that the proceedings against him in the seven cases should be quashed and his zemindari papers seized and detained by the Magistrate should be returned to him and by a separate petition he asked that the said seven cases should be transferred to a competent Court outside the District of Bhagalpur. Two Rules were issued which were heard together:

Mr. S. P. Sinha (*Advocate-General*) for the Crown.

Mr. A. Chaudhuri, Babus Atulya Charan Bose, Joy Gopal Ghosha and *Hara Prosad Chatterjee* for the Petitioner.

The JUDGMENT OF THE COURT was as follows:—

In the first of the cases a Rule has been granted calling on the District Magistrate of Bhagalpur to show cause why seven criminal cases that have been instituted against one Rash Behary Lal Mondal by that officer should not be transferred to the District Magistrate of Monghyr or some other suitable Magis

trate. In the second, the Petitioner moves that the same criminal proceedings should be quashed. This application was made to us on a date after the Rule was granted, and we directed that it should be heard together with the above-mentioned Rule, and this has now been done. The facts on which both applications are directly based are as follows.—In consequence of the result of investigations which we need not at this moment consider, Mr. Lyall, the District Magistrate of Bhagalpur, issued a warrant on the 16th of February 1908 ordering that the Petitioner's house should be searched and that any zemindari papers found there should be produced before him forthwith. This was done, and many papers were taken from the house where the search was ordered to take place, while other papers were received from his servants at other places. On the 28th February, the Petitioner put in a petition in the District Magistrate's Court asking for a return of the papers and, on the 29th, an order was passed that such papers might be given to the Petitioner, as were "not required for the purposes of the enquiry about to be made." Provisions were added as to the rules to be observed in selecting papers to be restored; and it was recorded that the Petitioner's pleader said that he had no further request to make, and that the order in question would serve his purpose. No papers were in fact returned and the Petitioner denies his pleader's authority to consent to the order as far as he did so. Early in April, the Petitioner was called on to take back his papers. To this he replied by a petition of the 11th April stating that he was willing to take them back unconditionally, but not on the terms mentioned in the order of the 29th February. On the 15th April the Petitioner's attorney gave notice to Mr. Lyall under sec. 424, Civil Procedure Code, that after two months he would sue him for a return of the papers seized and for damages for their seizure and retention. On the 20th April, the Petitioner in Calcutta received a notice from the Sub-divisional Officer of Madhipura, dated the 15th April, calling on him to take back all the papers seized. On the 29th April, 77 bundles of papers were delivered to the Petitioner's muktear at the Petitioner's house: but before he could take possession of them, seven search warrants were produced under which all the 77 bundles were again taken possession of by the Police. An inspection of these was made by a Deputy Magistrate on the 1st and 2nd of May, and, after some papers had been extracted, most of them were returned to the Petitioner. The Petitioner was served early in May with summonses in relation to the cases to which the search-warrants applied, dated the 28th April, and the Magistrate has subsequently given the Petitioner copies of the order sheets in those cases showing that the District Magistrate took cognizance of the offences to which the summonses and warrants related on the 28th April under sec. 190 (1) (c).

On these and a few other subsidiary facts, the Petitioner prays to have the criminal proceedings against him quashed and all the papers seized returned to him; and also for a transfer of the cases. As there is no dispute about the transfer, we will consider *first* the prayer for hav-

RASH BEHARI LAL MONDAL v. THE KING-EMPEROR.

ing the proceedings quashed and the papers returned.

Taking the grounds on which the petition is based, and postponing the consideration of the ground that the prosecution is not a *bonâ fide* one, the earliest, in respect of the facts on which it depends, is that the District Magistrate's action in causing the search and taking away the papers was illegal and without jurisdiction. At the hearing before us, it was doubtful if the District Magistrate issued any warrant for the search. But it now appears that he did. The warrant is in the form No. VIII of Sch. V of Criminal Procedure Code reciting that information had been laid before him of the commission of the offence of fraudulently obtaining decrees for sums not due. The question of its legality under sec. 96 depends on whether there was any investigation, enquiry, trial or other proceedings under the Code as mentioned in sec. 94. It seems that there was not. The Magistrate had no doubt received the information that he mentions in the order, but he had not acted judicially on it at the time he issued the warrant. The judgment in *In re Hari Lal Buce* (1) supports what seems to us the plain meaning of the two sections in question, and as there is here no question of search under the second and third paragraphs of sec. 96 (1), we must hold that the issue of the search warrant was not justified by that section.

It has been contended that the issue of the warrant might have been under sec. 98 in which case the existence of a proceeding etc. under the Code is not necessary and that, though the warrant is in form one under sec. 96, it may be taken to be under sec. 98 by the operation of sec. 537. The objections to this argument seem to be that no suggestion is made in the warrant of the existence of any forged document and that, though on the facts it may be that it was supposed that some of the documents that it was sought to seize, were forged, the warrants subsequently issued seem to have been issued under sec. 96. Further it does not seem possible to read sec. 537 as giving a legal effect to a defective warrant, as its highest effect is to validate a finding, sentence or order which is defective for an antecedent defect in procedure. In the view that we take of the effect of subsequent proceedings and bearing in mind that the legality of the warrant may be the subject of enquiry in civil proceedings, it is perhaps not necessary that we should come to a judicial finding on the point, but we cannot find that the warrant justified the seizure and retention of the papers that were seized.

The next grounds that we have to consider are that there were not sufficient materials before the Magistrate to justify the issuing of the summons and what depends on the same facts that the informations on which the Magistrate based his proceedings were vague and indefinite, and that he was not justified in taking action on them. As to this all that we have to say is that the information on which the Magistrate took cognizance under sec 190 (1) (c) has been recorded in each case, in accordance with the law as laid down in *Thakur Pershad Singh* v. *The Emperor* (2);

(1) I. L. R. 22 Bom. at p. 949 (1898).

(2) 10 C. W. N. 775 (1906).

and that in most of the cases, though all the allegations the proof of which would be necessary to prove the offence mentioned have not been made, enough has been alleged to justify the Magistrate in dealing judicially with the matter. It is nowhere laid down, and it is probably impossible to state in general terms, how much the accused is entitled to have recorded in such cases; but here in most of the recorded statements enough is said to make it impossible for us to say that the Magistrate had not enough before him to justify him in considering that a *primâ facie* case was made out; and, unless we can say as much as this, we cannot interfere. As regards the statements of Goribi Koeri and possibly that of Hansa Lal, if they stood alone, we might be inclined to interfere; but in view of the other cases and of the orders we propose to pass as to the transfer, we consider our interference unnecessary. Some of the statements are vague in form no date being specified, but looking to the acts mentioned this vagueness is formal rather than substantial. Apart from the absence of date, however, they are neither vague nor indefinite.

The next ground that we have to consider is that the so-called order of attachment, by which we understand to be meant the second set of search warrants, and the keeping of the papers in custody presumably after the 29th April, is unwarranted by law. We can see no force in this contention. From the order sheet it appears that the Magistrate took cognizance of the seven offences with which we are concerned on the 28th April, issued summonses in respect of them and ordered search warrants to be made out under sec. 96. These last orders had, therefore, exactly the justification which was lacking in the case of the first warrant, namely, a proceeding under the Code. The papers may have been illegally in the possession of the Magistrate or the Police up to the time they were returned on the 29th; but, as we have held that the Magistrate was justified in initiating proceedings, it is impossible to see on what ground the seizure and retention of the papers by virtue of the warrants executed on the 29th April can be impeached.

The last ground for setting aside the proceedings that we are asked to consider is that "the prosecution is not a *bonâ fide* one." The Petitioner's Counsel asked us to attach to *bonâ fides* the meaning attached to good faith in sec. 52, I. P. C., namely, that nothing is said to be done in good faith which is done without due care and attention. If we accept this meaning we cannot regard a want of good faith as a ground for setting aside criminal proceedings, as whenever a Magistrate makes a mistake he does something without due care and attention; and no one suggests that any mistake is a ground for setting proceedings aside. But looking at the contents of the petition in this application and to the recital in the petition for transfer of former proceedings which date back a very long way and have no immediate bearing on the present case, we cannot attach so limited a meaning to the phrase in question. The District Magistrate considers that it is imputed to him that he is acting otherwise than in what he takes to be in the interests of justice.

THE

Calcutta Weekly Notes

Vol. XII.] MONDAY, SEPTEMBER 21, 1908. [No. 45

Contents.

NOTES.

WE INVITE ATTENTION TO THE CASE OF *Sharafat* v. *Hira Dhar*, a short note of which appeared in the last issue of this journal, at p. cclii. In this case their Lordships Brett and Ryves, JJ., practically held that when a Magistrate passes final order in a proceeding under sec. 145, Cr. P. C., without taking any evidence, the whole proceeding is not to be quashed, but only the final order should be set aside and the case remanded to the Magistrate with directions to the Magistrate to proceed with the case from the stage which it had reached when the final order was passed and to dispose of it according to law. The decisions of the High Court on this point are not uniform. Most of the reported decisions of the Calcutta High Court are to the effect that in such a case the whole proceeding is quashed. In a previous issue of this journal we remarked that according to the interpretation of sec. 145, Cr. P. C., the proper order to be passed by the High Court in cases, in which a Magistrate passes final orders in a proceeding under sec. 145, Cr. P. C., is to set aside the final order and then to direct the Magistrate to proceed with the case after taking evidence. The decision of their Lordships Brett and Ryves, JJ., lends support to this view.

AFTER PERUSAL OF THE JUDGMENT IN THE APPLICATION for bail made recently before Sharfuddin and Coxe, JJ., on behalf of Raja Narendra Lal Khan and others of Midnapur we must say that the interpretation of the law regarding the grant of bail by their Lordships is far from convincing. We can show from the Code of Criminal Procedure itself that the principles governing the law regarding the grant of bail are the same both in England and in this country. It is the English Criminal Law that has been codified in India and in the course of codification the principles of English law have been widened rather than narrowed in many cases. It is a fundamental principle of the English law that a person must be presumed to be innocent till he is proved to be guilty. It is also a recognised principle of English law and the law as laid down in the Code of Criminal Procedure that no person should be arrested or kept in custody without satisfactory proof or strong presumption of his guilt based on good and reliable evidence.

THE LEGISLATURE HAS TAKEN PARTICULAR CARE to provide special provisions against any person being kept in police custody for a longer period than 24 hours. The police are no doubt entitled to arrest a person on suspicion but they must produce him before a Magistrate within 24 hours (sec. 61). The Magistrate may no doubt from time to time authorise the detention of the accused by the Police if proper and sufficient materials are placed before him but such periods of detention must not exceed in all 15 days (sec. 167). When the law does not permit a Police officer, whatever may be his rank, to keep a person in custody for a longer period than 24 hours, it must be presumed that sec. 167 contemplates that the materials on which the Magistrate can authorise further detention must be something other than the bare statement of police-officers, on oath or otherwise, of their belief in the guilt of the accused. The Code in its solicitude for the accused person provides in this section that the Police should take him to the nearest Magistrate no matter whether he has any jurisdiction to try him or not.

SEC. 497 WHICH SPECIALLY RELATES TO THE GRANT of bail gives a very wide discretion to every Magistrate in this behalf. It is erroneous to suppose that Magistrates have no discretion with regard to the grant of bail in non-bailable cases. The distinction between the terms "bailable" and "non-bailable" consists in the fact that in a certain class of offences bail has to be granted as a matter of course and that in regard to others specified in the Code bail may be granted at the discretion of the Magistrate. Sec. 497 limits the discretion of the Magistrate only in the latter class of cases where there are "reasonable grounds" for believing that the accused person is guilty. In the absence of sufficient and satisfactory evidence, it will not be "reasonable" on the part of a Magistrate to refuse bail on the

ground that he shares in or takes on trust the "belief" of the police-officers that the accused person is guilty. The "belief" of guilt to be "reasonable" must be based on evidence. Sec. 497 expressly says in cl. (2) that in cases where there are no "reasonable grounds," but only "sufficient grounds for further enquiry" "the accused shall be released on bail," and the section is explicit that the Magistrate has no discretion to refuse him bail even if the offence be of the class described in the Code as non-bailable.

ALTHOUGH THE CODE IS CLEAR THAT THE QUESTION of bail has nothing to do with the gravity of the offence alleged or charged yet Magistrates are often known to refuse bail on that ground. It is because the Magistrates often fail to comply with the provisions of sec. 497 and also because they are too much identified with the prosecution and the police in this country, that the Code in the very next section confers unlimited discretion to Sessions Judges and the High Court to grant bail in any case. Thus it would appear that the provisions in our Codes regarding the grant of bail is as wide as that of English law. It is greatly to be regretted that there is at present a tendency of putting a narrow interpretation on these wide provisions of the law.

WE HAVE SHOWN FROM THE TERMS OF SEC. 497 THAT "bail" is mainly a matter of evidence. We therefore regret that in the judgment under notice, any mention should have been made of the "gravity" of the alleged offence as a ground for refusal in certain cases. It is no less regrettable that the judgment does not also show a proper appreciation of the dictum of the late Lord Chief Justice Russel that the "object of bail is not punitive" and that it should not be refused in cases where there is no chance of the accused person absconding. The intimate relationship that exists between the question of bail and absconding is not dealt with in the Code because the Legislature did not care to embody in it self-evident propositions. It is assumed that a person who fails to give his address or is likely to abscond should be kept in custody, no matter whether the offence charge is bailable or not. The question of absconding is therefore the very first and fundamental question with regard to grant of bail in all cases. The only question that the Magistrate has to consider in granting bail to an accused person, before the initial presumption of his innocence has been rebutted by satisfactory evidence, is whether the accused is likely to abscond or not. This being so, we expect their Lordships will perceive that there is an obvious and logical connection between the view expressed by eminent English Judges and the law as laid down in secs. 497 and 498 of the Code.

THE VIEW THAT AN ACCUSED PERSON CANNOT BE remanded into custody without sufficient proof of his guilt is also supported by sec. 344 and especially its Explanation. There the expression "if in custody" in the section itself contemplates that where the evidence is not sufficient the accused must be on bail and this is further supported by the terms of the Explanation which says "if sufficient evidence has been obtained to raise a suspicion * * and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand." Sec 344 evidently refers to remands during trial. But sec 497, cl. (2) is clear that for the purposes of further inquiry an accused person cannot be remanded into custody. We fail to understand therefore on what grounds the order of the Magistrate refusing bail has been sustained in the cases of the majority of the accused. The order in respect of Raja Narendra Lal Khan is clearly opposed to the express provisions of sec. 497, cl. (2) inasmuch as their Lordships find an "absence of convincing direct evidence" and the section says that in such cases "the accused shall," pending enquiry, "be released on bail." There was therefore no justification for keeping him in confinement even in his own house.

Reviews.

LAND ACQUISITION ACTS. Being Act I of 1894 and Act XVIII of 1885. With notes. *By Mahim Chandra Sarkar, of the Bengal Provincial Civil Service. Calcutta : Printed at the Weekly Notes Printing Works, 3, Hastings Street. 1908. Price Rs 2-8.*

This is a case noted edition of the Land Acquisition Act and the Land Acquisition (Mines) Act, The case-notes are up-to-date and are classified and arranged, wherever they are sufficiently numerous, under appropriate headings. In an appendix are collected the Rules framed by the various Local Governments under sec. 55 of Act I of 1894. A detailed subject index makes the materials collected in the book readily accessible. The book ought to prove useful.

AN ANALYSIS OF WILLIAMS ON THE LAW OF REAL PROPERTY, for the use of students. *By A. M. Wilshere, LL. B., of Gray's Inn, of the Western Circuit, Barrister-at-Law. London : Sweet & Maxwell, Limited, 3, Chancery Lane, Law Publishers. 1908.*

The book is a very condensed summary of Williams on Real Property and can be safely utilised only by those students who have carefully studied the longer work but cannot, without such adventitious aids to their memory, get through the examinations. The compiler very properly warns students against using it as a *substitute* for the work which it purports to summarise. We can recommend the

book to those who offer themselves for the B. L. examination of the Calcutta University.

THE PROVINCIAL INSOLVENCY ACT. Being an annotated edition of Act III of 1907. Together with the rules made thereunder by the High Courts of Calcutta and Madras. *By A. P. Muddiman, I. C. S, Registrar of the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction. Calcutta: Thacker, Spink & Co. 1908. Price Rs. 4-8.*

This is, we believe, the first annotated edition of the Act which has appeared on this side of India. Madras, as usual, took the lead in this matter. But none of the Madras editions which we have come across awaited the publication of the rules which the High Courts have been empowered to issue under sec. 51 of the Act. The rules framed by the Calcutta and the Madras High Courts have been incorporated in the edition under review. The notes are select and taken from English decisions bearing on analogous provisions of English Statutes. Some Indian decisions under the Presidency Insolvency Act are also cited under appropriate sections of the Provincial Act. This edition of the Provincial Act will greatly assist Courts and legal practitioners in the mofussil in getting a fuller grasp of this new piece of legislation and in applying the provisions of a hitherto not very familiar branch of the law to cases as they may come up in the Mofussil.

A MEMORANDUM OF PRACTICE IN CIVIL CASES. *By W. J. Howard, Esq., LL. B., Trin. Coll., Dub., of the Middle Temple, Barrister-at-law. Second Edition. Calcutta: Thacker, Spink & Co. 1908. Price Rs. 2.*

The author very appropriately styles his book "a memorandum" of practice, for it is nothing more pretentious than a "memorandum." But it fully justifies its existence as such and we gladly recommend it to every beginner starting practice, specially in the Mofussil Courts. The materials out of which it has been compiled will no doubt be found in the Code of Civil Procedure and the Evidence Act, but the needs of the novice in the practice of law naturally found no place in the anxious thoughts of those who framed these statutes. It is sometime before he can pick up and assimilate the elements of practice from what he sees of their application in the Courts. This modest little book will go a great way towards the easy attainment of this end. Small as the book is, it is furnished with a subject-index which gives one at a glance an idea of the considerable amount of useful information which has been compressed within its 96 pages. The following are some of the subjects dealt with: Affidavit, Brief, Discovery, Expert witnesses, Interrogatories, Examination and Cross-examination of witnesses, Adjournments, Advice on evidence, &c.

THE LAW OF COPYRIGHT IN DESIGNS. Second edition. *By Lewis Edmunds, D. Sc., K. C. and Herbert Bentwich, LL. B. Messrs. Sweet and Maxwell, Ld., Law Publishers. London. 1908.*

This work of which the first edition was issued in 1895 has recently been brought up-to-date. The work has had to be thoroughly overhauled owing to the passing of Lloyd George's Patents and Designs Act of 1907. This Act was more or less a consolidating Act. It has not altered the judge-made law on the subject materially but has harmonised and dovetailed together the various statutory provisions which had been previously in force and chiselled their provisions to the extent necessary for the work of consolidation. The work that has devolved on the editors in comparing the repealed statutes and the one replacing them and adapting the annotations and case law to the new Statute has been a very arduous one. It is indeed very creditable to the authors, that they have accomplished their task so rapidly and so well. The general scheme of the work has not been altered but a considerable portion of it has had to be re-written owing to the passing of Lloyd George's Act. The passing of a comprehensive Act has not obviated the necessity of elucidating the principles and practice which have governed the law on the subject. The most valuable portion of the work is that which deals with the main principles of the law and rules of practice. These are given in bolder type and the material portions of the judgments from which they are drawn are given below pretty fully. We also notice that cases on the analogous questions of Copyright, Patents and Trade-marks are also given which are often on all fours with corresponding matters relating to Designs. Although the English Statute law is not in force in India, yet Indian practitioners will find in this work a safe and reliable guide when they have to deal with the question of copyright in designs.

THE CIVIL PROCEDURE CODE. Act V of 1908, annotated. *By Abulfazl Muhammad Ihsanullah Abbasi, pleader, Gorakpur. Price Rs. 10. Published by Muhammad Asadula Abbasi, Gorakpur, U. P. 1908.*

This appears to be a fairly useful commentary on the new Civil Procedure Code, of 800 odd pages, excluding the Table of cases (pp. i-lxxxi). The author appears to have exercised a wise discretion in leaving out obsolete and unimportant cases from old reports. The cases reported in the Indian Law Reports Series have, we are assured, been all given but only selected cases from the other reports. With regard, therefore, to recent decisions the notes cannot claim to be quite exhaustive. The notes are however classified and arranged under appropriate headings and are such as will satisfy ordinary requirements. It is needless to add that the comparative tables of the old and the new Acts and

the Reports of the Simla Special Committee and of the Select Committee appear in this as in other editions of the Code.

Notes of Cases.

CALCUTTA HIGH COURT.

Recent decisions not yet reported.

(The important cases to be fully reported hereafter.)

CRIMINAL REVISIONAL JURISDICTION. Before BRETT and RYVES, JJ. CRIMINAL REVISION No. 903 OF 1908. MAHAMAD WASET, Petitioner *v.* THE EMPEROR, Opposite Party. 24th August 1908.

Penal Code, sec. 177—False information in a road-cess return whether an offence—Road and Public Works-cess Act (IX B. C. of 1880) sec. 94—Object of.

This rule was issued for setting aside the conviction of and sentence passed upon the Petitioner under sec. 177, I. P. C, for having furnished false information in a road-cess return which he submitted to the Collector under sec. 14 of the Road-cess and Public Work Cess Act (IX B. C. of 1880) The allegation against the Petitioner was that he falsely represented rent payable to him in respect of his subordinate holding to be in excess of what his tenant was bound to pay. He was prosecuted at the instance of the Collector of Chittagong.

The Deputy Magistrate in a summary trial found that the Petitioner had furnished the false return with a view to creating false evidence in his favour which would be of use to him in a civil suit. He accordingly found him guilty under sec. 177, I. P. C., and sentenced him to simple imprisonment for one month.

Their Lordships observed :—

"The learned Magistrate has held that the object of the Petitioner in furnishing the false information in the return was to support a civil suit. The Magistrate has, however, failed to realise that under sec. 95 of the Act such a return is inadmissible in evidence against the person making it, but is not admissible in evidence in his favour. The object therefore for which the Magistrate finds that the false information was given in the return appears to us to fail. No doubt sec. 94 of the Act provides for the prosecution of a person who furnishes false information to a public servant in any return. It is, however, clear from the provisions of that and other sections in the Code that their object was to secure that the persons submitting a return should not submit one in which he undervalued his property for the purpose of the Road-cess and Public Works Cess."

Their Lordships then on reviewing the facts and the circumstances of the case found that in this case it was not proved that the Petitioner knew or had reason to believe that the information furnished by him in the Road-cess return was false.

Moulvi Z. R. Zahid for the Petitioner.

Rule made absolute and conviction and sentence set aside.

B. C.

[END OF VOL. XII.]